

JANUARY

1. Under the Arbitration and Conciliation Act, 1996, an arbitral tribunal has the authority to grant post-award interest on an arbitral award.

In *UHL Power Co. Ltd. v. State of Himachal Pradesh*,¹ the Supreme Court held that the arbitral tribunal might award interest on the sum directed to be paid by the award, which is a figure that includes both the principal sum adjudicated and the interest. As a result, the High Court's findings in the impugned judgement that the arbitral tribunal has no authority to award compound or interest-on-interest and that only simple interest can be given in favour of UHL on the original sum requested were quashed, and UHL's appeal was partially accepted.

The Supreme Court stated that the decision in *State of Haryana v. S.L. Arora and Co.*² was incorrect in holding that a sum directed to be paid by an arbitral tribunal and the reference to the award on the substantive claim does not refer to *pendente lite* interest awarded on the “*sum directed to be paid upon award*,” and that in the absence of any provision in the contract providing for interest upon interest or compound interest, the arbitral tribunal does not have the power to award interest upon interest or compound interest either for the pre-award period or for the post-award period.

2. An assertion by one party and denial of the said assertion by another is enough for germination of the concept of a dispute.

In *Indian Oil Corp. Ltd. & Ors. v. M/s Tatpar Petroleum Centre*,³ the definition of “dispute” was thoroughly examined by the Madhya Pradesh High Court. The High Court pointed out that the term “dispute” is not defined in the Arbitration and Conciliation Act, 1996 [“**Arbitration Act**”], despite the fact that it appears in a number of clauses, and the primary goal of the legislation is to resolve disputes between rival parties by various means, including arbitration. The High Court decided that, based on the dictionary definition of the term, it is clear that for a disagreement to emerge, there must be an assertion/claim that is disputed by the opposing side. Thus, a dispute would only occur if at least two contending parties disagree on a specific point. When just one party asserts and, the other remains mute, a dispute cannot occur. It is not essential for a dispute to arise if one party's allegation and the other's denial lead to the passing of any particular order by one of the parties.

¹ *UHL Power Co. Ltd. v. State of Himachal Pradesh*, 2022 SCC OnLine SC 19.

² *State of Haryana v. S.L. Arora and Co.*, (2010) 3 SCC 690.

³ *Indian Oil Corp. Ltd. & Ors. v. M/s Tatpar Petroleum Centre* Arbitration Appeal No. 80/2021.

3. Merely filing of an application under Section 34(4) of the Arbitration and Conciliation Act, 1996 puts no obligation on the court to remit the matter to Arbitral Tribunal.

In *I-Pay Clearing Services Pvt. Ltd. v. ICICI Bank Ltd.*,⁴ the Supreme Court held that just because a party files an application under Section 34(4) of the Arbitration Act,⁵ the Court is not always required to transfer the issue to an Arbitral Tribunal. The discretionary power given by Section 34(4) of the Arbitration Act is to be used if there is an insufficient explanation or to fill in the gaps in the reasoning in support of the findings previously recorded in the award, according to the Court.

4. Article 227 cannot be invoked to challenge case management orders of the Arbitral Tribunal.

In *Future Retail Ltd. v. Amazon.Com NV Investment Holdings Llc & Ors.*,⁶ the Delhi High Court has ruled that the High Court, in exercising its authority under Article 227 of the Constitution of India,⁷ cannot dictate the style and procedure of arbitration proceedings to a properly constituted Arbitral Tribunal. On the restricted scope of Article 227's interference with the Arbitral Tribunal's procedure, Justice Amit Bansal remarked that there is only a tiny window for interfering with the Arbitral Tribunal's orders while exercising jurisdiction under Article 227.

5. Unilateral appointment of an arbitrator is not permissible.

In *Envirad Projects Pvt. Ltd. v. NTPC Ltd.*,⁸ the Delhi High Court reiterated that no one party can choose an arbitrator unilaterally, as this would negate the purpose of the Arbitration Act, which is to provide for neutral adjudication of disputes between parties. As a result, a unilateral arbitral clause placed by NTPC, a Public Sector Undertaking, in its contract with the petitioner-company for a power project was dismissed by Justice Suresh Kumar Kait. In such a case, the Court has the authority to select an arbitrator, according to the Court.

6. The limitation period for seeking an appointment of an arbitrator commences after the expiry of 30 days from the issuance of notice invoking arbitration.

⁴ *I-Pay Clearing Services Pvt. Ltd. v. ICICI Bank Ltd.* AIR 2022 SC 301.

⁵ Arbitration and Conciliation Act 1996, s 34(4).

⁶ *Future Retail Ltd. v. Amazon.Com NV Investment Holdings Llc & Ors.* CA No. 859-864 of 2022.

⁷ Constitution of India, Art. 227.

⁸ *Envirad Projects Pvt. Ltd. v. NTPC Ltd.* ARB. P. 27/2022.

In *Huawei Telecommunications (India) Co. Pvt. Ltd. & Anr v. WIPRO Ltd.*,⁹ the Delhi High Court has ruled that the three-year limitation period for seeking an appointment of an arbitrator begins when the 30-day term expires from the date of issuance of the notice requesting arbitration. As a result, the Petitioner, Bharat Sachar Nigam Ltd. (BSNL), has been granted permission to pursue arbitration against the Respondent, WIPRO Ltd.

7. The arbitral award is to be executed at a place where the judgement debtor resides, carries business, or has assets.

In *Continental Engineering Corp. v. Sugesan Transport Pvt. Ltd.*,¹⁰ the Delhi High Court dismissed an execution petition filed by a Decree Holder for an arbitral award under Section 36 of the Arbitration Act¹¹ because the Judgment Debtor was conducting business in Chennai and had no office or assets within Delhi jurisdiction. The judge noted that the Judgment Debtor is a company doing business in Chennai, that its major bank account is in Chennai, and that it has no office or asset in Delhi. The Judgment Debtor's affidavit of assets likewise fails to reveal any moveable or immovable assets within the Delhi High Court's jurisdiction.

8. High Court cannot enter into merits of the claim in an appeal under Section 37 of the Arbitration Act.

In *Haryana Tourism Ltd. v. M/s Kandhari Beverages Ltd.*,¹² the Supreme Court held that in an appeal under Section 37 of the Arbitration Act,¹³ a High Court cannot delve into the merits of the claim. The arbitrator ordered a party to pay Rs. 9.5 lakhs in this instance. The other party filed an objection petition under Section 34¹⁴ against the arbitrator's verdict before the Additional District Judge in Chandigarh. The petition in question was dismissed. Following that, a new appeal was filed in the High Court under Section 37 of the Arbitration Act. The High Court granted the appeal, which evaluated the merits of the claim and annulled and set aside the arbitrator's judgement as well as the order of the Additional District Judge, Chandigarh.

9. Arbitral Tribunal constituted before the 2015 Amendment cannot operate if it violates neutrality mandate under Section 12(5).

⁹ *Huawei Telecommunications (India) Co. Pvt. Ltd. & Anr v. WIPRO Ltd.* ARB. P. 365/2019.

¹⁰ *Continental Engineering Corp. v. Sugesan Transport Pvt. Ltd.* EX.APPL.(OS) 1034/2021.

¹¹ Arbitration and Conciliation Act 1996, s 36.

¹² *Haryana Tourism Ltd. v. M/s Kandhari Beverages Ltd.* Civil Appeal No. 266 of 2021.

¹³ Arbitration and Conciliation Act 1996, s 37.

¹⁴ Arbitration and Conciliation Act 1996, s 34.

In *Ellora Paper Mills Ltd. v. State of Madhya Pradesh*,¹⁵ the Supreme Court ruled that an arbitral tribunal established under an arbitration clause prior to the 2015 amendment to the Arbitration Act will lose its mandate if it violates the neutrality clause under Section 12(5)¹⁶ read with the Seventh Schedule, both of which were incorporated by the 2015 amendment. The Court ruled that an arbitration clause that requires the appointment of arbitrators in violation of the revised Section 12(5) provision cannot be enforced.

10. Party without notice of Section 11(6) petition filed by the other party free to appoint an arbitrator.

In *M/s. Durga Welding Works v. Chief Engineer, Railway Electrification, Allahabad & Anr.*,¹⁷ the Supreme Court held that a party to an arbitration agreement can appoint an arbitrator even if the other party has filed a petition before the High Court for the appointment of an arbitrator under Section 11(6) of the Arbitration Act¹⁸ if the party has not been given due notice of the same.

¹⁵ *Ellora Paper Mills Ltd. v. State of Madhya Pradesh* AIR 2022 SC 280.

¹⁶ Arbitration and Conciliation Act 1996, s 12(5).

¹⁷ *M/s. Durga Welding Works v. Chief Engineer, Railway Electrification, Allahabad & Anr.* [2022] 3 SCC 98.

¹⁸ Arbitration and Conciliation Act 1996, s 11(6).

FEBRUARY

1. Award of interest contrary to express terms of agreement susceptible to challenge under Section 34 of Arbitration Act.

The Delhi High Court, in *National Seeds Corporation Ltd. v. National Agro Seeds Corporation*,¹⁹ reaffirmed that the award of interest contrary to the express terms of the agreement between the parties would be susceptible to challenge under Section 34 of the Arbitration Act.²⁰ However, if there is no such agreement prohibiting the award of interest, the award of interest cannot be questioned. The Court relied on *Punjab State Civil Supplies Corporation Limited (PUNSUP) and Anr. v Ganpati Rice Mills*²¹ where it was held that the Arbitral Tribunal has broad discretion in awarding interest under Section 31(7)(a) of the Arbitration Act,²² and that the impugned award can only be set aside on the grounds set out in Section 34 of the Act.

2. A Court acting under Section 34 of the Arbitration Act can remand the matter to the arbitrator for fresh decision only if both the parties consented to the same.

In *Mutha Construction v. Strategic Brand Solutions (I) Pvt. Ltd.*,²³ under Section 34 of the Arbitration Act, a party contested an arbitration award before the Bombay High Court. By the consent of the parties, the High Court set aside the award and remanded the matter to the sole arbitrator to pass a fresh and reasoned award. Subsequent to this, the Petitioner moved an application to modify the order but the bench upheld the previous ruling. Dissatisfied with the order, the Petitioner applied for a Special Leave Petition before the Supreme Court. The Apex Court ruled that in this case, both parties consented to have the award set aside and the case remanded to the sole arbitrator for a fresh and reasoned decision. As a result, the petitioner could not claim that the matter should not have been remanded to the same sole arbitrator after the order was issued based on the consent of the parties.

3. Statutory remedy against the appointment of the arbitrator lies under the Arbitration Act only

¹⁹ *National Seeds Corporation Ltd. v. National Agro Seeds Corporation* 2022 SCC OnLine Del 43.

²⁰ Arbitration and Conciliation Act 1996, s 34.

²¹ *Punjab State Civil Supplies Corporation Limited (PUNSUP) and Anr. v. Ganpati Rice Mills* SLP (C) 36655 of 2016.

²² Arbitration and Conciliation Act 1996, s 31(7)(a).

²³ *Mutha Construction v. Strategic Brand Solutions (I) Pvt. Ltd.* SLP (Civil) No. 1105 of 2022.

In *Sandipbhai Ashokbhai Parmar v. The Arbitrator, Kumari Neetaben Vitthabbhai Patel*,²⁴ the Gujarat High Court dismissed a writ petition seeking a stay of the arbitration proceedings based on a previous working relationship between the Arbitrator and the Respondent, while emphasising the Petitioner's remedies under Sections 13²⁵ and 14²⁶ of the Arbitration Act for challenging the Arbitrator's appointment. The Court opined that if an Act provides for a procedure to redress particular concerns, but the petitioner is unaware of it or chooses not to use it, and instead invokes the High Court's extraordinary jurisdiction under Article 226 of the Constitution, then doing so is not correct.²⁷ The Bench opined that when the power is already encompassed in the Arbitration Act, powers under High Court's extraordinary jurisdiction should be exercised sparingly.

4. When contentions on non-arbitrability are plainly arguable, the Courts would refer to arbitration by default under Section 11 of the Arbitration Act.

The Supreme Court, in *Mohd. Masroor Shaikh v. Bharat Bhushan Gupta*,²⁸ observed that when dealing with a petition under Section 11 of the Arbitration and Conciliation Act,²⁹ the Court would default to referring the case when contentions relating to non-arbitrability are plainly arguable. In such a situation, the Arbitral Tribunal decides upon the issue of non-arbitrability. In this case, the Single Judge of the Bombay High Court appointed a member of the Bar as the sole Arbitrator after admitting a petition under Section 11 of the Arbitration Act. The opposing party went to the Supreme Court, claiming that the High Court failed to issue and serve a notice of the petition filed under Section 11 of the Arbitration Act. Relying on *Vidya Drolia v. Durga Trading Corpn.*,³⁰ the Court dismissed the appeal.

5. An arbitral award would be patently illegal if the arbitrator failed to operate in accordance with the terms of the contract or ignored specific terms.

In *Indian Oil Corporation Ltd. v. M/s Shree Ganesh Petroleum Rajgurunagar*,³¹ the Supreme Court observed that because an arbitral tribunal is a creature of contract, it must function according to the conditions of the contract under which it was established. When an arbitral tribunal fails to operate in accordance with the contract or ignores the contract's particular terms, the award is

²⁴ *Sandipbhai Ashokbhai Parmar v. The Arbitrator, Kumari Neetaben Vitthabbhai Patel* (Civil) No. 1 of 2021 in R/Petn. under Arbitration Act No. 140 of 2021.

²⁵ Arbitration and Conciliation Act 1996, s 13.

²⁶ Arbitration and Conciliation Act 1996, s 14.

²⁷ Constitution of India, art. 226.

²⁸ *Mohd. Masroor Shaikh v. Bharat Bhushan Gupta* (2022) 4 SCC 156.

²⁹ Arbitration and Conciliation Act 1996, s 11.

³⁰ *Vidya Drolia v. Durga Trading Corpn.* (2019) 20 SCC 406.

³¹ *Indian Oil Corporation Ltd. v. M/s Shree Ganesh Petroleum Rajgurunagar* 2022 SCC OnLine SC 131.

considered to be patently illegal. However, there must be a distinction made between failing to act in accordance with the terms of a contract and an erroneous interpretation of those terms. While adjudicating a dispute, an arbitral tribunal has the authority to interpret the contract's terms and conditions. An error in contract interpretation occurs when there is a valid and lawful submission of arbitral disputes to an arbitral tribunal.

6. Two kinds of courts can have jurisdiction over arbitration applications i.e., (i) courts possessing the subject-matter/cause of action jurisdiction and (ii) courts where the place/seat of arbitration was designated.

The Allahabad High Court, in *Hasmukh Prajapati v. Jai Prakash Associates Ltd.*,³² looked into the issue of whether the Commercial Court of Gautam Budh Nagar (Uttar Pradesh) has jurisdiction to hear the case under Section 34 of the Arbitration Act involving an arbitral award made by a single arbitrator with a venue in New Delhi, as specified in the arbitration agreement.

The Court relied on the English case of *Shashoua v. Sharma*,³³ which laid the contrary indicia test as per which a place of arbitration is a stipulation that such place shall be the seat of the arbitration and consequently determine the *lex fori* in the absence of any significant contrary indication. This was upheld by the Supreme Court and was further reiterated in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc.*,³⁴ where the Apex Court held that two kinds of courts can have jurisdiction over arbitration applications i.e., (i) courts possessing the subject-matter/cause of action jurisdiction and (ii) courts where the place/seat of arbitration was designated.

In this case, the Court dismissed the Petitioner's application as the parties agreed, as stated in clause 10.6 of the arbitration agreement, that the governing law and jurisdiction of the courts would be vested in the Courts of Gautam Budh Nagar.

7. Recourse to Section 14 of the Arbitration Act not available in respect of challenge to arbitrator under Section 12(1).

The Delhi High Court, in *Union of India v. APS Structures (P) Ltd.*,³⁵ has ruled that any challenge to the appointment of an arbitrator under Section 12(1)³⁶ of the Act cannot be brought under Section 14 (failure or impossibility to act) of the Arbitration and Conciliation Act, 1996. Section 12 defines

³² *Hasmukh Prajapati v. Jai Prakash Associates Ltd.* 2022 SCC OnLine All 96.

³³ *Shashoua v. Sharma* [2009] EWHC 957 (Comm).

³⁴ *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc.* (2016) 4 SCC 126.

³⁵ *Union of India v. APS Structures (P) Ltd.* 2022 SCC OnLine Del 79.

³⁶ Arbitration and Conciliation Act 1996, s 12(1).

‘grounds of challenge,’ and subsection (1) states that an arbitrator must disclose in writing any circumstances that could give rise to reasonable doubts about his independence or impartiality. However, the Court stated that the clause can be invoked if the arbitrator is ineligible under Section 12(5) of the Arbitration Act.³⁷ Any person whose relationship with the parties or counsel falls into one of the categories listed in the Seventh Schedule is ineligible to be chosen as an arbitrator, according to the Act.

8. When exercising discretion under Section 9 of the Arbitration Act, Courts must be conscious of the power of the arbitral tribunal.

The Gujarat High Court, in *Essar Bulk Terminal Limited v. ArcelorMittal Nippon Steel India*,³⁸ reasoned that because Section 9 of the Arbitration Act³⁹ allows the court to take ‘interim measures,’ the exercise of jurisdiction must be in the character of ‘interim measures.’ The Court relied on the *Bank of Maharashtra v. MV River Orghese*⁴⁰ judgement. Furthermore, the Court must be aware of the power bestowed in the arbitral tribunal by Section 17⁴¹ when exercising its power under Section 9.

The Bench enumerated the following principles for Section 9: (i) existence of a prima facie case, (ii) balance of convenience and the possibility of irreparable loss or prejudice if interim relief is declined, and (iii) public interest.

The Court also relied on *Kiritkumar Futarmal Jain v. Valencia Corporation*⁴² where it was held that once the jurisdiction of the court was invoked under Section 9 of the Arbitration Act for interim measures either before or during the pendency of the arbitral proceedings and such remedy was exhausted, similar interim measures cannot be claimed before the arbitral tribunal under Section 17(2) of the Arbitration Act⁴³ as the same may give rise to a situation where there would be simultaneously two orders in existence in respect of the same cause of action; one, that may be passed by the court, and another, that may be passed by the arbitral tribunal.

9. Objections against enforcement of foreign arbitral award can’t be filed in a piecemeal manner.

³⁷ Arbitration and Conciliation Act 1996, s 12(5).

³⁸ *Essar Bulk Terminal Limited v. ArcelorMittal Nippon Steel India* C/FA/3040/2021.

³⁹ Arbitration and Conciliation Act 1996, s 9.

⁴⁰ *Bank of Maharashtra v. MV River Orghese* 1990 AIR (Bom) 107.

⁴¹ Arbitration and Conciliation Act 1996, s 17.

⁴² *Kiritkumar Futarmal Jain v. Valencia Corporation* (2019) 3 GLH 667.

⁴³ Arbitration and Conciliation Act 1996, s 17(2).

The Delhi High Court, in *TAQA India Power Ventures Private Limited and Ors. v. NCC Infrastructure Holdings Limited*,⁴⁴ held that a Judgement Debtor cannot be permitted under Section 48 of the Arbitration Act⁴⁵ to file its objections against enforcement of an arbitral award in a piecemeal manner.

In this case, the Court observed that the petition was pending since 2018 and sufficient opportunity was given to the Respondent to file its objections but it limited its objection only on the ground of territorial jurisdiction of this Court. The Respondent submitted to the Court to allow it an opportunity to file objections on merit in case the Court found the petition maintainable. The Court rejected this contention but still allowed the request subject to a fine of Rs. 1 Lakh cost.

⁴⁴ *TAQA India Power Ventures Private Limited and Ors. vs NCC Infrastructure Holdings Limited* OMP(EFA) (Comm.) 1/2018.

⁴⁵ Arbitration and Conciliation Act 1996, s 48.

MARCH

1. Supreme Court observes that invocation of Article 226 for a contractual matter with an existing arbitration clause is not the appropriate remedy in law.

The main question before the Supreme Court in *Gujarat Housing Board & Anr. v. Vandemataram Projects Private Limited*⁴⁶ was whether there is any remedy under Article 226 of the Indian Constitution⁴⁷ for contractual matters where an arbitration clause already exists. In this matter, the respondent approached the Gujarat High Court for quashing and setting aside an order of termination of contract. Aggrieved by the judgment of the high court, the petitioner brought the matter before the Supreme Court invoked by invoking Article 226 of the Indian Constitution.

The Supreme Court set aside the order of the high court and noted that invoking Article 226 of the Constitution of India for a contractual matter where an existing arbitration clause existed was not the appropriate remedy, and that the High Court could not have examined the matter and granted the relief granted in the instant case.

2. Delhi High Court holds that arbitral fee has to be determined on the basis of aggregate amount of claim and counter claim.

In the matter of *Jivanlal Joitaram Patel v. National Highways Authority of India*,⁴⁸ the Delhi High Court held that Sections 31(8)⁴⁹ and 31A⁵⁰ of the Arbitration Act would not apply when the arbitral tribunal's fees were set by agreement between the parties or by the Court under the 4th Schedule⁵¹ to the Arbitration Act. The term "sum in dispute" as defined in the Arbitration Act's 4th Schedule must be read to cover the total value of all claims and counter claims. Unlike a civil litigation, where a counterclaim could be for a completely separate transaction, the high court said that in arbitral proceedings, the counterclaim must be related to the arbitration agreement. As a result, it may not be accurate to suggest that a counterclaim is a "separate" cause of action in arbitration proceedings because it arises from the same subject matter/transaction.

3. Delhi High Court observes that mere use of word 'arbitration' in heading clause of agreement does not infer existence of arbitration agreement.

⁴⁶ *Gujarat Housing Board & Anr v. Vandemataram Projects Private Limited* Civil Appeal No. 2093/2022.

⁴⁷ Constitution of India, art 226.

⁴⁸ *Jivanlal Joitaram Patel v. National Highways Authority of India* FAO (OS)(COMM) 70/2017.

⁴⁹ Arbitration and Conciliation Act, 1996, s 31(8).

⁵⁰ Arbitration and Conciliation Act, 1996, s 31A.

⁵¹ Arbitration and Conciliation Act, 1996, sched 4.

The Delhi High Court held in *Foomill Pvt Ltd v. Affle (India) Ltd*⁵² that the mere presence of the word 'Arbitration' in the title of the Clause of Agreement does not imply that the parties have reached an agreement to resolve disputes through arbitration. The petitioner requested the appointment of an arbitrator to resolve disputes over software development deriving from the parties' agreement and fees. According to the petitioner, the petitioner and respondent had signed a Master Service Agreement, and after the project began, the petitioner expressed concerns about the respondent's delays.

The Court cited Delhi High Court's ruling in *Avant Garde Clean Room & Engg Solutions Pvt Ltd v. Ind Swift Limited*,⁵³ which held that simply putting the word arbitration in the heading of a dispute resolution clause does not make it a valid arbitration clause if the clause's main body provides for court jurisdiction. Therefore, in view of the above, no ground to appoint an arbitrator was found.

4. Supreme court decides which law should prevail if provisions of Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008 are in conflict with the Arbitration Act.

In a case involving Bihar Public Works Contracts Disputes, *Bihar Industrial Area Development Authority v. Rama Kant Singh*,⁵⁴ the bench of Ajay Rastogi and Abhay S Oka held that if any of the provisions of the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008 ["**2008 Act**"]⁵⁵ conflict with the Arbitration Act, the 2008 Act shall prevail to the extent of the conflict. There was no arbitration clause in the parties' agreement in the issue at hand. In this case, it was asserted that the respondent failed to refer the disagreement to the Arbitration Tribunal within one year of the occurrence of the dispute, as required under Section 9(1) of the 2008 Act.⁵⁶ The delay was tolerated by the Arbitration Tribunal.

Taking into account the provisions of both Acts as well as the facts of the case, the Court determined that because the parties' agreement does not include an arbitration clause, the provisions of the Arbitration Act will not apply, and the reference to the Arbitration Tribunal will be governed by the 2008 Act. Article 137 of the schedule in the Arbitration Act will not apply because the 2008 Act specifies a time restriction. Furthermore, the Arbitration Tribunal has the authority to excuse the delay under Section 18 of the 2008 Act. As a result, the Court refused to

⁵² *Foomill Pvt Ltd v. Affle (India) Ltd* ARB.P. 325/2022.

⁵³ *Avant Garde Clean Room & Engg Solutions Pvt Ltd v. Ind Swift Limited* (2014) 210 DLT 714.

⁵⁴ *Bihar Industrial Area Development Authority v. Rama Kant Singh* Civil Appeal No. 2030 of 2022.

⁵⁵ Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008.

⁵⁶ Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008, s 9(1).

interfere with the award under Article 136 of the Indian Constitution,⁵⁷ claiming that the reference was precluded by limitation.

⁵⁷ Constitution of India, art. 136.

APRIL

1. Arbitrators must say upfront their fees for the number of sittings, opines Supreme Court during hearing

The Supreme Court, while hearing on the issue of fixation of standards for fees for arbitrators, has emphasized on “upfront” fixation of arbitrator's fee. The Bench of Justices D.Y. Chandrachud, Sanjiv Khanna and Surya Kant was considering the issue regarding the mandatory nature of the 'model' fee scale for arbitrators prescribed under the Fourth Schedule of the Arbitration and Conciliation Act 1996.

2. Arbitration Tribunal can't direct interim deposit of amount in dispute when liability to pay is seriously disputed: Supreme Court

The Supreme Court has held that the Arbitral Tribunal cannot pass an order by way of interim measure under Section 17 of the Arbitration Act to deposit the amount involved in the dispute, in a case where the liability to pay such an amount is seriously disputed and the same is yet to be adjudicated upon by the Tribunal. A Bench comprising of Justices M.R. Shah and B.V. Nagarathna partly allowed an appeal assailing the order of the Delhi High Court, which affirmed the order passed by the Arbitral Tribunal under Section 17 directing the appellant to deposit the entire rental amount even when the liability of the said amount was yet to be considered by it.

3. Group of companies doctrine can be applied to bind non signatory to an arbitration agreement: Supreme Court

The Supreme Court, in a judgment delivered on 27th April 2022, explained the 'Group of companies' doctrine which postulates that an arbitration agreement entered into by a company within a group of companies, can bind its non-signatory affiliates or sister concerns if the circumstances demonstrate a mutual intention of the parties to bind both the signatory and affiliated, non-signatory parties.

The bench comprising Justices DY Chandrachud, Surya Kant and Vikram Nath observed that a non-signatory may be bound by the arbitration agreement where: (i) There exists a group of companies; and (ii) Parties have engaged in conduct or made statements indicating an intention to bind a non-signatory.

4. Arbitration Act: Supreme Court asks High Court to submit particulars of all pending Section 11(6) applications

The Supreme Court has asked its Registry to seek particulars of the pending applications under Section 11(6) of the Arbitration and Conciliation Act, 1996 from all High Courts. It noted that the same shall reach the Apex Court by 06.05.2021. A Bench comprising Justices M.R. Shah and B.V. Nagarathna was hearing a plea assailing an order passed by the Telangana High Court, which had decided to dismiss an application filed under Section 11(6) of the Arbitration Act for appointment of Arbitrator after 4 years.

MAY

1. Supreme Court decides on High Courts' power to invoke Section 11 to adjudicate upon disputes under Section 14 of Arbitration Act.

On 5th May, a division bench of the Supreme Court decided on an appeal against a judgement passed by the Madhya Pradesh High Court.⁵⁸ The High Court used its power under Section 11(6) of the Arbitration Act⁵⁹ to terminate the mandate of a sole arbitrator selected by the parties themselves in a family dispute over division of property. The HC also appointed a new Arbitrator, claiming that the original Arbitrator's mandate had expired under Section 14(1)(a) of the Arbitration Act⁶⁰ due to an unnecessary delay in the proceedings.

In this regard, the Supreme Court propounded that *"whenever there is a dispute and/or controversy that the mandate of the arbitrator is to be terminated on the grounds mentioned in Section 14(1)(a), such a controversy/ dispute has to be raised before the concerned "court" only and after the decision by the concerned "court" as defined under Section 2(e) of the Act, 1996 and ultimately it is held that the mandate of the arbitrator is terminated, thereafter, the arbitrator is to be substituted accordingly, that too, according to the rules that were applicable to the initial appointment of the arbitrator."* The Court also observed that - where the sole arbitrator is appointed by the parties by mutual consent, the arbitration agreement cannot be invoked for the second time.

2. South China International Arbitration Center (Hong Kong) Arbitration Rules come into force.

South China International Arbitration Center (Hong Kong) [**"SCIAHK"**] is a newly established arbitral institution in Hong Kong. It is associated with the Shenzhen Court of International Arbitration [**"SCIA"**] in Shenzhen, also known as the South China International Economic and Trade Arbitration Commission, but it is a separate entity. The SCIAHK Arbitration Rules⁶¹ were recently accepted by the SCIAHK Board and will take effect on May 1, 2022. The Rules' most noticeable aspect is that they were created in accordance with the 2013 UNCITRAL Arbitration Rules⁶² structure and numbering. As a result, many users will be familiar with them. The Rules illustrate best practise in international arbitration by including procedures such as consolidation,

⁵⁸ *Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal and Ors*, Civil Appeal Nos 2935-2938 of 2022.

⁵⁹ Arbitration and Conciliation Act 1996, s 11(6).

⁶⁰ Arbitration and Conciliation Act 1996, s 14(1)(a).

⁶¹ South China International Arbitration Center (Hong Kong) Arbitration Rules 2022.

⁶² UNCITRAL Arbitration Rules, 2013.

concurrent proceedings, expedited procedure, summary dismissal, and emergency arbitration. The Rules also reflect the med-arb procedure and the optional appellate procedure, which are unique to Mainland China seated arbitrations and SCIA administered arbitrations.

3. Supreme Court observes that a non-signatory is a member of a group of affiliated companies is no ground to claim an extension of the arbitration agreement to the non-signatory.

In *Cox and Kings Ltd v. SAP India Private Ltd & Anr*,⁶³ the Supreme Court of India was hearing an arbitration petition under Section 11(6)⁶⁴ and Section 11(12)(a) of the Arbitration Act⁶⁵ for the appointment of an Arbitral Tribunal in accordance with the provisions of the Arbitration Act, on the grounds that the parties' agreements regarding the appointment of an Arbitral Tribunal had been violated. The primary issue before the Supreme Court was, whether the principles of party autonomy in arbitration law and corporate personality in company law had been adequately safeguarded in outlining the scope and applicability of the doctrine being followed at present in Indian jurisprudence.

The court examines the rationality behind the doctrinal approach taken the Supreme Court in *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc*⁶⁶ and doubts the doubts the correctness of the law laid down by this case. The court noted that *"the doctrine of group of companies is one such area which is utilized to bind third parties to an arbitration agreement. Theoretically, the policy consideration of efficiency is argued to allow such joinders. However, until a legal basis for the same is provided, efficiency cannot itself be the sole ground to bind a party to arbitration"*. The court held that *"the group of companies doctrine must be applied with caution and 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"*.

Justice Surya Kant observed that under the Group of Companies Doctrine, bringing a third party to arbitration based on the convergence of a group of companies as a "single economic entity" is no longer the norm. Instead, the norm is based mostly on implicit permission derived from the actions and conduct of one of the entities in the group. The court referred the case to a larger bench since the questions raised by this case seem to be fundamental to arbitration practice in India and have large scale repercussions. Justice Surya Kant referred the following substantial questions of law for authoritative determination by a larger bench:

⁶³ *Cox and Kings Ltd v. SAP India Private Ltd & Anr*, Arbitration Petition (Civil) No 38 of 2020.

⁶⁴ Arbitration and Conciliation Act 1996, s 11(6).

⁶⁵ Arbitration and Conciliation Act 1996, s 11(12)(a).

⁶⁶ *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc* 2013 (1) BomCR 392.

“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?”

4. Supreme Court upholds Delhi High Court order on INR 4600 Crore arbitral award to DAMEPL.

A bench of Justices L Nageswara Rao and B R Gavai issued an order in *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Ltd*⁶⁷ upholding a Delhi High Court ruling on 5th May, directing the Delhi Metro Rail Corporation [“DMRC”] to pay Anil Ambani Groups’ Delhi Airport Metro Express Private Limited [“DAMEPL”] over INR 4,600 crore in arbitral award plus interest in two equal instalments over two months.

On 10th March, the Delhi High Court ordered the DMRC to pay DAMEPL over INR 4,600 crore in arbitral judgement with interest. The HC’s decision came in response to DAMEPL’s execution petition against DMRC about the arbitral judgement in its favour. In a May 2017 award, an arbitral tribunal ruled in favour of DAMEPL, which had withdrawn from operating the Airport Express metro line due to safety concerns and accepted its claim that operations on the line were not viable due to structural defects in the viaduct through which the train would pass. The arbitral ruling concerned a concession agreement signed on August 25, 2008, between the two businesses. The DMRC was to carry out civil works, except at the depot, and DAMEPL, a joint venture of Anil Ambani Group’s Reliance Infrastructure (R-infra) and a Spanish construction company, Construcciones Y Auxiliar De Ferrocarriles, with 95 and 5% shareholdings respectively, was to carry out the rest, including the project system works. DAMEPL had borrowed money from 11 different banks to operate the line: Axis Bank, UCO Bank, Punjab and Sind Bank, Andhra Bank, Central Bank of India, Dena Bank, Allahabad Bank, Canara Bank, Bank of India, IIFC UK, and

⁶⁷ *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Ltd* Civil Appeal No 3657 of 2022.

Canara Bank London. The Airport Express line opened on February 23, 2011, after a INR 2,885 crore investment from the DAMEPL promoters' fund, banks, and financial institutions.

5. Delhi High Court sets aside arbitration award of over INR 50 crore against CRPF for “patent illegality”.

The Delhi High Court on 4th May decided on the case of *Director General Central Reserve Police Force v. Fibroplast Marine Pvt Ltd*⁶⁸ and set aside the Arbitral award against Central Reserve Police Force [“CRPF”] to pay INR 50 Crores to Fibroblast Marine Pvt Ltd over a breach of agreement. The court was hearing a petition filed by the Director-General of the CRPF challenging an arbitral tribunal's award dated May 31, 2019 for breach of an agreement.

Justice Vibhu Bakhru observed herein, “*Considering the impugned award on merits, this Court is of the view that the same is vitiated by patent illegality and in conflict with the public policy of India*”. It was also noted that “*the impugned award was rendered after an inordinate and unexplained delay. Further, considering the impugned award on merits, this Court is of the view that the same is vitiated by patent illegality and in conflict with the public policy of India*”. Therefore, setting aside the Tribunal order, the court said that it will be open for the parties to re-agitate the disputes afresh and further awarded interest at the rate of 18% per annum in favour of Fibroplast Marine Pvt. Ltd. The arbitral tribunal awarded the respondent INR 18,32,22,680 in addition to INR 8,000 in costs. The tribunal additionally awarded pre-referral and pendente lite interest at a rate of 18 percent per year. In addition, the Arbitral Tribunal granted future interest on the amount awarded. The Delhi High Court, on the other hand, ruled that, in addition to the reasons stated above, the award deserved to be set aside due to an excessive and inexplicable delay of approximately 18 months in rendering it. The court held that, “*a large time gap between hearing of the oral submissions and rendering the decision would, in effect, debilitate the purpose of resorting to arbitration for expeditious adjudication of the disputes. No person can be expected to remember the same after a long period of time*”.

6. UNCITRAL Tribunal dismisses under-the-radar treaty claim of Ras Al Khaimah Investment Authority against India on jurisdictional grounds.

The UNCITRAL tribunal hearing the under-the-radar arbitration between the Ras Al Khaimah Investment Authority [“RAKIA”] and India, has released its judgement, dismissing the Emirati investor's claims on jurisdictional grounds. The claimant, RAKIA, filed the arbitration in 2016 under the India-UAE bilateral investment treaty in response to the state government of Andhra

⁶⁸ *Director General Central Reserve Police Force v. Fibroplast Marine Pvt Ltd* OMP (COMM) 511/2019.

Pradesh cancelling an agreement to supply bauxite to a RAKIA-majority-owned aluminium mill. During the hearings, little information about the arbitration surfaced (apart from the fact that the tribunal refused to bifurcate the proceedings). The case was unanimously dismissed on jurisdictional grounds by the panel. According to local media reports, RAKIA's claim was worth more than 270 million dollars.

7. India requests revision of Satellite Award by UNCITRAL Tribunal, arguing that recent Supreme Court decision revealed fraudulent scheme.

In the UNCITRAL case of *Deutsche Telekom v. India*,⁶⁹ due to the discovery of an allegedly fraudulent scheme relating to the underlying investment, India has requested that two awards be revised, alleging that the Swiss Federal Court should cancel the awards and remand the matter to the arbitration tribunal. Three arbitration proceedings were initiated in the long-running dispute between India and investors in the local telecoms business Devas. However, India's National Company Law Tribunal (NCLT) decided to liquidate Devas in 2021 after concluding that the company was formed "fraudulently and for unlawful reasons". This liquidation order was affirmed by India's Supreme Court on January 17, 2022,⁷⁰ causing a group of Devas shareholders (included Deutsche Telecom) to file a new treaty arbitration.

In support of its revision application, India cites a Supreme Court decision from January 17, 2022, claiming that it constitutes a new fact or fresh proof. The Supreme Court judgement is the "first judicial decision that ultimately established the fraudulent plan behind Devas to a sufficient degree of certainty", according to India. As a result, India has asked the Federal Panel to set down the verdicts and send the case back to the arbitration tribunal.

⁶⁹ *Deutsche Telekom v. India* PCA Case No. 2014-10.

⁷⁰ *Devas Multimedia Private Ltd v. Antrix Corporation Ltd & Anr* Civil Appeal No 5766 of 2021.