September 15, 2022

SIGNIFICANT JUDGMENTS ON ARBITRATION

JANUARY, 2022 to JUNE, 2022

- PART I

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SOLICITORS AND ADVOCATES

MUMBAI I DELHI I BENGALURU I KOLKATA

Index

INTRODUCTION

In this first part of the three-part series, we cover the significant decisions rendered by the courts of India during the period of January 2022 to June 2022, expanding the ever-evolving landscape of arbitration law in the country.

Read our previous editions on the significant judgments on arbitration (here and here)

Section 2(e) (definition of the term 'Court')

1. **Which court would have the jurisdiction to entertain a challenge to an award passed in an international commercial arbitration?**

   A Division Bench of the Karnataka High Court in the case of *ITI Limited* v. *Alphion Corporation*, [Com. App. No. 32 of 2022, decided on February 16, 2022], has opined that, in terms of Section 10(1) of the Commercial Courts Act, 2015, a challenge to an award in an international commercial arbitration would have to be considered by a Single Judge of a Commercial Division of the High Court. Any proceeding seeking for the execution of an international commercial arbitral award or seeking for an interim relief in respect of international commercial arbitration would also have to be dealt with by a Single Judge of the Commercial Division.

   The Court noted that, since the High Court of Karnataka does not exercise Ordinary Original Civil Jurisdiction, it is the later portion of Section 2(e)(ii) of the Arbitration and Conciliation Act, 1996 ("**the Act**") which would be applicable and the Roster judge of the Court having jurisdiction to hear the appeals from decrees of courts subordinate to it, would have the jurisdiction to consider any aspect relating to international commercial arbitration.

Section 2(1)(h) (definition of the term 'party')

1. **Does an arbitrator have the power to implead a non-signatory/ third party to the arbitration?**

   A Single Bench of the Madras High Court in *Abhibus Services India Private Limited* v. *Pallavan Transport Consultancies Services Limited*, [C.M.A. Nos. 408, decided on February 4, 2022], has observed that it is only the courts that enjoy residuary and inherent power, which can take the initial call on impleadment of a non-signatory as a party to the arbitration proceedings. This is in view of the fact that an arbitrator may not necessarily be a Judge with legal experience, endowed with professional competence and any individual can be appointed as arbitrator on the basis of consent of parties. Thus, in such scenario, powers exercisable by the tribunal ought to be well defined and circumscribed by the Act itself. Therefore, the Court held that, in the absence of any trace of power being vested in the arbitral tribunal in the scheme of the Act, to implead a non-signatory/ third party to the arbitration, a non-signatory/ third party cannot be impleaded to the arbitration by an arbitral tribunal. However, the Court in the instant case also observed that, "*…after the amendment to section 8(1) and the universal acceptance of the "Group of Companies" doctrine an express provision could be inserted in the existing A & C Act, 1996 conferring power on the arbitral Tribunal to implead non-signatory/third party to arbitral proceedings in a given circumstance. In any event as it stands today any order of the Tribunal passed in terms of Section 16 or Section 17 is appealable under Section 37 of the Act. The parties affected by any decision of the Tribunal in this regard have a remedy before the competent court. By bringing an express provision in the Act could be in tune with the evolving liberal legal standards adopted by the Courts in the realm of arbitration. The legal uncertainty on this cardinal issue has been hanging fire for some time giving rise to divergent views. A suitable amendment will set at rest the conflict of legal opinions on this vital issue.*"

   It is pertinent to mention at this juncture that, a Single Bench of the Delhi High Court in the case of *Vistrat Real Estates Private Limited* v. *Asian Hotels North Limited*, [ARB. P. 1124/2021, decided on April 22, 2022], has held that, once a valid arbitration agreement exists between the parties, the issue whether the petitioner is entitled to any relief in the absence of a third party to the agreement or that third party is required to be impleaded in the proceedings, is covered by the Doctrine of Competence-Competence and it will be for the arbitrator to decide the said issue. Therefore, according to the Court, the issue whether

in the absence of a third party, the petitioner can claim the refundable security deposit would be for the learned arbitrator to determine.

2. When can non-signatories be referred to arbitration without their consent?

A Single Bench of the Delhi High Court in the case of *Haryana State Cooperative Supply and Marketing Federation Limited (HAFED)* v. *Indo Arya Logistics*, [Arb. P. 792, decided on January 19, 2022], has held that, although courts are always cautious in referring non-signatories to arbitration, there can be no quarrel that non-signatories or third parties to arbitral agreements can be referred to arbitration, without their prior consent, in exceptional cases which fall within the touchstone of court-laid precedents. According to the Court, one such principle is when the courts have commonality of subject-matter, and the circumstances indicate that the adjudication of a dispute in arbitration cannot be possible without the presence of such non-signatory.

However, the Telangana High Court in the case of *Gagiri Hari Krishna* v. *Messrs. Jasper Industries Private Limited*, [Arbitration Application No.4 of 2020], has made it clear that when there is absolutely no privity of contract between the parties, there can be no reference to arbitration.

3. Can an arbitration agreement entered into by a company within a group of companies, bind its non-signatory affiliate?

A Three Judge Bench of the Supreme Court in the case of *Oil and Natural Gas Corporation Limited* v. *Discovery Enterprises Private Limited*, [Civil Appeal No. 2042 of 2022, decided on April 27, 2022], has held that, in deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors: (i) The mutual intent of the parties; (ii) The relationship of a non-signatory to a party which is a signatory to the agreement; (iii) The commonality of the subject matter; (iv) The composite nature of the transaction; and (v) The performance of the contract. The Court held that consent and party autonomy are undergirded in Section 7 of the Act, however, a non-signatory may be held to be bound on a consensual theory, founded on agency and assignment or on a non-consensual basis such as estoppel or alter ego.

4. Is the 'Group of Companies Doctrine' a valid principle of law?

Hon'ble Justice N.V. Ramana, , a part of the Three Judge Bench of the Supreme Court in the case of *Cox and Kings Limited* v. *SAP India Private Limited*, [Arbitration Petition (Civil) No. 38 of 2020, decided on May 6, 2022], while deciding upon the efficacy of the 'Group of Companies Doctrine' has opined that the group of companies doctrine must be applied with caution and the mere fact that a non-signatory is a member of a group of affiliated companies will not be sufficient to claim extension of the arbitration agreement to the non-signatory. Hon'ble Justice N.V. Ramana observed that it is pertinent to have a relook at the aspect of interpretation of 'claiming through or under' as occurring in amended Section 8 of the Act qua the doctrine of group of companies and referred the issue to a larger Bench to provide clarity on this aspect. He also noted that the law laid down *Chloro Controls (India) (P) Limited* v. *Severn Trent Water Purification Incorporated*, [(2013) 1 SCC 641], and the cases following it, appears to have been based more on economics and convenience and the same may not have been a correct approach. The Court thus referred the following questions to a larger Bench: a. whether the phrase 'claiming through or under' in Sections 8 and 11 could be interpreted to include 'Group of Companies' doctrine? b. Whether the 'Group of companies' doctrine as expounded by Chloro Control Case (*supra*) and subsequent judgments are valid in law?

Further, Hon'ble Justice Surya Kant, taking a separate view on the issue, observed that, it

is important to note that the group of companies doctrine has now travelled a reasonable distance in Indian law and while the opinion of Hon'ble Justice Ramana correctly notes that the term 'parties' under Section 2(1)(h) of the Act has not been amended despite the changes introduced in Section 8 of the Act, it appears that one of the objectives in introducing the amended Section 8 was to accord tacit recognition and acceptance of the group of companies doctrine in India. Therefore, he noted that the question as to which entities are parties to the arbitration agreement is usually left to judicial discretion, especially when there is a limited statutory guidance. According to him, it is important to note what intent the non-signatory has conveyed to a reasonable party in the same position as the contracting entity. The decisive factor is the extent to which the contracting party has placed "trust" in the other party, reasonably, and on the basis of the non-signatory's actions.

Hence, in view of the above observations, Surya Kant J. was also of the opinion that the questions that were referred to a larger Bench by the Hon`ble Chief Justice of India deserves further elaboration and thus, in addition and in conjunction with the questions formulated by the Hon'ble Justice N.V. Ramana, Hon'ble Surya Kant J., referred the following questions to a larger Bench: (a) whether the 'Group of Companies Doctrine' should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of any statutory provision. (b) whether the 'Group of Companies Doctrine' should continue to be invoked on the basis of the principle of 'single economic reality' (c) whether the 'Group of Companies Doctrine' should be construed as a means of interpreting the implied consent or intent to arbitrate between the parties? (d) whether the principles of alter ego and/ or piercing the corporate veil can alone justify pressing the 'Group of Companies Doctrine' into operation even in the absence of implied consent.

Section 7 (arbitration agreement)

1. **Does arbitration clause contained in an agreement survive after termination of the agreement?**

   A Single Judge Bench of the Madras High Court in the case of *Rajasthani Marbles* v. *Na.K. Kumar Son of N. Kuppurathinam*, [Arb. O.P. (Comm.Div) No. 73 of 2021], has observed that "…*the termination or effacing of the Contract does not terminate or efface the arbitration agreement*". The principle of '*when in doubt, do refer*' as laid down by the Supreme Court in *Vidya Drolia and Others v. Durga Trading Corporation and Others* was reiterated by the Court.

   Further, a Single Judge Bench of the Bombay High Court in the case of, *Praful A. Mehta* v*. Nainesh M. Gandhi,* [Commercial Arbitration Application No.483 of 2019 decided on February 21, 2022] held that the contention of the respondent that his signature has been forged in the partnership deed is an issue which cannot be adjudicated by the court in an application under section 11 of the Act, especially in view of the fact that it appears that the respondent had been handling the bank accounts at material times. Therefore, upon *prima facie* satisfaction that an arbitration agreement exists, the disputes were referred to arbitration.

2. **Does mere use of the word, 'arbitration' in the heading of a clause lead to the inference of existence of an arbitration agreement?**

   A Single Bench of the Delhi High Court in the case of *Foomill Private Limited* v. *Affle (India) Limited*, [Arb.P. 325/2022, decided on March 25, 2022], has held that, mere use of the word 'arbitration' in the heading of a clause in an agreement between the parties would not lead to the inference that there exists an agreement between the parties seeking resolution of disputes through arbitration.

Further, a Single Judge Bench of the Bombay High Court in the case of *Concrete Additives and Chemicals Private Limited* v. *S.N. Engineering Services Private Limited*, [Arbitration Application (L.) No.23207 of 2021 decided on January 17, 2022] held that the arbitration clause in a tax invoice cannot be treated as an arbitration agreement especially in view of the fact that the purchase orders issued by the respondent did not contain any arbitration clause

However, the Delhi High Court in the case of *Swastik Pipe Limited* v. *Dimple Verma* [ARB.P. 100/2021 decided on July 6, 2022] held that, arbitration clause in a tax invoice can be treated as an arbitration agreement between the parties since the respondent had made payments against the invoices which contained the arbitration clause and has never disputed the clause. It would be interesting to note that the respondents had relied on the *Concrete Additives (supra)* judgment to impress upon the fact that tax invoices cannot be construed as an agreement between the parties but the Court considering various other rulings including the Supreme Court decision in *MTNL* v. *Canara Bank*, [Civil Appeal Nos. 6202-6205/2019], was of the opinion that there exists a valid arbitration agreement between the parties.

3. **When can an agreement for extension of application of the arbitration clause in a previous agreement be held valid?**

A Single Bench of the Calcutta High Court in the case of *Sukumar Ray* v. *Messrs. Indo Industrial Services*, [A.P. No. 70 of 2022, decided on April 21, 2022], has noted that where there is no fresh agreement with separate rights and obligation which has been entered into between parties and, mutual intention of the parties and the nature of subsequent agreement suggest the will to continue with the arbitration clause in the earlier agreement, the subsequent agreement would be regarded as a mere agreement for extension of validity of the original agreement and, would be permissible in law.

4. **Does an arbitration agreement have to be compulsorily registered?**

A Single Bench of the Delhi High Court in the case of *Parsvnath Developers Limited* v. *Future Retail Limited*, [Arb. P. 14/2020, decided on April 12, 2022], has held that an arbitration agreement, even though embodied in a main agreement, is a separate agreement. Therefore, invalidation of the main agreement does not necessarily invalidate the arbitration agreement. Hence, an arbitration agreement is not required to be compulsorily registered. Thus, following the doctrine of severability, denying the benefit of an arbitration agreement to a party on the ground of any deficiency in the main agreement, may not be apposite.

Section 8 (power to refer parties to arbitration where there is an arbitration agreement)

1. **Is the party instituting a suit entitled to a refund of court fees in the event an application under Section 8 of the Act filed in the suit is allowed?**

A Single Bench of the Delhi High Court in the case of *A-ONE Realtors Private Limited* v. *Energy Efficiency Services Limited*, [CS(COMM) 610/2019, decided on May 23, 2022], has held that, since it is settled law that a litigant is not entitled to refund of court fees in case of rejection of plaint under Order VII Rule 11 of the CPC where the plaint does not disclose a cause of action; applying the same analogy, a plaintiff cannot be entitled to a refund of court fees in the event of an application under Section 8 of the Act is allowed and the parties are referred for arbitration.

2. **Can parties by-pass pre arbitration mechanisms which are stipulated in a contract?**

A Single Judge of the Chattisgarh High Court in the case of *Devanshi Construction* v. *CPWD*, [ARBR No. 28 of 2020, decided on January 14, 2022] has held that, once the contract provides for a pre-arbitration mechanism, reference (to Dispute Redressal Committee in this case), appointment of arbitrator would be misconceived if the same is done without adherence to the mechanism laid down in the contract. Similarly, a Single Judge of the Gujarat High Court in the case of *Lite Bite Foods Private Limited* v. *Airports Authority of India*, [R/Petn. No. 36 of 2021, decided on June 8, 2022], also held that once a contract provides for reference to Dispute Redressal Committee the parties cannot bypass the same and refer their disputes to arbitration.

Judgments on similar lines were passed by a Single Judge Bench of the Madhya Pradesh High Court in the case of *Dharmadas Tirthdas Construction Private Limited* v*. Government of India,* [Misc. Civil case no. 1043 of 2003, decided on May 7, 2022], and the Karnataka High Court in the matter of, *Sobha Limited* v. *Nava Vishwa Shashi Vijaya*, [C.M.P. No. 24 of 2022, decided on June 10, 2022].

However, a Division Bench of the Himachal Pradesh High Court in the case of *Backend Bangalore Private Limited* v. *Chief-Engineer-Cum-Project Director, HPRIDC*, [Arbitration Case No. 61 of 2022, decided on April 1, 2022], has observed that pre-arbitration reference to adjudicator becomes directory in nature when the contract itself is terminated, and there is no bar for appointment of arbitrator.

Section 9 (Interim measures by Court)

1. **What is the difference in the scope of applicability of Section 9 and 17 of the Act?**

A Single Bench of the Delhi High Court in the case of *Hindustan Cleanenergy Limited* v. *Maif Investments India 2 Pte. Limited*, [O.M.P. (I) (COMM.) 308/2020, decided on January 20, 2022], while observing the scope of Section 9 of the Act and noting its differences from Section 17 of the Act, has stated that, there is a perceptible difference between the two, primarily with respect to the aspect of existence of a *prima-facie* case. According to the Court, this difference must necessarily exist, for the simple reason, that a Section 9 proceeding is not a pre-arbitral Section 17 proceeding. It is merely a precursor to the arbitral proceedings and the exercise of jurisdiction by the arbitral tribunal. If a Section 9 Court were to undertake the same exercise which, after constitution of an arbitral tribunal is expected to be undertaken by it, it is bound to frustrate the arbitral proceedings, as any findings returned by the Section 9 Court, even *prima-facie*, would affect the arbitral proceedings. While it is true that, while disposing of a Section 9 petition, the Court does normally enter into a disclaimer that the findings in the order are merely *prima-facie* and interlocutory in nature, intended to dispose of the Section 9 application, such a disclaimer is, in its practical application, more a caveat of form than of substance. Observations and findings of the Section 9 Court are, invariably, treated by the arbitral tribunal with due deference, and that does colour, to a greater or lesser degree, the subjectivity of the exercise of jurisdiction by it.

Thus, the arbitral tribunal, while examining the existence of a *prima-facie* case in exercising its jurisdiction under Section 17, is expected and, indeed, obligated, to enter into the intricacies of the matter and the rival contentions of the parties before it *vis-a-vis* the contractual stipulations and other relevant factors, such an approach is neither expected from, nor available to, the Section 9 Court.

Thus, it was held that the role of the Court, under the Act, is only to ensure that the arbitral proceedings are allowed to be initiated and continued without interruption, till their conclusion and any interference, by the Court, with the arbitral proceedings, even after

they conclude, is limited to cases of patent illegality, or where the conscience of the Court is shocked. Hence, the Delhi High Court noted that, it is difficult, in fact, to conceive of a situation in which the interests of justice would justify passing of orders, under Section 9, to remain in effect till the conclusion of the arbitral proceedings though, theoretically, it is certainly permissible.

2. Can a relief of specific performance or injunction be granted pending arbitral proceedings?

A Single Bench of the Bombay High Court in the case of *Chetan Iron LLP* v. *NRC Limited*, [Arbitration Petition (L) No. 1366 of 2022, decided on January 24, 2022], while considering a petition filed under Section 9 of Act for interim measures, pending arbitral proceedings, has held that, an interim relief can be granted only in aid of and is ancillary to the main relief. Therefore, as per the Court, if it is *prima-facie* seen that a relief of specific performance or an injunction cannot be granted to the petitioner, a relief of a temporary injunction as an interim measure also cannot be granted to the petitioner, pending the arbitral proceedings.

This was reiterated by the Division Bench of the Delhi High Court in the case of *Pink City Expressway Private Limited* v. *National Highways Authority of India*, [FAO(OS) (COMM) 158/2022, decided on June 15, 2022]. Also, the Gujarat High Court in the case of *Kanhai Foods Limited* v. *A and HP Bakes*, [C/FA/2638/2021, decided on June 10, 2022], has held that "…*the celebrated principles for grant of interim injunction, namely that prima facie case, balance of convenience and irreparable injury are relevant considerations also in respect of passing orders for interim measures under section 9 of the Arbitration Act, 1996. Interim injunction is an equitable remedy, so would be the consideration in granting interim measures under section 9 of the Arbitration Act. It is trite principle that interim injunction of the nature amounting to granting of principal relief, could not granted. All these would be the cardinal principles for judging the case of a party who apply for grant of interim measures pending or during the pendency of the arbitral proceedings.*"

3. Can third parties be impleaded in a proceeding under Section 9

The Division Bench of the Gujarat High Court in the matter of *Vijay Arvind Jariwala* v. *Umang Jatin Gandhi,* [C/SCA/16131/2021, decided on May 6, 2022], has held that an award which may be passed by the arbitrator would operate only between the parties to the arbitration agreement. Therefore, in an application seeking interim measures, if a non-party to the arbitration agreement is joined and the order passed concerns such party, it would lead to chaotic situation, as such third party would not be amenable to the final resolutions of the disputes. The arbitrator will have no jurisdiction to decide the rights of the third party. A person who is not party to arbitration agreement, remains stranger to the proceeding under Section 9 of Act. For such third party no *lis* is created in proceedings of Section 9. Even if the parties to the arbitration and the third party have some inter se rights and obligations to be enforced vis a vis each other, it would be a separate course of action.

However, it is noteworthy that previously the Bombay High Court in the case of *Choice Developers* v. *Pantnagar Pearl CHS Limited,* [Arbitration Petition (L) no. 7966 of 2022, decided on April 13, 2022], had held that, "…*Section 9 does not limit the jurisdiction of the Court to pass an order of interim measures not only against party to an arbitration agreement or arbitration proceedings, but Court is free to exercise same power for making appropriate order against a third party impleaded in a petition filed under section 9 of the Act. It was held that the fact that the order would affect the person who is not party to the arbitration agreement or arbitration proceedings does not affect the jurisdiction of the Court under section 9 of the Act which is intended to pass interim measures of protection or preservation of the subject-matter of the Arbitration Agreement.*"

4. **Can a Court under Section 9 decide upon the legality of invocation of bank guarantee?**

   A Single Bench of the Calcutta High Court in the case of, *Exide Industries Limited* v. *West Bengal Renewable Energy Development Agency*, [F.M.A.T. 15 of 2022, decided on January 19, 2022], has held that while adjudicating a Section 9 application, a Court can adjudicate and decide upon the legality of invocation of bank guarantees after considering issues of fraud, special equity and so on, on an affidavit of evidence.

5. **Can an order passed under Section 9 of the Act be reviewed?**

   A Single Bench of the Delhi High Court in the case of *Edelweiss Asset Reconstruction Company Limited* v. *GTL Infrastructure Limited*, [Review Pet. 71/2021 in ARB. A. (COMM.) 13/2020, decided on February 4, 2022], has held that, there is no provision in the Act, for review of an order passed under Section 9. The Court observed that the power of review, it is well settled, is not inherent, but must emanate from statute and therefore, no court or authority has an inherent power to review its orders.

6. **Is manifest intention to arbitrate *sine qua non* for approaching the Court under Section 9 of the Act?**

   A Single Bench of the Madras High Court in the case of *Messrs Cholamandalam Investment and Finance Company Limited* v. *Mr. Harkhabhai Amarshibhai Vaghadiya*, [Arb.Appln.Nos.40, decided on February 16, 2022], has held that, manifest intention to arbitrate is *sine qua non* for an applicant who approaches a court under Section 9 of the Act.

7. **Can procedural orders by an arbitral tribunal fixing arbitration fees be assailed under Section 9 of the Act?**

   A Division Bench of the Delhi High Court in the case of *Cement Corporation of India* v. *Promac Engineering Industries Limited*, [FAO(OS)(COMM) 44/2022, decided on March 29, 2022], has held that, procedural orders passed by the arbitral tribunal fixing the arbitration fees may not be assailed under Section 9 of the Act and such a challenge will not fall under the residuary clause of Section 9(1)(ii)(e) of the Act.

8. **Can the scope of Section 9 of the Act be extended to enforcement of the award or granting the fruits of the award to the award holder as an interim measure?**

   A Single Bench of the Calcutta High Court in the case of *Satyen Construction* v. *State of West Bengal*, [A.P. No. 78 of 2021, decided on April 8, 2022], has held that the scope of Section 9 of the Act cannot be extended to enforcement of the award or granting the fruits of the award to the award holder as an interim measure. The Court noted that, even in a situation under Section 9(ii)(e) of the Act, which is an omnibus protection and where the court is guided purely by equitable considerations, a court cannot permit withdrawal as a measure of protecting the award holder. Therefore, the Court has held that, even after the amended Section 36 of the Act, the right to withdraw the deposited amount by the judgment debtor cannot be stretched as an interim protection under Section 9 of the Act.

9. **Can a direction for sale of shares to a third party be passed under Section 9 of the Act?**

   The Calcutta High Court in the case of *Aditya Birla Finance Limited* v. *Mcleod Russel India Limited*, [AP/254/2022, decided on May 17, 2022], has held that, a direction for sale of shares to a third party is not permissible under Section 9 of the Act. However, a direction to restrain a party from selling the shares in question would have been in line with the

object of Section 9 of the Act.

10. Can the scope of Section 9 of the Act be extended to directing specific performance of a contract?

A Single Bench of the Delhi High Court in the case of *Pink City Expressway Private Limited* v. *National Highways Authority of India*, [FAO(OS) (COMM) 158/2022, decided on June 15, 2022], has held that, it is well-settled that powers under Section 9 can only be exercised for preservation of the subject matter of the dispute and cannot be extended to directing specific performance of the contract itself.

11. Where would an application under Section 9 of the Act lie in case 'specified value' of the immovable property is more than one crore?

A Division Bench of the Telangana High Court in the case of, *Telangana State Tourism Development Corporation Limited* v. *Messrs. A.A. Avocations Private Limited*, [Civil Miscellaneous Appeal No. 163 of 2022, decided on June 9, 2022], has opined that, on a cumulative reading of Section 2 (1)(C)(vii), Section 10 and Section 12 of the Commercial Courts Act, 2015 it is apparent that if a dispute arising out of an agreement concerning immovable property which is exclusively used in trade or commerce and whose 'specified value' is more than one crore, then, it is a 'commercial dispute' and only the commercial Court has jurisdiction to deal with application filed under Section 9 of the Act.

Reference may also be made to the Odisha High Court ruling in the matter of *M.G. Mohanty* v. *State of Odisha*, [W.P.(C) Nos. 3523, 5491 & 5494 of 2022 and W.P.(C) Nos. 28644 & 30554 of 2022, decided on April 8, 2022] where the Bench clarified that the provisions of the Act must yield to the provisions of the Commercial Courts Act, 2015.

Section 11 (Appointment of arbitrators)

1. When can multiple disputes be referred to the same arbitrator?

A Single Bench of the Delhi High Court in the case of, *Panipat Jalandhar NH 1 Tollway Private Limited* v. *National Highways Authority of India*, [Arb. P. 820/2021, decided on January 17, 2022], while adjudicating upon certain objections raised on the appointment of the arbitrator on the ground that he had been appointed as an arbitrator in more than three previous occasions, held that, in a contract, an arbitration clause is inserted with the object of speedy resolution of disputes and where disputes are of a greater magnitude and are multiple in number, they should be referred to the same arbitral tribunal, to avoid confusion or infirmity.

2. Can a matter be referred to arbitration if the arbitration agreement is insufficiently stamped?

A Three Judge Bench of the Supreme Court in the case of *Intercontinental Hotels Group (India) Private Limited* v. *Waterline Hotels Private Limited*, [Arbitration Petition (Civil) No. 12 of 2019, decided on January 25, 2022], while adjudicating upon the issue whether insufficient stamping is indicative of an unworkable arbitration agreement and makes the matter incapable of being referred to arbitration under Section 11 of the Act, held that, once stamp duty has been paid, the question whether it is insufficient or appropriate maybe answered at a later stage as the Court cannot review this aspect while exercising its jurisdiction under Section 11(6) of the Act. The Court, however, noted that, if it was a question of complete non stamping, then this Court, might have had an occasion to examine the concern raised in *N.N. Global Mercantile Private Limited* v. *Indo Unique Flame Limited*, [(2021) 4 SCC 379], however, the same was not the scenario in the instant case.

The Supreme Court thus, referred the matter to arbitration.

The aforesaid decision has been followed by the Bombay High Court in the case of *Pigments & Allieds* v. *Carboline (India) Private Limited*, [Arbitration Application No. 225 of 2016, decided on February 28, 2022]; *Vivek Mehta* v. *KaRRs Designs & Developments*, [Arbitration Application No. 101 of 2016, decided on February 28, 2022]. Further, a Single Bench of the Bombay High Court in the case of, *B4U Broadband (India) Private Limited* v. *Affluence Movies Private Limited*, [Commercial Arbitration Application (L.) No. 22197 of 2021, decided on April 4, 2022], while elaborating on the aforementioned judgment, the Court in Vivek Mehta (*supra*) has held, the decision of the Supreme Court in *Garware Wall Ropes Limited* v. *Coastal Marine Constructions & Engineering Limited*, [(2019) 9 SCC 209], would continue to hold the field until the Constitution Bench holds such judgment to be no more good law as also observed by their Lordships in N.N. Global Mercantile (*supra*) and in Intercontinental Hotels Group (India) Private Limited (*supra*). Also, a Division Bench of the Andhra Pradesh High Court in the case of *VR Commodities Private Limited v. Norvic Shipping Asia Pte. Limited*, [ICOMAA No.01 of 2022, decided on May 5, 2022] went on to observe that even reliefs under section 9 can be provided and it is left open to the arbitral tribunal to "…*to record a finding, if any, on the clause, its admissibility due to failure to pay stamp duty on the substantive document*"

It is also pertinent to mention at this juncture that a Single Bench of the Delhi High Court in the case of *Alexis Global Private Limited* v. *Oma Living Private Limited*, [Arb. P. 142/2022, decided on March 8, 2022], while referring to the facts of the case before it, noted that the respondent party had shown no cogent objection qua stamp duty and, upon a perusal of its reply, it was evident that the respondent did not even mention whether it is a case of insufficiency or total absence of payment of stamp duty. Further, there was also no averment made as to the quantum of stamp duty required to be paid, or whose obligation it was to ensure that the agreement is duly stamped. The Court noted that the respondent could have taken this objection at the stage of invocation of arbitration but chose to be conspicuously silent. Therefore, in light of these circumstances, the Court observed that the objection of non-stamping might be merely a routine and convenient excuse to delay and deny the adjudication of disputes at the time and cost of the petitioner. Therefore, the Delhi High Court went onto appoint an arbitrator in the instant case and directed the parties to arbitration.

Further, a Single Judge of the Telangana High Court in the case of, *Neela Satyanarayana* v. *R. Subrahmanyam*, [Arbitration Application No. 54, decided on April 4, 2022], while placing reliance on the decision of the Supreme Court in the case of *Intercontinental Hotels Group (India) Private Limited* (*supra*), went onto appoint an arbitrator, however, with a condition that, the arbitration shall commence once the adequate stamping is done.

3. Where would an application under Section 11 be filed in case there is an exclusive jurisdiction clause conferring jurisdiction on courts other than the ones located at the seat of arbitration?

A Single Bench of the Delhi High Court in the case of *Hunch Circle Private Limited* v. *Futuretimes Technology India Private Limited*, [ARB. P. 1019/2021, decided on February 2, 2022], observed that, although, ordinarily, a court having jurisdiction over the seat of arbitration, as provided by contract, would be competent to exercise jurisdiction under Sections 9, 11 and 34 of the Act; where the jurisdiction clause confers exclusive jurisdiction in respect of arbitral proceedings on a court located elsewhere, the Section 11 petition would have to be filed in the High Court exercising jurisdiction over that place.

Further, a Division Bench of the Supreme Court in the case of *Ravi Ranjan Developers Private Limited* v. *Aditya Kumar Chatterjee*, [Civil Appeal Nos. 2394-2395 of 2022, decided on March 24, 2022], has held that, it is well settled that, when two or more courts have

jurisdiction to adjudicate disputes arising out of an arbitration agreement, the parties might, by agreement, decide to refer all disputes to any one court to the exclusion of all other courts, which might otherwise have had jurisdiction to decide the disputes. Parties cannot, however, by consent, confer jurisdiction on a court which inherently lacked jurisdiction. The Supreme Court while referring to the facts of the case noted that, the parties did not agree to refer their disputes to the jurisdiction of the courts in Kolkata and it was not the intention of the parties that Kolkata should be the seat of arbitration and it was only intended to be the venue for arbitration sittings. Therefore, the Supreme Court held that the Calcutta High Court inherently lacked jurisdiction to entertain a petition for appointment of arbitrator under Section 11 of the Act.

4. **Can the size of the arbitral tribunal be abridged/ reduced by a Court under Section 11 of the Act?**

   A Single Bench of the Madras High Court in the case of *Heligo Charters Private Limited* v. *Hindustan Oil Exploration Company Limited*, [Arb. O.P. (Com. Div.) No. 54 of 2022, decided on February 28, 2022], has held that, the size of the arbitral tribunal can be abridged/ reduced by a Section 11 Court.

5. **Is splitting up of cause of action permissible at the stage of reference to arbitration?**

   A Single Bench of the Karnataka High Court in the case of *South India Biblical Seminary* v. *Indraprastha Shelters Private Limited*, [Civil Miscellaneous Petition No.129/2020, decided on March 28, 2022], has noted that the instant case involved third party rights which required to be decided and therefore, complete adjudication could not be done unless the third parties involved were also heard. According to the Court, this would lead to splitting up of cause of action, a determination on matters which are not contemplated to be arbitrated and would lead to multiplicity of proceeding. Hence, the Court held that for such reasons the parties cannot be forced to arbitrate when the matter is demonstrably non-arbitrable.

   It is pertinent to mention in this regard that on a previous occasion, a Single Bench of the Calcutta High Court in the case of *Lindsay International Private Limited v. Laxmi Niwas Mittal*, [C.S. No. 2 of 2017, decided on December 22, 2021], while taking a contrary view, had held that the *ratio* of the Supreme Court in *Sukanya Holdings (P) Limited* v. *Jayesh H. Pandya*, [(2003) 5 SCC 531], is no longer a relevant factor for the courts to consider at the stage of reference in an application under Section 8 of the Act and that courts are not even under a mandate, especially after the 2015 amendment to the Act, to adjudicate on the bifurcability of the causes of action or the presence of parties who are necessary to the action but not to the arbitration; and the only brake in the momentum of reference is the court finding, *prima facie*, that no valid arbitration agreement exists.

6. **Does the Court need to go into the merit of claim/ counter claim in a section 11 application?**

   A Single Judge Bench of the Delhi High Court in the case of *OYO Hotels and Homes Private Limited* v. *Parveen Juneja*, [ARB.P. 332/2020, decided on April 28, 2022] has observed that, "*a petition under Section 11 of the Arbitration & Conciliation Act, 1996 this Court is not to go into the merits of the claim or the counter-claim, if any, of the parties*".

7. **Can arbitration clause be deemed to be incorporated into a Memorandum of Understanding (MoU) from an agreement?**

   A Single Judge Bench of the Delhi High Court in the case of *Juki India Private Limited* v. *Messrs. Capital Apparels Technology Private Limited*, [ARB.P. 1151/2021, decided on April 7, 2022], has observed that when an MoU is intrinsically linked to the transaction

borne out of the agreement containing an arbitration clause, the arbitration clause can be deemed to be a part of the MoU.

8. Can a court appoint arbitrator after setting aside of an arbitral award?

The Bombay High Court in the case of *Wadhwa Group Holdings Private Limited* v. *Homi Pheroze Ghandy*, [Commercial Arbitration Application No.414 of 2019, decided on March 7, 2022], has held that when an award is set aside other than on merits, the court can appoint an arbitrator under section 11 of the Act.

9. Does mere filing of a proceeding under the Insolvency and Bankruptcy Code, 2016 preclude a court from exercising its jurisdiction under Section 11 of the Act?

A Single Bench of the Bombay High Court in the case of *Jasani Realty Private Limited* v. *Vijay Corporation*, [Commercial Arbitration Application (L) No. 1242 of 2022, decided on April 25, 2022], has held that mere filing of a proceeding under Section 7 of the Insolvency and Bankruptcy Code, 2016, when such proceeding is yet to reach a stage where the National Company Law Tribunal ("**NCLT**") has passed an order admitting the said proceeding, the Court would not be precluded from exercising its jurisdiction under Section 11 of the Act, when admittedly, there is an arbitration agreement between the parties and invocation of the arbitration agreement has been made.

A Single Judge Bench of the Delhi High Court on a similar question in the case of *Tata Capital Financial Services Limited* v. *Naveen Kachru Proprietor of Messrs South Delhi Motorcycle*, [ARB.P. 295/2021, decided on April 6, 2022] has further clarified that, "*Section 10 CPC lays an embargo in proceeding with the arbitral proceedings because of the pendency of the insolvency proceedings is again not sustainable for the reason that Section 10 CPC comes into play only in a case where the proceedings are between the same parties and the matter in issue is directly and substantially in issue in the previously instituted suit.*"

Similarly in relation to a section 9 application filed by under the provisions of the Insolvency and Bankruptcy Code, 2016, a Single Judge Bench of the Delhi High Court in the case of *Millennium Education Foundation* v. *Educomp Infrastructure and School Management Limited,* [ARB.P. 326/2022, decided on May 13, 2022], has held that so long as the application is pending before the NCLT and no moratorium has been imposed there is no bar on the court to entertain an application under section 11 for appointment of arbitrator.

However, in relation to claims which arise after insolvency commencement date, the Delhi High Court in the matter of *Bharat Petroresources Limited* v. *JSW Ispat Special Products Limited* [ARB.P. 1154/2021, decided on February 11, 2022], has observed that as the resolution professional rejected the claims on the ground that they arose after the insolvency commencement date, dispute relating to such claims was arbitrable and a Section 11 application in relation to such disputes was maintainable.

10. What is the distinction between Section 11(5) and Section 11(6) of the Act? Is an application to terminate the mandate of an arbitrator maintainable under Section 11(6) of the Act?

A Division Bench of the Supreme Court in the case of *Swadesh Kumar Agarwal* v. *Dinesh Kumar Agarwal*, [Civil Appeal Nos. 2935-2938 of 2022, decided on May 5, 2022], has noted that there is a difference and distinction between an arbitrator appointed under Section 11(5) and under Section 11(6) of the Act. The Court opined that, even in the absence of any arbitration agreement in writing between the parties, consensually, the parties may refer the dispute for arbitration and appoint a sole arbitrator/ arbitrator by mutual consent. In such a situation and failing an agreement referred to sub-section (2), the aggrieved party

may approach the High Court for appointment of an arbitrator under Sub-section (5) of Section 11 and in such a situation sub-section (5) of Section 11 shall be attracted. However, where there is a written agreement on the appointment procedure agreed upon by the parties and there is a failure to appoint an arbitrator or arbitrators, in that case, sub-section (6) of Section 11 shall be attracted and an aggrieved party may approach the High Court for appointment of an arbitrator under sub-section (6) of Section 11 of the Act. Therefore, an application under Section 11(6) of the Act shall be maintainable only in a case where there is a written agreement and/ or the contract containing the arbitration agreement and the appointment procedure has been agreed upon by the parties.

The Court further held that once an arbitrator is appointed by mutual consent and it is alleged that the mandate of the sole arbitrator stands terminated in view of Section 14(1)(a) of the Act, the application under Section 11(6) of the Act to terminate the mandate of the arbitrator in view of Section 14(1)(a) of the Act shall not be maintainable. Thus, once the appointment of an arbitrator is made, the dispute whether the mandate of the arbitrator has been terminated on the grounds set out in Section 14(1)(a) of the Act, cannot be decided in an application under Section 11(6) of the Act, 1996 and aggrieved party has to approach the concerned 'Court' as per Sub-section (2) of Section 14 of the Act.

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