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SIGNIFICANT JUDGMENTS ON ARBITRATION

JANUARY 2022 to JUNE 2022

- PART II

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INTRODUCTION

In this second part of the three-part series, we continue to 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 the first part of the significant judgments on arbitration for the period, January 2022 to June 2022, [here](#).

Read our previous editions on the significant judgments on arbitration ([here](#) and [here](#)).

Section 12 (*Grounds for challenge*)

1. **Is deemed waiver of Section 12(5) of the Arbitration and Conciliation Act, 1996 (“Act”) permissible?**

A Single Bench of the Gujarat High Court in the case of, *MN Trapasia v. Divisional Railway Manager (WA)*, [R/Petn. under Arbitration Act No. 109 of 2020, decided on February 28, 2022], has held that there cannot be a deemed waiver of the embargo contained in Section 12(5) of the Act by mere issuance of a letter or communication calling upon the opposite party to waive rigour/ embargo found in Section 12(5) of the Act.

Further, a Single Judge Bench of the Delhi High Court in the case of *AK Builders v. Delhi State Industrial Infrastructure Development Corporation Limited*, [O.M.P. (T) (COMM.) 12/2022 and IA No. 1395/2022, decided on February 25, 2022] has held that, the waiver under section 12 (5) has to be express. The Court further held that “...there is no scope for entertaining the submission that the petitioner had, by his conduct, impliedly waived its right under Section 12(5) of the A&C Act. The waiver under Section 12(5) of the A&C Act has to be by an express agreement in writing.”

2. **If the appointment of an arbitrator falls foul of section 12(5) of the Act, will the procedure prescribed under sections 12, 13 and 14 apply to a fresh appointment?**

A Single Judge Bench of the Madhya Pradesh High Court in the case of *Om Sai RK Constructions Pvt. Ltd. v. M/s Forsight Infractech Private Limited*, [Arbitration Case No. 32/2021, decided on April 29, 2022], placing reliance on the Supreme Court decision *Bharat Broadband Network Limited v. United Telecoms Ltd.*, [2019 (5) SCC 755], has held that, once the appointment of arbitrator is *void ab initio* in view of the guidance given by the Apex Court then in case the arbitrator is ineligible by virtue of Section 12 (5) of the Act, then procedure prescribed under Sections 12, 13 and 14 are not applicable. It was held that in such a case a petition under section 11 of the Act would be maintainable.

Section 14 (*Failure or impossibility to act*)

3. **Does Section 14 confer any power on a court to expunge any part of the order of the arbitral tribunal?**

A Single Bench of the Delhi High Court in the case of, *Mr. Bhavanishankar H Sharma v. SRS Private Investment Powai Limited*, [O.M.P. (T) (COMM.) 26/2022, decided on April 21, 2022], has held that a petition under Section 14 of the Act does not confer any power on the Court to expunge any part of an order passed by the arbitral tribunal.

Section 16 (*Competence of arbitral tribunal to rule on its jurisdiction*)

4. **Can insufficiency of payment of stamp duty be decided as a preliminary issue under Section 16 of the Act?**

A Single Bench of the Delhi High Court in the case of, *Religare Finvest Limited v. Asian Satellite Broadcast Private Limited*, [ARB. A. (COMM.) 6/2021 & I.A. 2614/2021, decided on January 19, 2022], has held that insufficiency of payment of stamp duty is a jurisdictional issue. Therefore, the same can be entertained and decided upon by an arbitrator as a preliminary issue under Section 16 of the Act basis the principle of *kompetenz-kompetenz*.

5. Where does remedy lie in case of rejection of a plea under Section 16(3) of the Act?

A Single Bench of the Delhi High Court in the case of, *Virtual Perception OPC Private Limited v. Panasonic India Private Limited*, [CM (M) 174/2022, decided on February 22, 2022], has held that, it is evident from Sections 16(5) and 16(6) of the Act, that the statute contemplates the course of action in the event of rejection of a plea under Section 16(3), and the remedy lies under Section 34 of the Act.

Further, a Division Bench of the Kerala High Court in the case of, *Anto Augustine v. Girish Koshy George*, [Arb. A. No. 4 of 2022, decided on June 6, 2022], has held that, as per the mandate of Section 16(5) and (6) of the Act, where the plea of "lack of jurisdiction" is rejected by the arbitral tribunal, the arbitrator is obliged to continue with the arbitration proceeding and conclude the proceeding in the manner known to law in terms of Chapter V of the Act and render the award and then, a party having a grievance will be at liberty to challenge the said award, in terms of Section 34 of the Act. The Court noted that the law provides an opportunity to the aggrieved party to challenge the award in terms of the provisions contained in Section 34 of the Act and at that stage, both issues pertaining to the jurisdictional bar as well as other aspects of the matter may be raised in any manner known to law.

As far as the question of maintainability of a petition under Article 226 of the Constitution of India challenging an order dismissing an application under section 16 by an arbitral tribunal is concerned, the Telangana High Court in the case of *Union of India, Rep. by Ministry of Railways v. Krishnapatnam Railway Company Limited*, [WP No.29440 of 2021, decided on February 22, 2022], has held that, "A foray to the writ Court from Section 16 application being dismissed by the Arbitrator can only be if the order passed is so perverse, that the only possible conclusion is that there is a patent lack in inherent jurisdiction and it must be the perversity of the order that must stare one in the face."

Section 17 (Interim measures ordered by arbitral tribunal)

6. What is the mode of enforcing an interim order passed under Section 17 of the Act?

A Single Bench of the Kerala High Court in the case of, *Kishorekumar M. v. Shriram Transport Finance Company Limited*, [O.P. (C) No. 240 of 2022, decided on February 15, 2022], while examining the question of the mode of enforcing an interim order passed by an arbitrator under Section 17(1) of the Act, has held that the procedure for executing an interim order passed by the civil court or the arbitrator is not by resorting to Order 21 of the Code of Civil Procedure, 1909, however, at the same time, the civil court is competent to enforce the interim order passed by the arbitrator in tune with the spirit of Section 94 of Code of Civil Procedure, 1909.

However, the Supreme Court in the case of *Evergreen Land Mark Private Limited v. John Tinson and Company Private Limited*, [Civil Appeal No. 2783 of 2022, decided on April 19, 2022] has observed that the arbitral tribunal cannot order deposit of the entire amount in dispute in an application under section 17.

Section 20 (place of arbitration)

7. Would the conduct of arbitral proceedings by a new arbitrator at a different location change the 'seat' of arbitration fixed by the first arbitrator?

The Supreme Court in the case of, *BBR (India) Private Limited v. S.P. Singla Constructions Private Limited*, [Civil Appeal Nos. 4130-4131 of 2022, decided on May 18, 2022], has held that, once the jurisdictional 'seat' of arbitration is fixed in terms of sub-section (2) of Section

20 of the Act, then, without the express mutual consent of the parties to the arbitration, the 'seat' cannot be changed. Therefore, the appointment of a new arbitrator who holds the arbitration proceedings at a different location would not change the jurisdictional 'seat' already fixed by the earlier or first arbitrator. Thus, the Court held that, the place of arbitration in such an event should be treated as a venue where arbitration proceedings are held.

Section 21 (commencement of arbitral proceedings)

8. What is meant by the words, “Unless otherwise agreed by the parties” under Section 21 of the Act?

A Single Bench of the Bombay High Court in the case of, *Malvika Rajnikant Mehta v. JESS Construction*, [Arbitration Application No. 425 of 2019, decided on April 28, 2022], has held that, the exclusionary clause, “Unless otherwise agreed by the parties”, under Section 21 of the Act, implies that the parties can by agreement provide that the arbitral proceedings shall commence on a date other than when a request was made by one of the parties to refer the dispute to arbitration. The Court also held that, the requirement of notice under Section 21 of the Act can be waived. However, with respect to the facts of the instant case, the Court held that the mere fact that the parties have named the arbitrator, would not imply that the parties have agreed to waive the requirement of the notice contemplated under Section 21 of the Act.

9. Does a notice under Section 21 of the Act quantify the amounts claimed?

A Single Bench of the Delhi High Court in the case of, *Ministry of Youth Affairs and Sports v. Agility Logistics Private Limited*, [O.M.P. (COMM) 95/201, decided on April 7, 2022], has held that it is not necessary that a notice under Section 21 of the Act quantifies the amounts claimed but it is required to set out the disputes. The Court, thus, upheld the decision of the arbitral tribunal which noted that it was not necessary for the claims to be specifically stated in the notice under Section 21 of the Act and therefore, the claim could not be rejected only on the ground that there was no mention of the same in the notice under Section 21 of the Act.

Further, a Single Judge Bench of the Delhi High Court in the case of, *National Highways Authority of India v. Continental Engineering Corporation (CEC)*, [O.M.P. (COMM) 422/2019 and IA No. 14163/2019, decided on April 13, 2022] has held failure mention amounts in the notice does not preclude the claimant from claiming it in arbitration.

10. How would limitation be decided in the absence of a notice under Section 21 of the Act?

A Single Bench of the Madras High Court in the case of, *Daimler Financial Services India Private Limited v. Jenson Mathew*, [Arb. O.P. (Com. Div.) No. 9 of 2022, decided on April 13, 2022], has held that in absence of a notice under Section 21 of the Act, how a limitation would be decided is a matter which the arbitral tribunal concerned may have to decide. The Court further opined that it would be open to the respondents to raise the issue of limitation before the arbitral tribunal which can then decide the same on its own merits and in accordance with the law.

Section 23 (statement of claim and defence)

11. Is an order passed under Section 23(3) of the Act amenable to challenge under Section 37 of the Act?

A Single Bench of the Delhi High Court in the case of, *Vil Rohtak Jind Highway Private Limited v. National Highways Authority of India*, [O.M.P. (COMM) 339/2021, decided on January 28, 2022], has noted that, Section 23(3) of the Act specifically deals with the power of the arbitral tribunal to allow amendments and that the exercise of such power is not amenable to challenge under Section 37 of the Act, which grants a right of appeal only on limited grounds. Further, the Court in the instant case also observed that, an order can be considered as an 'interim award' only if it completely decides an issue and thus, 'finality' is the key to identifying whether an 'interim order' qualifies as an 'interim award'.

Section 25 (default of a party)

12. Can an order terminating proceedings under Section 25(a) of the Act be recalled by the arbitral tribunal?

A Single Bench of the Delhi High Court in the case of, *Union of India v. Delhi State Consumer Co-operative Federation Limited*, [CM (M) 425/2021, decided on May 9, 2022], has held that, an order terminating proceedings under Section 25(a) of the Act can be recalled by the arbitral tribunal on the application of the claimant and that the interference of the writ court is justified where the arbitral tribunal has failed to interfere.

Also, on the maintainability of Article 227 of the Constitution of India against an order terminating arbitration under Section 25(a), a Single Judge Bench of the Delhi High Court in the case of, *Union of India v. Indian Agro Marketing Co Operative Limited*, [decided May 2, 2022], has held that since, "No alternate remedy being available to the petitioner, to challenge the impugned order, which was passed under Section 25(a) of the 1996 Act, the present petitions under Article 227 of the Constitution of India are, ex facie, maintainable."

Section 27 (court assistance in taking evidence)

13. Does Section 27 of the Act confer adjudicatory powers on the courts?

A Single Bench of the Bombay High Court in the case of, *Dilip v. Errol Moraes*, [Arbitration Petition (I) No. 722 of 2022, decided on January 17, 2022], has held that Section 27 needs to be read on the touchstone of Section 5 read with Section 19 of the Act, which clearly brings out a legal consequence that under Section 27 of the Act, the court has not been conferred with any adjudicatory powers, being a provision merely intended to enable the parties to seek assistance of the court in taking evidence, which is particularly clear from the provisions of sub-section (1) of Section 27 of the Act.

Section 29 (decision making by panel of arbitrators)

14. Does the Act contemplate a majority award and a minority award?

A Division Bench of the Kerala High Court in the case of, *Lloyed Insulations (India) Limited v. Foremexx Space Frames*, [Arb. A. No. 17 of 2013, decided on January 17, 2022], has held that there can only be only one award and the same is the decision made by the majority members of the arbitral tribunal, which would be binding on the parties. The Court also noted that, although there is no specific provision in the Act providing for passing a dissenting view, the Act does not prohibit such an opinion being rendered by the minority

member(s), however, the findings/ opinions/ views of the minority members is not an award, but only the dissenting view and the same does not form part of the award. Therefore, such dissenting view/ opinion cannot be made the basis of a proceeding under Section 34 or under Section 36 for its enforcement, but it can be relied upon by the party seeking to set aside the award to buttress his submissions in the proceedings under Section 34 of the Act.

Section 29A (time limit for an arbitral award)

15. Is an appeal from an order rejecting a petition filed under Section 29A(4) and (5) of the Act maintainable under Section 13(1) of the Commercial Courts Act, 2015?

A Single Judge Bench of the Jharkhand High Court in the case of, *Indu - ZMJ - Zhengzhou Design - Xinfeng Consortium v. Bharat Coking Coal Limited*, [Commercial Appeal (D.B.) Nos. 5 and 25 of 2020, decided on January 3, 2022], has held that an appeal under Section 13(1) of the Commercial Courts Act, 2015 from an order rejecting a petition filed under Section 29A(4) and 29A(5) of the Act, 1996 read with Section 10(3) of the Commercial Courts Act, 2015, (which was filed for an extension of time for arbitration for six months under Section 29A(4) of the Act), will not be maintainable since the same does not come either under the fold of Order XLIII of the Code of Civil Procedure, 1908 or Section 37 of the Act.

16. Where would an application for extension of time for delivering an arbitral award lie?

A Single Bench of the Allahabad High Court in the case of, *Indian Farmers Fertilizers Cooperative Limited v. Messrs. Manish Engineering Enterprises*, [APPL.U/S11(4) No.5 of 2022, decided on March 11, 2022], has noted that the power to substitute the arbitrator as mandated in sub-section (6) of Section 29A of the Act vests only with the High Court and the said provision cannot be read in isolation but with Section 11 of the Act. The Court thus held that an application for extension of time for delivering an arbitral award moved under Section 29A of the Act, will also be maintainable before the High Court.

17. Does the substitution of Section 29A of the Act vide the 2019 Amendment to the Act, operate retrospectively?

A Division Bench of the Telangana High Court in the case of, *Roop Singh Bhattu v. Messrs. Shriram City Union Finance Limited*, [C.R.P.NO.1354 of 2021, decided on April 8, 2022], has held that the effect of substitution of Section 29A of the Act vide the 2019 Amendment, does not operate retrospectively. The Court further observed that merely because the word, 'substitution' is used, the amended provision does not relate back to the date of the original provision that was amended as per the language employed, the effect of the amendment and the intention of the legislature.

Section 31 (Form and contents of arbitral award)

18. Is it necessary for all the arbitrators to sign the majority award?

A Division Bench of the Kerala High Court in the case of, *Lloyed Insulations (India) Limited v. Foremexx Space Frames*, [Arb. A. No. 17 of 2013, decided on January 17, 2022], has held that a perusal of Section 31 evinces that it is not necessary for all the arbitrators to sign the majority award as Section 31(2) of the Act says that where there is more than one arbitrator, the signatures of the majority of the members of the tribunal shall be sufficient so long as the reason for any omitted signature is stated. However, the Court noted that the same applies only in the case of a unanimous award and it can have no application

when there is a dissenting view rendered by one of the arbitrators. Therefore, any member of the tribunal who does not assent to an award need not sign it but may set out his own views of the case, either within the award document or in a separate dissenting opinion which shall not be a part of the award.

19. What is an interim award and would a decision by an arbitral tribunal that a counterclaim is not maintainable be regarded as an interim award?

A Single Bench of the Delhi High Court in the case of, *National Highways Authority of India v. Abhijeet Angul Sambalpur Toll Road Limited*, [O.M.P. (COMM) 224/2021, decided on February 28, 2022], noted that an 'interim award' is not defined under the Act, however, Section 31(6) of the Act empowers an arbitral tribunal to make an interim award on any matter with respect to which it may make a final arbitral award. Therefore, since the decision of an arbitral tribunal brings a quietus to an issue before the arbitral tribunal and is an order which the arbitral tribunal is empowered to pass at the final stage, it would constitute an 'interim award' within the meaning of Section 31(6) and consequently, within the meaning of Section 34 of the Act.

Further, while referring to the question of whether a decision on the maintainability of a counter-claim can be regarded as an 'interim award', the Court held that a decision that the counter-claim is not maintainable and is, therefore, liable to be rejected, is a decision which an arbitral tribunal can certainly take only at the final stage of the proceedings, especially in view of the power conferred on the arbitral tribunal under Section 16 of the Act to rule on its own jurisdiction. It is therefore, in the nature of a decision which could be taken at the final stage of the proceedings, i.e., in the final award which the arbitral tribunal would pass. It was held that such a decision, when taken at an interlocutory stage, would constitute an 'interim award'.

Section 31(7) (grant of interest)

20. When is the arbitral tribunal empowered to award interest?

The Supreme Court in the case of, *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation*, [Civil Appeal No. 3657 of 2022 arising out of S.L.P. (C) No. 4901 of 2022, decided on May 5, 2022] while analysing Section 31(7) observed that the part which deals with the power of the arbitral tribunal to award interest, would operate if it is not otherwise agreed by the parties. If there is an agreement between the parties to the contrary, the arbitral tribunal would lose its discretion to award interest and will have to be guided by the agreement between the parties. The provision is clear that the arbitral tribunal is not bound to award interest. It has a discretion to award the interest or not to award. It further has a discretion to award interest at such rate as it deems reasonable, either on the whole or any part of the amount. It is also not necessary for the arbitral tribunal to award interest for the entire period between the date on which the cause of action arose and the date on which the award is made. It can grant interest for the entire period or any part thereof or no interest at all.

21. At what stages can an arbitral tribunal award interest?

A Single Bench of the Madras High Court in the case of, *Bharat Sanchar Nigam Limited v. Telecommunications Consultants India Limited*, [Arb. O.P. (Com. Div.) No. 297 of 2021, decided on January 4, 2022], has held that under Section 31(7) of the Act, the arbitral tribunal is empowered to award interest in the pre-reference, pendente lite and post-award period unless the relevant contract prohibits the same.

22. Can an arbitral tribunal grant compound interest?

A Three Judge Bench of the Supreme Court in the case of, *UHL Power Company Limited v. State of Himachal Pradesh*, [Civil Appeal Nos. 10341, decided on January 7, 2022], has held that an arbitral tribunal is empowered to grant compound interest.

23. Can an award of interest on interest be granted?

A Single Bench of the Delhi High Court in the case of, *Delhi Development Authority v. Watcon Water Specialists Private Limited*, [O.M.P. (COMM.) 300/2020, decided on April 19, 2022], wherein the arbitral tribunal had already awarded interest at the rate of 12% per annum on the amount of service tax and had also allowed respondent's claim for further interest, held that an award of interest on interest cannot be sustained.

24. What is the difference between Section 31(7)(a) and Section 31(7)(b) of the Act?

A Single Bench of the Calcutta High Court in the case of, *Future Market Networks Limited v. Laxmi Pat Surana*, [IA No. G.A. 1 of 2022 in A.P. 698 of 2016, decided on April 28, 2022], noted that there is a marked difference in the language between Section 31(7)(a) - pre-award and *pendente lite* interest and Section 31(7)(b) - future interest reflected from the transition from 'may' to 'shall' respectively indicates that award of future/ post-award interest is not advisory but a mandate of the Act and is to be given its due weightage. The Court further stated that the object of the mandate has also been explained by the Supreme Court in the case of, *Hyder Consulting (UK) Limited v. Governor, State of Orissa*, [(2015) 2 SCC 189], as a safeguard against delayed payment of the amount awarded to the award-holder. The Court proceeded to pass an order directing the award debtor to secure the principal sum of the award along with interest levied on it till date as a condition to stay its effect.

25. Can the arbitral tribunal grant post-award interest on the sum of the award which also includes the interest component?

The Supreme Court in the case of *Indian Oil Corporation Limited v. U.B. Engineering Limited*, [Civil Appeal Nos. 2921-2922 of 2022, decided on April 12, 2022] while placing reliance on the judgment of the Supreme Court in the case of *Hyder Consulting (UK) Limited v. Governor, State of Orissa*, [(2015) 2 SCC 189], has held that the arbitral tribunal can grant post-award interest on the sum of the award which also includes the interest component. Further, the Court also noted that the reduction in the interest from 18% to 9% by the concerned High Court is unsustainable in view of the statutory provision contained in Section 31(7)(b) of the Act which was applicable pre-amendment Act, 2015. Thus, as per Section 31(7)(b) of the Act, the sum directed to be paid by the arbitral award shall, unless the award otherwise directs, carry interest at the rate of 18% per annum from the date of the award to the date of payment. Since the arbitrator in the instant case had specifically awarded the interest at the rate of 18% per annum from the date of award to the date of payment, the Court found that the same was absolutely in consonance with the statutory provision applicable.

Section 34 (application for setting aside arbitral award)

26. What is the nature of proceedings under Section 34 of the Act?

A Single Judge Bench of the Madras High Court, while discussing the pigeon-hole theory, in *Messrs Color Home Developers Private Limited v. Messrs Color Castle Owners Society*, [Arb. O.P.(Com.Div.) No.157 of 2022, decided on April 5, 2022] has held that, "Section 34 legal drill is neither an appeal nor a revision. It is not even a full-fledged judicial review. It

is a limited challenge to an arbitral award under specific legal slots adumbrated in sub-sections(1) and (2) besides standalone (2A) of Section 34 of A and C Act which have been described as 'pigeon holes'. The test is whether a challenge to an arbitral award fit nay snugly fits into any one or more of the 'legal slots' described by this Court as 'pigeon holes', if the answer is in the affirmative, arbitral award will be dislodged. If that not be so, there will be no judicial intervention."

27. When can an application filed under Section 34 of the Act be modified?

A Single Bench of the Madras High Court in the case of, *Bharat Heavy Electricals Limited v. Sudhir Cranes Private Limited*, [C.R.P. (PD) No. 3790 of 2019, decided on January 4, 2022], has observed that the governing principles which are applied while considering an application under Order VI Rule 17 of the Code of Civil Procedure, 1909 cannot be applied when a person seeks amendment of the application filed under Section 34 of the Act. Further, it was held that some amount of discretion in the matter of amendment is still available with the court and the court while exercising such discretion judiciously cannot refuse such prayer unless it has reason to believe that the amendments proposed are not legitimate or that the amendment is likely to take away the right accrued to the other side.

28. Can an arbitral tribunal act beyond the terms of the contract under which it had been constituted?

The Supreme Court in the case of, *Indian Oil Corporation Limited v. Shree Ganesh Petroleum, Rajgurunagar*, [Civil Appeal Nos. 837-838 of 2022, decided on February 1, 2022], has held that an arbitral tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted and an award can be said to be patently illegal where the arbitral tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract. However, the court also noted that a distinction has to be drawn between failure to act in terms of a contract and an erroneous interpretation of the terms of a contract. An arbitral tribunal is entitled to interpret the terms and conditions of a contract while adjudicating a dispute. An error in the interpretation of a contract in a case where there is a valid and lawful submission of arbitral disputes to an arbitral tribunal is an error committed within the jurisdiction.

29. Does the court have discretionary power under Section 34(4) of the Act to remit the matter to the arbitral tribunal to give an opportunity to resume the proceedings?

The Supreme Court in the case of, *I-Pay Clearing Services Private Limited v. ICICI Bank Limited*, [Civil Appeal No. 7 of 2022, decided on January 3, 2022], has held that Section 34(4) of the Act itself makes it clear that it is the discretion vested with the court for remitting the matter to an arbitral tribunal to give an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award. The words "*where it is appropriate*" itself indicate that it is the discretion to be exercised by the court, to remit the matter when requested by a party. Thus, when an application is filed under Section 34(4) of the Act, the same is to be considered keeping in mind the grounds in the application under Section 34(1) of the Act by the party, who has questioned the award of the arbitral tribunal.

Therefore, it was held that merely because an application is filed Under Section 34(4) of the Act by a party, it is not always obligatory on the part of the court to remit the matter to an arbitral tribunal. The discretionary power conferred under Section 34(4) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award. If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself.

Therefore, in absence of any finding on contentious issues, no amount of reasons can cure the defect in the award.

The Court further noted that a harmonious reading of Section 31, 34(1), 34(2A) and 34(4) of the Act, makes it clear that in appropriate cases, on the request made by a party, the court can give an opportunity to the arbitrator to resume the arbitral proceedings for giving reasons or to fill up the gaps in the reasoning in support of a finding, which is already rendered in the award. But at the same time, when it *prima facie* appears that there is a patent illegality in the award itself, by not recording a finding on a contentious issue, in such cases, the court may not accede to the request of a party for giving an opportunity to the arbitral tribunal to resume the arbitral proceedings.

Further, the Supreme Court in the case of, *National Highways Authority of India v. P. Nagaraju @ Cheluvaiiah*, [Civil Appeal No. 4671 of 2022, decided on July 11, 2022] clarified that “*the position of law being clear that it would not be open for the court in the proceedings under Section 34 or in the appeal under Section 37 to modify the award, the appropriate course to be adopted in such event is to set aside the award and remit the matter to the learned Arbitrator in terms of Section 34(4)*”.

30. What are the differences in the scope of application of setting aside an award under Section 34 and the stay of enforcement of an award under Section 36 of the Act?

A Single Bench of the Calcutta High Court in the case of, *Bharat Heavy Electricals Limited v. Optimal Power Synergy India Private Limited*, [RVWO/15/2021, decided on February 21, 2022] while laying down the difference in the scope of application of Section 34 and 36 of the Act, has observed that the grounds of challenge under Section 34(1) and (2) of the Act are distinct and independent from the grounds which are generally accepted by the court for a stay of an award under Section 36(2) of the Act. Further, the *proviso* to Section 36(3) reinforces the difference between the fields occupied by an application for stay and that for setting aside an award. Therefore, the Calcutta High Court noted that the court under Section 34 of the Act would only assess the sustainability of an arbitral award on the grounds available under Section 34 of the Act.

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