

JUNE

1. **Power under Section 9 of the Arbitration Act can only be used for preservation of subject matter of dispute and not for directing specific performance of a contract.**

In *Pink City Expressway Private Limited v National Highway Authority of India & Anr*,¹ the parties entered into a concession agreement. The appellant sought approval from the respondent for an extension of the concession agreement. The respondent granted only an interim extension for a part of the requested period. Further the respondent also issued a notice inviting fresh tender and bids for the remaining time period. Seeking an interim protection of its rights, the appellant filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 [“**Arbitration Act**”]. The Delhi High Court held that the power under Section 9 of the Arbitration Act can only be exercised for the preservation of the subject matter of the dispute till the decision of the arbitral tribunal, and the scope of relief under Section 9 of the Arbitration Act cannot be used for directing specific performance of a contract.

2. **Rejection of the party's claims by the arbitrator means a final verdict on claims and the arbitrator's order can be challenged under Section 34 of the Arbitration Act.**

The High Court of Gujarat in *Pahal Engineers v The Gujarat Water Supply and Sewerage Board*,² held that once the arbitrator rejects the claims of a party, it denotes the final verdict of the arbitrator on the same. The court also observed that such an order of the arbitrator can be challenged under Section 34 of the Arbitration Act. The court dismissed the writ petition since the petitioner had an alternative remedy available under the Arbitration Act and held that such a petition cannot be filed against the order of an arbitration tribunal.

3. **Orders passed under Section 9 of the Arbitration Act are interim in nature.**

¹ *Pink City Expressway Private Limited v National Highway Authority of India & Anr* 2022 LiveLaw (Del) 598.

² *Pahal Engineers v The Gujarat Water Supply and Sewerage Board* R/Special civil application No. 8727 of 2019, 2022 LiveLaw (Guj) 220.

In the instant case of *Kanbai Foods Limited v A and HP Bakes*,³ a franchise agreement was created between the petitioner and the respondent. The franchise agreement required the respondent to only sell the appellants' bakery goods which was later breached. The appellant filed an application under Section 9 of the Arbitration Act before seeking an interim direction to the respondent to not carry any activity in the franchised premises and handover the property to the appellant. Additionally, the appellant also sought for a directive prohibiting the respondent from conducting any sort of similar business activity.

The High Court of Gujarat referred to the principles laid down in *Arvind Constructions Co Limited v Kalinga Mining Corporation*,⁴ in exercising its power under the Section 9 of the Arbitration Act. Courts are required to follow the recognized principles that apply when granting interim injunctions under Order 39 of the Code of Civil Procedure, 1908. The court held that interim injunction is an equitable remedy and cannot be granted in such cases where it would amount to granting a principal relief. Therefore, the High Court of Gujarat dismissed the appeal filed by the appellant as there was no basis to interfere with the impugned order.

4. The court cannot decide disputed questions of facts in an application for the appointment of an arbitrator under Section 11(6).

In the case of *Lords Inn Hotels and Developers Limited v Raysons Residency Private Limited*,⁵ a petition was filed under Section 11(6) of the Arbitration Act for the appointment of a sole arbitrator. The respondent in this case has solely cancelled the said agreement, and a dispute has arisen with this regard the petitioner sent a notice to the respondent to comply with the appointment of one of the three arbitrators proposed thereunder, which the respondent failed to do. The dispute eventually went to the Gujarat High Court where the respondent claimed that the agreement entered into had passed its validity period and therefore, the petitioner had no right to seek enforcement of the arbitration clause. However, the petitioner contended that the agreement was extended for another five years. The High court held that these factual disputes cannot be resolved through adjudication of a petition under Section 11(6) of the Arbitration Act. The arbitral tribunal itself has to examine such issues including arbitrability.

³ *Kanbai Foods Limited v A and HP Bakes* R/First Appeal No. 2638 of 2021, 2022 LiveLaw (Guj) 219.

⁴ *Arvind Constructions Co Private Limited v Kalinga Mining Corporation* (2007)6 SCC 798.

⁵ *Lords Inn Hotels and Developers Limited v Raysons Residency Private Limited* C/IAAP/23/2019; 2022 LiveLaw (Guj) 230.

5. Failure to appeal an objection to the jurisdiction of the tribunal would invalidate a future application under section 8.

In the present case, *BEML Limited v Prakash Parcel Services Limited*,⁶ the parties entered into an agreement which contained an arbitration clause and the appointment of a sole arbitrator. The respondent filed an application under Section 16 of the Arbitration Act regarding the jurisdiction of the tribunal. The arbitrator accepted the respondent's objection and an order was passed to pursue the appropriate legal remedies and remained unchallenged by the appellant.

The court was of the view that according to Section 8 of the Arbitration Act, it is mandatory for the court to refer the parties to arbitration in terms of arbitration agreement, but the appellant in this case did not challenge the arbitrator's order holding that it lacked jurisdiction to resolve the dispute, and as a result, the appellant has waived its right to argue that the dispute should be referred to arbitration.

6. Existence of an arbitration agreement is not a prerequisite for the matter to be referred to arbitration under Section 18 of the MSMED Act.

In *M/s SGM Packaging Industries v M/s Goyal Plywood LLP*,⁷ the Punjab and Haryana High Court held that a matter can be referred to arbitration under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 Act [**"MSMED Act"**], even if the parties have not signed an arbitration agreement. The court elaborated on the council's powers for such a reference to the arbitration. Further the court made reference to the Supreme Court case in *M/s Silpi industries v Kerala State Road Transport Corporation and another*,⁸ to reiterate the provisions of the MSMED Act, being a special Act, will prevail and have an overriding effect over the Arbitration Act.

7. An arbitral tribunal cannot reduce liquidated damages based on "guesswork" when pre-estimated damages cannot be quantified.

The High Court of Delhi, in the matter of *Haryana Vidyut Prasaran Nigam Limited v Cobra Instalaciones Y Services SA & Shyam Indus Power Solution Private Limited*,⁹ held that while adjudicating a dispute, the arbitral tribunal cannot decrease the liquidated damages based merely on guesswork and on

⁶ *BEML Limited v Prakash Parcel Services Limited* M.F.A. No. 4180 of 2019; 2022 LiveLaw (Kar) 218.

⁷ *M/s SGM Packaging Industries v M/s Goyal Plywood LLP* 2022 LiveLaw (PH) 147.

⁸ *M/s Silpi Industries etc v Kerala State Road Transport Corporation & Anr* Civil appeal Nos.1570-1578 of 2021.

⁹ *Haryana Vidyut Prasaran Nigam Limited v Cobra Instalaciones Y Services SA & Shyam Indus Power Solution Private Limited* O.M.P. (COMM) 8/2021.

the grounds that quantification of the same was not possible. Further, it was noted by the court that there was an absence of sufficient material on record for the tribunal to make an educated guess. In this matter, the court interfered with only this aspect of the claim and did not discuss the tribunal's reasoning in respect to other claims.

8. The Bombay High Court held that disputes regarding the refund of security deposit is not within the exclusive jurisdiction of the Court of Small Causes.

In the matter of *Bafna Motors Private Limited v Amanulla Khan*,¹⁰ the Bombay High Court while dealing with an application filed under Section 11¹¹ of the Arbitration Act, stated that in a dispute pertaining to the refund of security deposit in a leave and license agreement, the Court of Small Causes will not have an exclusive jurisdiction, as provided by Section 41¹² of the Presidency Small Causes Courts Act, 1882. The court appointed an arbitrator in the matter and stated that when such parties have an arbitration agreement in place, such suits to recover said amounts must be determined via arbitration.

9. Interim measures under Section 9 can be provided against third parties.

In a case concerning redevelopment of a housing society whose condition was deemed dangerous, titled *Choice Developers v Pantnagar Pearl CHS Limited & Ors*,¹³ the Bombay High Court has held that under the Section 9¹⁴ of the Arbitration Act, an order granting interim measures against a third party can be issued by the court. However, the caveat to this is that the third party, against whom such an order is being granted, should have been impleaded in the initial petition, as filed under the abovementioned section.

10. A third party cannot be impleaded as a party in the arbitration proceedings under Section 9 of the Act.

In the matter of *Vijay Arvind Jarivala v Umang Jatin Gandhi*,¹⁵ the High Court of Gujarat has held that a third party cannot be made a party in the proceedings under Section 9¹⁶ of the Arbitration Act for interim measures wherein by the very nature of the proceedings, it does not have a legal

¹⁰ *Bafna Motors Private Limited v Amanulla Khan* Arb. App. 340/2019.

¹¹ Arbitration and Conciliation Act 1996, s 11.

¹² Presidency Small Causes Courts Act 1882, s 41.

¹³ *Choice Developers v Pantnagar Pearl CHS Limited & Ors* Arb. Pet. (L) No. 7966/2022.

¹⁴ Arbitration and Conciliation Act 1996, s 9.

¹⁵ *Vijay Arvind Jarivala v Umang Jatin Gandhi* R/ SCA No. 16131/2021.

¹⁶ Arbitration and Conciliation Act 1996, s 9.

participatory right. In the verdict, the court stated that the earlier mentioned section allows parties to seek interim reliefs aimed at balancing the rights of such parties involved in an arbitral adjudication. However, given the factual matrix and on a perusal of the said section, it was held that only parties to an arbitration agreement can be impleaded as parties to the arbitration proceedings at an interim stage.

11. Application concerning enforcement of arbitral award lies solely before the court with which Section 9 read with Section 34 application are initially filed.

The High Court of Telangana has stressed again the settled legal position that only the court which initially entertained application(s) filed under Section 9¹⁷ and/or Section 34¹⁸ of the Arbitration Act, can have the jurisdiction to entertain an application in relation to enforcing the arbitral award. This position was taken by the court in the matter titled *M/s India Media Services Private Limited v M/s SBPL Infrastructure Limited*.¹⁹ The verdict was backed by the emphasis as laid on the 'non-obstante clause' under Section 42²⁰ of the Arbitration Act.

¹⁷ Arbitration and Conciliation Act 1996, s 9.

¹⁸ Arbitration and Conciliation Act 1996, s 34.

¹⁹ *M/s India Media Services Private Limited v M/s SBPL Infrastructure Limited* CRP No. 507/2021.

²⁰ Arbitration and Conciliation Act 1996, s 42.

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12. Failure of the petitioner to file an application under section 8 of the Arbitration Act does not debar the party from seeking judicial intervention in appointment of arbitrator.

Section 8 of the Arbitration Act empowers the judicial authority to direct the parties to arbitration in the presence of an arbitration agreement.²¹ In *Anita Mehta v Gulkand Hues Private Limited*,²² High Court of Jammu and Kashmir has restated that in case the petitioner does not file an application under section 8 of the Arbitration Act, it cannot be construed as the petitioner submitting to the jurisdiction of the courts and ruling out arbitration as a means to resolve the dispute at hand.

Also, referring to the Supreme Court case of *Uttrakhand Purv Sainik Nigam Limited v Northern Coal Field Limited*,²³ the High Court observed that the issue of whether the petitioner has waived their right to seek arbitration is a matter to be decided by the arbitrator only and the courts job is to merely check for the existence of an arbitration agreement and appoint an arbitrator.

13. Non-filing of an application challenging termination of the arbitral proceedings by the arbitrator would render the second application for appointment of an arbitrator non-maintainable.

Section 32 of the Arbitration Act provides for grounds on which Arbitral proceedings can be terminated, one of which is at the discretion of the arbitrator.²⁴ Section 14 of the Arbitration Act lays down the conditions when the “mandate of the arbitrator shall be terminated.”²⁵ In *Vimlesh Bansal v Ashok Kumar*,²⁶ Rajasthan High Court has held that when the arbitrator’s award terminating arbitral proceedings rendered under section 32(2)(c) was not challenged by the parties under section 14 of the Arbitration Act, then a second arbitration application for appointment of arbitrator would be rendered non-maintainable. It was the court’s analysis that before filing of a second application for appointment of arbitrator, the party has to first challenge the termination of arbitral proceedings by the arbitrator. Non-filing of this application would be interpreted as the petitioner

²¹ Arbitration and Conciliation Act 1996, s 8.

²² *Anita Mehta v Gulkand Hues Private Limited* ARB.P. 6/2020.

²³ *Uttrakhand Purv Sainik Nigam Limited v Northern Coal Field Limited* Special Leave Petition (C) No. 11476 of 2018.

²⁴ Arbitration and Conciliation Act 1996, s 32(2)(c).

²⁵ Arbitration and Conciliation Act 1996, s 14.

²⁶ *Vimlesh Bansal v Ashok Kumar* Arb. No. 51/2020.

“*sleeping over their rights.*” In the case referred here, the arbitral proceedings were terminated due to non-appearance of the parties.

14. An arbitration agreement in tax invoice is valid since there is no specific form of an arbitration agreement.

In *Swastik Pipe Limited v Dimple Verma*,²⁷ the Delhi High Court has held that despite the tax invoice being a unilateral agreement, the arbitration clause contained in it is valid and binding if the parties were at *consensus ad idem*. The High Court referred to the case of *MTNL v Canara bank*,²⁸ wherein it was held that there is no particular form to an arbitration agreement and only the intention of the parties need to be ascertained. In the present case, *ad idem* was determined by showing that the defendant had knowledge of the arbitration clause contained in the tax invoices and made payments to the petitioner. The conduct of the parties established *prima facie ad idem* and thereby their liability under the arbitration agreement.

15. Supreme Court rules that an arbitral award cannot be altered under sections 34 and 37 of the Arbitration Act but can only be remitted to the arbitrator.

Section 34 of the Arbitration Act sets out the conditions for setting aside an arbitral award.²⁹ Section 37 of the Arbitration Act lays down the grounds when an appeal may lie in case the courts set aside an arbitral award or refuse to set aside an arbitral award.³⁰ In *National Highways Authority of India v P Nagaraju and Ors*,³¹ the Supreme Court observed that under the section cited above, the court has the power to set aside an award but not alter or modify the contents of the awards. The court may remit the matter to the arbitrator for reconsideration but not alter the award itself.

16. Venue of the arbitration in its entirety as mentioned in the arbitration clause shall be construed as the seat of arbitration.

In *Priya Malay Sheth v VLCC Health Care Limited*,³² the Bombay High Court reiterated the Supreme Court case of *BGS SGS Soma JV v NHPC Limited*,³³ which held that “*when a place is designated as the venue of the arbitration proceedings in an Arbitration Clause, the expression arbitration proceeding would make it*

²⁷ *Swastik Pipe Limited v Dimple Verma* Arb No. 100/2022.

²⁸ *MTNL v Canara Bank* 2019 SCC OnLine SC 995.

²⁹ Arbitration and Conciliation Act 1996, s 34.

³⁰ Arbitration and Conciliation Act 1996, s 37.

³¹ *National Highways Authority of India v P Nagaraju and Ors* Civil Appeal No. 4671 of 2022.

³² *Priya Malay Sheth v VLCC Health care Limited*, Commercial Arbitration (L.) No. 3094 of 2022.

³³ *BGS SGS Soma JV v NHPC Limited* Civil Appeal No. 9307 of 2019.

clear that the venue is really the seat of arbitration". In the case at hand, under the arbitration agreement, the first clause mentioned that "a sole arbitrator would be appointed by the Respondent." The second clause stated that the Arbitral proceedings between the parties would be conducted following the ICC Rules and venue of the arbitration would be in Delhi. The High Court held that it would be erroneous to hold an arbitration clause which conferred powers on the respondent to unilaterally appoint an arbitrator as valid. Also, it was the contention of the applicant that the first two clauses were interlinked. The court, dismissing this contention, held that it was the intention of the parties to mutually differentiate between the venue of arbitration and the arbitral mechanism to be followed with Delhi being the seat of arbitral proceedings. Hence, the court ruled that the "venue of the arbitration in its entirety" shall be construed as the "seat" of Arbitration.

17. Under Section 34 of the Arbitration Act, an award can only be set aside on specific grounds.

In *Punjab State Cooperative Supply and Marketing Federation Limited v M/s BDS Decor & Prefab Private Limited and Anr*,³⁴ the Punjab and Haryana High Court reaffirmed that an award can only be set aside on the specific grounds mentioned in Section 34 of the Arbitration Act.³⁵ In the present case, the appellant suffered losses after recalling fresh tenders as the first party could not undertake the allotted work. After the dismissal of his claim by the arbitrator, the appellant came up with the present appeal before the court, seeking remedy under Section 34 of the Arbitration Act.

Relying on the judgement of the Hon'ble Supreme Court in *NTPC Limited v M/s Deconar Services Private Limited*,³⁶ the bench observed that the court could not sit in as a court of appeal to interfere in the view taken by the arbitrator if such a view is backed with reasonable prudence, based on the facts and evidences. Accordingly, the court concluded that the appellant in the instant case has failed to make out a case for setting aside the award on the grounds mentioned in Section 34 of the Arbitration Act. Hence, the appeal was dismissed.

18. Proceedings before two different forums can't be maintained under the Arbitration Act.

In the case of *M/s Sanganer Enviro Project Development v State of Gujarat*,³⁷ the Gujarat High Court observed that the petitioner had intentionally approached two different forums, that is the District Court of Gandhinagar and the Gujarat High Court under Section 34 of the Arbitration Act³⁸ in

³⁴ *The Punjab State Cooperative Supply and Marketing Federation Limited v M/s B.D.S. Decor & Prefab Private Limited and Anr* Civil Writ Petition No. 20537 of 2015.

³⁵ Arbitration and Conciliation Act 1996, s 34

³⁶ *NTPC Limited v M/s Deconar Services Private Limited* AIR 2021 SC 2588.

³⁷ *M/s Sanganer Enviro Project Development v State of Gujarat* Civil Application No. 6436 of 2021.

³⁸ Arbitration and Conciliation Act 1996, s 34.

order to seek stay on the arbitration proceedings. Hence, the High Court rejected the petition while stating that proceedings cannot be maintained simultaneously before two forums under Section 34 of the Arbitration Act.

19. An ambiguous clause that merely enables the parties to enter into arbitration agreement does not constitute a binding effect.

In *Derivados Consulting Private Limited v Pramara Promotions Private Limited*,³⁹ the Bombay High Court highlighted that it should be examined that whether there is a clear, unfettered and an absolute intention of the parties as discerned from the arbitration clause to refer the disputes to arbitration. However, in the present case, the *prima facie* reading of the clause clearly indicates that in case of any dispute either party may, but, is not mandatorily required to submit the dispute to arbitration. Therefore, the bench in view of Section 7(1) of the Arbitration Act,⁴⁰ observed that the said clause was just an enabling clause that provided an option to move to arbitration but does not imply an absolute intention thereto. Hence, relying on *Mayavati Trading Private Limited v Pradyut Deb Burman*,⁴¹ the court concluded that its jurisdiction cannot be exercised under Section 11(6) of the Arbitration Act⁴² for the appointment of the arbitrator in this matter, since there was no arbitration agreement between the parties.

20. Right to refer the dispute to arbitration cannot be reclaimed once waived off.

The Karnataka High Court held in the case of *Y Harish and Anr v Y Satish and Ors*,⁴³ that, once a party had waived off its right to refer the dispute to arbitration, it cannot be reclaimed. Through the writ petition, the petitioner seeks the quashing of the suit filed by the respondent before the Commercial Court on the grounds that the arbitration proceedings had already commenced and accordingly the dispute should be referred to arbitration only. In this case, the respondent had earlier initiated the arbitration proceedings, which was rejected by the petitioner raising the contention that the dispute is outside the ambit of the arbitration clause of the agreement between the parties. Therefore, the respondent filed a suit before the Commercial Court under Section 11 of the Commercial Courts Act, 2015.⁴⁴

³⁹ *Derivados Consulting Private Limited v Pramara Promotions Private Limited* Arbitration Application No. 4 of 2022.

⁴⁰ Arbitration and Conciliation Act 1996, s 7(1).

⁴¹ *Mayavati Trading Private Limited v Pradyut Deb Burman* 2019 SCC OnLine SC 1164.

⁴² Arbitration and Conciliation Act 1996, s 11(6).

⁴³ *Y Harish and Anr v Y Satish and Ors* Writ Petition No. 10716 of 2022.

⁴⁴ Commercial Courts Act 2015, s 11.

However, the Commercial Court had observed that the petitioner had earlier waived off its right to resolve the dispute through arbitration, by its act of rejecting the same. While dismissing the writ petition, the High Court upheld the order of Commercial Court and stated that since the petitioner had already waived off its right to refer the dispute to arbitration, the latter cannot be reclaimed.

21. The interim relief granted in isolation of the main relief sought, is incorrect.

The Delhi High Court ruled in *Orchid Infrastructure Developers Private Limited v Five Star Constructions Private Limited*,⁴⁵ that the arbitral tribunal cannot grant the claimant an interim or ancillary sum, which is a part of the same claim, when the main relief sought by the claimant has been rejected by the arbitral tribunal. The court noted that notwithstanding this, the arbitrator had granted a portion of the aforementioned claim, which was requested as interim relief, on the grounds that the petitioner had not expressly refuted the portion in question in its counter-claim, and as a result, the portion was assumed to be true. As a result, the court noted that the arbitrator had partially granted the respondent's claim based on a presumptive admission by the petitioner.

22. Agreements forming one compounded transaction can invoke arbitration clause of one another.

In the case of *M/S Bestpay Solutions Private Limited v M/S Razorpay Software Private Limited*,⁴⁶ the Karnataka High Court ruled that if both agreements refer to one another and form one composite transaction, a party may invoke the arbitration clause found in one agreement with respect to disputes arising with a third party under another agreement. The court ruled that the legal notice would be invalid and in violation of Section 21 of the Arbitration Act⁴⁷ if it did not include one of the required parties. The petition to refer the parties to arbitration was denied by the court on the grounds that such a deficiency would be the cause of the issue. The court further stated that as the aforementioned legal notice was not delivered in accordance with Section 21 of the Arbitration Act,⁴⁸ the problem would be resolved at its core.

⁴⁵ *Orchid Infrastructure Developers Private Limited v Five Star Constructions Private Limited* O.M.P. (COMM) 124/2019.

⁴⁶ *M/s Bestpay Solutions Private Limited v M/s Razorpay Software Private Limited* Civil Misc. Petition No. 565 of 2021.

⁴⁷ Arbitration and Conciliation Act 1996, s 21.

⁴⁸ Arbitration and Conciliation Act 1996, s 21.

23. Concurrence of views of the court and tribunal cannot be concluded merely by rejection of application.

In the case of *Glitter Overseas and Ors v MMTC Limited*,⁴⁹ the Delhi High Court held that mere rejection of the appeal against the arbitral award under Section 34 of the Arbitration Act,⁵⁰ does not conclude that the court is in concurrence with the view of the arbitral tribunal. In this case the court did not adjudicate on the facts and merits of the case however, it simply dismissed the appeal filed under Section 34 of the Arbitration Act⁵¹ because the required grounds were not met. The bench further observed that, the court can have a different viewpoint on the merits of the case and therefore it cannot be concluded to have concurrence with the stand of the tribunal.

24. Section 29A of the Arbitration Act only has prospective application.

The Bombay High Court in the case of *Meenanath Fatarpekar v MicroStrategy India Private Limited*,⁵² held that the Section 29A of the Arbitration Act⁵³ only has a prospective application. The court in this case observed that Section 29A has been inserted in the Arbitration Act through the Arbitration and Conciliation (Amendment) Act, 2015⁵⁴ and therefore its benefits cannot be claimed for arbitration proceedings had commenced before the amendment came into force. Thus, highlighting the prospective application of Section 29A, the Bombay High Court dismissed the petition.

25. Interim order by an arbitration tribunal cannot be challenged under Article 226 and 227 of the Constitution.

In *Easy Trip Planners Limited v One97 Communications Limited*,⁵⁵ the Delhi High Court ruled that an interim order given by an arbitration tribunal can be challenged only if the said order is appealable under Section 37⁵⁶ of Arbitration Act. The court relied on the enunciation given by the Hon'ble Supreme Court in *SBP & Co v Patel Engineering Limited*,⁵⁷ which says that, if a party is aggrieved by any order of the tribunal and that order is not appealable as per Section 37 of the Arbitration Act, then he had to wait until the final award is passed. The bench while highlighting the said judgement,

⁴⁹ *Glitter Overseas and Ors v MMTC Limited* O.M.P. (COMM) 487/2020.

⁵⁰ Arbitration and Conciliation Act 1996, s 34.

⁵¹ Arbitration and Conciliation Act 1996, s 34.

⁵² *Meenanath Fatarpekar v MicroStrategy India Private Limited* Commercial Arbitration Petition No. 53 of 2021.

⁵³ Arbitration and Conciliation Act 1996, s 29A.

⁵⁴ Arbitration and Conciliation (Amendment) Act, 2015, s 15.

⁵⁵ *Easy Trip Planners Limited v One97 Communications Limited* CM APPL. 32174/2022.

⁵⁶ Arbitration and Conciliation Act 1996, s 37.

⁵⁷ *SBP & Co v Patel Engineering Limited* AIR 2006 SC 450.

stated that writ under Article 226⁵⁸ and 227⁵⁹ of the Indian Constitution cannot be issued against an interim order given by the tribunal, as it would defeat the purpose of minimal judicial intervention in the disputes pending before arbitration tribunals.

Moreover, the court dismissed the invocation of Section 31(6)⁶⁰ of the Arbitration Act on the grounds that the order given in the present case cannot be concluded as an interim award and hence cannot be challenged under Section 34⁶¹ of the Arbitration Act. Accordingly, the petition under Article 226 and 227 was dismissed for not being maintainable.

26. An order by the Facilitation council cannot be considered an arbitral award, if the conciliation has failed.

In *M/s Unicon Engineers v M/s Jindal Steel and Power Limited*,⁶² the Delhi High Court noted that an order passed by the facilitation council under the MSMED Act, cannot be considered as an arbitral award if the process under Section 18⁶³ of the MSMED Act is not followed. In the present case the petitioner has filed an application before the High Court under Section 36⁶⁴ of the Arbitration Act for the execution of an order passed by Micro & Small Enterprises Facilitation Council, Coimbatore Region [“**the Council**”] contending it to be an arbitral award.

However, the bench noted that the Council while pronouncing the order had admitted that conciliation between the parties have failed. Therefore, relying on the judgement of Supreme Court in *Jharkhand Urja Vikas Nigam Limited v The State of Rajasthan & Ors*,⁶⁵ the bench observed that if a conciliation by the facilitation council fails, then under Section 18(3) of the MSMED Act⁶⁶, the dispute can be resolved through arbitration. Moreover, the council can only arbitrate and pass an award if the due process of law under Section 20, 23, 24 and 25 of the Arbitration Act⁶⁷ is being followed, which never happened in this case. Thus, the application was dismissed on not being maintainable.

⁵⁸ Constitution of India art. 226.

⁵⁹ Constitution of India art. 227.

⁶⁰ Arbitration and Conciliation Act 1996, s 31(6).

⁶¹ Arbitration and Conciliation Act 1996, s 34.

⁶² *M/s Unicon Engineers v M/s Jindal Steel and Power Limited* Ex.Appl.(OS) 988/2021.

⁶³ Micro, Small & Medium Enterprises Development Act 2006, s 18.

⁶⁴ Arbitration and Conciliation Act 1996, s 36.

⁶⁵ *Jharkhand Urja Vikas Nigam Limited v The State of Rajasthan & Ors* CA No. 2899 of 2021.

⁶⁶ Micro, Small & Medium Enterprises Development Act 2006, s 18(3).

⁶⁷ Arbitration and Conciliation Act 1996, s 20; s 23; s 24 and s 25.

27. Same contract/transaction cannot have two arbitration proceedings.

In *M/s Tantia Constructions Limited v Union of India*,⁶⁸ the Hon'ble Supreme Court while dismissing the Special Leave Petition, took a concurrent view with the Calcutta High Court and expressed its firm opinion that there cannot exist two different arbitration proceedings for the same contract or transaction whatsoever, once an award under one of the proceedings have been passed. Proceedings under Section 11(6)⁶⁹ of the Arbitration Act cannot be initiated for the same transaction or contract, regarding which a rightful arbitral award has been passed.

28. A party can withdraw from arbitration proceedings before its initiation, despite giving consent to it earlier.

In *Krishna Calibration Services v Jasmin Bharat Patel*,⁷⁰ the Gujarat High Court held that a party can withdraw from the arbitration proceedings, before the initiation of the same. In the present case, both the parties consented to resolve the dispute through arbitration under Section 89(2)(a) of the Civil Procedure Code, 1908.⁷¹ With the consent of both the parties, the court appointed an arbitrator. However, before the formulation of terms of settlement by the court, the original plaintiff withdrew his consent thereto. The bench concurring with the order of the lower court dismissed the appeal and observed that the consent to arbitration can be withdrawn by the party before the initiation of proceedings by the court or before formulation of terms of settlement as happened in the present case.

⁶⁸ *M/s Tantia Constructions Limited v Union of India* SLP (Civil) No. 10722 of 2022.

⁶⁹ Arbitration and Conciliation Act 1996, s 11(6).

⁷⁰ *Krishna Calibration Services v Jasmin Bharat Patel* R/Special Civil Application No. 5682 of 2021.

⁷¹ Code of Civil Procedure 1908, s 89(2)(a).

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29. Mere use of the word “arbitration” or “arbitrator” in a clause won’t make it an arbitration agreement.

In the case of *Mahanadi Coalfields Limited v IVRCL AMR Joint Venture*,⁷² the Supreme Court bench comprising of Justice DY Chandrachud and AS Bopanna noted that merely the use of the word arbitration and arbitrator in a clause would not mandatorily make it an arbitration agreement if it requires a fresh consent of parties to do so. The current case required that in case of dispute the dispute resolution had to occur at a company level and not via arbitration agreement.

30. Dispute involving refund of payment under “Flat Buyer Agreement” arbitrable.

The Delhi High Court ruled in the case of *Priyanka Taksh Sood & Ors v Sunworld Residency Private Limited & Anr*,⁷³ that a dispute involving the refund of payment under the flat buyer agreement from a real estate developer will be arbitrable. A remedy that exists under the Real Estate (Regulation and Development) Act, 2016 [“**RERA Act**”] will not act as a bar to the issue being arbitrable. The judgement was provided by a single judge bench of Justice Sanjeev Narula who held that the RERA Act provides for remedies in addition to remedies available under the Arbitration Act and does not in any way bar its application.

31. Account Statements amongst others have evidentiary value if relied on by arbitrable tribunal.

The Delhi High Court referring to cases *Kanta Batra v M/s Scholastic India Private Limited & Anr*,⁷⁴ held that any award cannot be set aside on basis that material relied on by the arbitral does not measure up to the standards laid down in the Indian Evidence Act, 1872. Justices Vibhu Bakhru and Amit Mahajan held that the award passed by the tribunal relying upon the income tax returns and Account statements would be valid.

⁷² *Mahanadi Coalfields Limited v IVRCL AMR Joint Venture* 2022 SCC OnLine SC 960.

⁷³ *Priyanka Taksh Sood & Ors v Sunworld Residency Private Limited & Anr* Arb Pet No. 868/2021.

⁷⁴ *Kanta Batra v M/s Scholastic India Private Limited & Anr* 2022 SCC OnLine SC 2351.

32. Notice of proceedings under Section 11 is a mandatory requirement.

The Madhya Pradesh High Court held that the notice of proceeding under Section 11⁷⁵ of the Arbitration Act is a compulsory requirement. Without which the entire proceeding of appointing an arbitrator would be vitiated. This was provided for in the case of *State of Madhya Pradesh v Nidhi Industries*.⁷⁶

33. Supersession of the arbitration clause must not be inferred lightly.

The Delhi High Court ruled that when there is an arbitration agreement between parties and when one party seeks to negate it by leaning towards other provisions of the contract, the Court must lean towards referring the matter for arbitration. This view was enunciated by Justice Anup Jairam Bhambhani in the case of *Shristi Infrastructure Development Corp Limited v Ircon International Limited*.⁷⁷

34. Section 5 of Limitation Act application is not required if application under Section 34 of the Arbitration Act is within statutory period.

The Orissa High Court in the case of *Faridabad Gurgaon Minerals v Orissa Mining Corp Limited*,⁷⁸ followed the Supreme Court ruling in the case of *State of Bihar v Bihar Rajya Bhumi Vikas Bank Samiti*,⁷⁹ that the provisions under Section 34 (5) of the Arbitration Act is directory in nature and not mandatory.

35. Section 79 of RERA Act cannot bar an arbitral tribunal from passing an order of injunction.

The Bombay High Court in the case of *Ashok Palav Coop Housing Society Limited v Pankaj Bhagubhai Desai & Anr*,⁸⁰ ruled that any Arbitral tribunal is not synonymous to a Civil Court as per the purview of the Code of Civil procedure, 1908. Thus, the arbitral proceedings cannot be said to be barred under Section 79 of the RERA Act.

⁷⁵ The Arbitration and Conciliation Act 1996, s 11.

⁷⁶ *State of Madhya Pradesh v Nidhi Industries* 2022 SCC OnLine MP 1798.

⁷⁷ *Shristi Infrastructure Development Corp Limited v Ircon International Limited* 2022 SCC OnLine Del 2383.

⁷⁸ *Faridabad Gurgaon Minerals v Orissa Mining Corp Limited* WP (C) No. 20046 of 2019.

⁷⁹ *State of Bihar v Bihar Rajya Bhumi Vikas bank Samiti* (2018) 9 SCC 472.

⁸⁰ *Ashok Palav Coop Housing Society Limited v Pankaj Bhagubhai Desai & Anr* 2022 LiveLaw (Bom) 298

36. Award of Demurrage Charges under Major Ports Act is not valid when contract does not provide for it.

The High Court of Calcutta held that demurrage charges on the basis of Major Ports Act, 1963 cannot be awarded when the contract entered into by the parties does not have a provision for it. This was held in the case of *Steel Authority of India v Vizag Seaport Private Limited*,⁸¹ where the Justice Krishna Rao set aside the award.

37. Award passed by an arbitrator not being adequately qualified as per agreement will be *non-est*.

The Madhya Pradesh High Court set aside an arbitral award when an application was filed challenging the jurisdiction of the arbitrator by the appellant to the case *Chokhi Dhani v JS Construction*.⁸² The agreement entered by the parties provided for the arbitrator to have certain qualifications that must be met. However, the appointed arbitrator failed to fulfil the requirements and thus the award passed was held to be outside their jurisdiction.

38. Section 29A(6) of the Arbitration and Conciliation Act will not be applicable to substitution of arbitrator on grounds of bias.

The Kerala High Court when ruling in the case of *Flemingo Duty Free Shop Private Limited v Airports Authority of India*,⁸³ ruled that allegation of bias cannot be raised as a ground to seek substitution of the arbitration under Section 29A of the Arbitration Act.

39. Mere erroneous application of law will not lead to the award being set aside mandatorily.

The Bombay High Court enunciated that when the Arbitrator has erred only on specific issues and the arbitral award can otherwise stand true will allow for the award to pass. There is not mandatory requirement to set aside the award in such cases. Justice Manish Pitale in the case of *National Highways Authority of India v The Additional Commissioner, Nagpur & Ors*,⁸⁴ held this and thus did not set aside the award.

⁸¹ *Steel Authority of India v Vizag Seaport Private Limited* 2022 SCC OnLine Cal 2299.

⁸² *Chokhi Dhani v JS Construction* 2022 LiveLaw (MP) 193.

⁸³ *Flemingo Duty Free Shop Private Limited v Airports Authority of India* Arb.P. No. 1 of 2021.

⁸⁴ *National Highways Authority of India v The Additional Commissioner, Nagpur & Ors* 2022 LiveLaw (Bom) 303.

40. Unilateral Construction of a narrow panel of Arbitrators violates impartiality.

The High Court of Delhi held in the case of *Overnite Express Limited v DMRC*,⁸⁵ that the power conferred on a single party to unilaterally choose the names of the arbitrator and forwarding it to the other party to choose from that list violated the principles of impartiality in arbitration. Even if the selected arbitrators are meritorious, they will be party to suspicion due to this unilateral exercise of power.

⁸⁵ *Overnite Express Limited v DMRC* 2022 SCC OnLine Del 2488.