

QUARTERLY ALTERNATIVE DISPUTE RESOLUTION ROUND- UP

(APRIL-JUNE 2021)

APRIL

1. Madras High Court reiterates the threefold test for granting Anti-arbitration Injunctions.

In the recent decision of *ADM International Sarl v Sunraja Oil Industries Pvt. Ltd. & Ors.*,¹ the Madras High Court discussed, in length, the principal conditions for granting an anti-arbitration injunction. The High Court reiterated the findings of the Delhi High Court in the case of *McDonald's India Pvt. Ltd. v Vikram Bakshi & Ors.*,² wherein it was held that the court would grant an anti-arbitration injunction only when the arbitration agreement is (i) null and void, (ii) inoperative or, (iii) is incapable of being performed. The Madras High Court reinforced the position in law, stating that the focus needs to be on minimising the courts' interference with the arbitration process. It is only in furtherance of the object of the Arbitration Act that the courts be extraordinarily circumspect and reluctant to thwart arbitral proceedings.

2. The issue of novation of contract cannot be considered in an application under Section 11 of the Arbitration and Conciliation Act, 1996.

The Supreme Court of India in *Sanjiv Prakash v Seema Kukreja & Ors.*,³ has held that the question of novation of contract containing an arbitration clause cannot be considered by the court in an application filed under Section 11 of the Arbitration Act.⁴ The Supreme Court relied on its recent decision in *Vidya Drolia v Durga Trading Corporation*⁵ to hold that the court cannot, at the stage of an application under Section 11 of the Arbitration Act,⁶ enter into a mini-trial or elaborate review of the facts and law which would usurp the jurisdiction of the arbitral tribunal.

¹ *ADM International Sarl v Sunraja Oil Industries Pvt. Ltd. & Ors.* Application Nos. 5723 to 5730 of 2019, O.A. Nos. 644, 645 of 2019 in C.S. Nos. 406 and 407 of 2019.

² *McDonald's India Pvt. Ltd. v Vikram Bakshi & Ors.* 2016 SCC Online Delhi 3949.

³ *Sanjiv Prakash v Seema Kukreja & Ors.* 2021 SCC OnLine SC 282.

⁴ Arbitration and Conciliation Act 1996, s 11.

⁵ *Vidya Drolia v Durga Trading Corporation* 2020 SCC OnLine SC 1018.

⁶ Arbitration Act and Conciliation Act 1996, s 11.

3. When parties change the venue of arbitration by mutual agreement, the changed venue becomes the seat of arbitration.

In *M/s Inox Renewables Ltd v Jayesh Electricals Ltd.*,⁷ the Supreme Court held that when parties change the venue/place of arbitration by mutual agreement, the new venue/place will become the seat of the arbitration. The court relied on the decision of *BGS SGS Soma JV v NHPC Ltd.*,⁸ wherein it was held that the venue of arbitration will be the juridical seat of arbitration in the absence of contrary intention of the parties. The court observed that the parties may mutually arrive at a seat of arbitration and may change the seat of arbitration by mutual agreement.

4. Court can appoint new arbitrator with parties' consent after award is set aside.

Relying on the principle of party autonomy, the Calcutta High Court in *Jagdish Kishinch & Valecha v Srei Equipment Finance Ltd. & Anr.*,⁹ whilst setting aside an award on account of lack of impartiality and independence of the arbitrator, appointed a different arbitrator. In this regard, the Court, relying on Section 43(4) of the Arbitration Act¹⁰ and Section 89 of the Civil Procedure Code, 1908,¹¹ observed that the Act ensures party autonomy at all levels right through the dispute resolution process and even to the procedure for the challenge to the award. The freedom of the parties to decide on the next course of action must, therefore, be preserved in the facts of the present case. The basic premise is that, the parties who have come to the Court cannot be without a remedy when they have agreed that the matter should go before a different arbitrator. The Arbitration Act does not curtail the power of a Court to mould the relief in fit cases, provided the relief is not repugnant to the law as existing on that date.

5. Introduction of the new Brazilian Contracts Act which fosters the use of arbitration.

Introducing a new regime for private parties to bid and enter into contracts with Brazilian state-controlled entities, Brazilian Law 14.133¹² was brought out on April 1, 2021. The new Brazilian Public Contracts Act allows the adoption of arbitration, mediation, and dispute boards. The new Public Contracts Act acknowledges that state-controlled entities can submit disputes to arbitration, provided that such disputes deal with “disposable pecuniary rights”. The procedure to choose

⁷ *M/s Inox Renewables Ltd v Jayesh Electricals Ltd.* Civil Appeal No. 1556 of 2021.

⁸ *BGS SGS SOMA JV v NHPC Ltd.* (2020) 4 SCC 234.

⁹ *Jagdish Kishinchand Valecha v Srei Equipment Finance Ltd. & Anr.* Calcutta High Court, AP/103/2021.

¹⁰ Arbitration and Conciliation Act 1996, s 43(4).

¹¹ Civil Procedure Code, 1908, s 89.

¹² Law No. 14.133 of April 1, 2021.

arbitrators, arbitral institutions, and members of dispute boards shall have a technical basis, be transparent, and equally treat the parties. The new Public Contracts Law did not bring news for arbitration, but it is positive as it consolidates the possibility to submit disputes with state entities to arbitral proceedings.¹³

6. The Supreme Court of Canada finds Uber's arbitration clause to be unconscionable.

In *Uber Technologies Inc. v Heller*,¹⁴ the Supreme Court of Canada upheld the Ontario Court of Appeal's decision that Uber's arbitration agreement is invalid and unenforceable, leaving disputes under the clause to be litigated in the courts. The Court re-affirmed the competence principle and the deference generally afforded to arbitrators by the courts while creating an exception to the general rule of arbitral referral.

7. A non-signatory third party can be compelled to arbitrate if the courts deem it to be a necessary and a proper party for the arbitration.

In the case of *Shapoorji Pallonji & Co. Pvt. Ltd. v Rattan Indian Power Ltd. & Anr.*,¹⁵ the Delhi High Court dealt extensively with joinders of non-signatories to arbitral proceedings. The court reiterated a principle indicating that in some situations, an arbitration agreement between two or more parties could operate to bind other parties as well. Additionally, it was reaffirmed that where a party conducted itself as if it were a party to a commercial contract by playing a substantial role in negotiations or performance, it may be held to have consented, in an implied manner, to be bound by the arbitration agreement. While referring to multiple decisions, the High Court also explained the 'group of companies' doctrine, stating that it could be invoked to bind the non-signatory affiliate of a parent company if there was: (i) a direct relationship with the signatory to the arbitration agreement; (ii) commonality of the subject matter, and; (iii) a composite transaction between the parties at dispute.

8. Supreme Court's decision on Choice of Foreign Seat Of Arbitration by Indian Parties.

¹³ Joaquim de Paiva Muniz, 'New Brazilian Bid and Public Contracts Act fosters the use of arbitration' (*Global Arbitration News*, 7 April 2021) <<https://www.globalarbitrationnews.com/2021/04/07/new-brazilian-bid-and-public-contracts-act-fosters-the-use-of-arbitration/>> accessed 12 July 2021.

¹⁴ *Uber Technologies Inc. v Heller* 2020 SCC 16.

¹⁵ *Shapoorji Pallonji & Co. Pvt. Ltd. v Rattan Indian Power Ltd. & Anr.* 2021 SCC OnLine Del 2875.

In its latest pro-arbitration judgement delivered on April 20, 2021, a 3-judge bench of the Supreme Court, in the case of *PASL Wind Solutions Pvt. Ltd. v GE Power Conversion India Pvt. Ltd.*,¹⁶ settled the most commonly asked question in Indian arbitration law - whether two Indian parties can adopt a foreign seat of arbitration. The Supreme Court has decided this issue in favour of party autonomy and held that two Indian parties can choose a foreign seat of arbitration. The Supreme Court has further upheld the right of parties to seek interim relief under Section 9 of the Arbitration Act¹⁷ in such cases.

9. United States: First Circuit Enforces Delegation Clause in an Arbitration Agreement.

In *Bossé v New York Life Insurance Co.*,¹⁸ the First Circuit Court of Appeals issued an important decision upholding the enforceability of an arbitration agreement that delegates the arbitrability of claims to an arbitrator and not a court. In recent years, employers have increasingly sought to include delegation clauses in an attempt to avoid adverse holdings from judges on “gateway” issues like arbitrability. With the decision in *Bossé*, employers operating within the First Circuit can be more confident that if their arbitration agreements contain delegation clauses that clearly and unmistakably manifest an intent to delegate issues of arbitrability to arbitrators, courts within the First Circuit will likely enforce the clauses.

10. Supreme Court reiterates that Courts at the Seat Of Arbitration have Exclusive Jurisdiction over Arbitral Proceedings.

In the recent decision taken in *M/s Inox Renewables Ltd. v Jayesh Electricals Ltd.*,¹⁹ a two-judge bench of the Supreme Court held that it’s open for parties to an arbitration agreement to change the seat of arbitration through mutual agreement. Such an agreement, albeit not in writing, would be considered valid if it is recorded in the award and not challenged by either party. Referring to *BGS SGS SOMA JV v NHPC Ltd.*,²⁰ the Court reiterated that the selection of a seat by the parties is akin to an exclusive jurisdiction clause conferring jurisdiction on the courts at such seat over all matters connected with the arbitration.

This decision of the Supreme Court once again emphasized the need to be prudent when deciding the venue, place and seat of arbitration. The importance of the parties’ choice in this regard cannot

¹⁶ *PASL Wind Solutions Private Limited v GE Power Conversion India Private Limited* Civil Appeal No. 1647 of 2021.

¹⁷ Arbitration and Conciliation Act 1996, s 9.

¹⁸ *Bossé v New York Life Insurance Co.* No. (2021) 19-2240.

¹⁹ *M/s Inox Renewables Ltd.* (n 7).

²⁰ *BGS SGS SOMA JV* (n 8).

be contradicted. As iterated by the Supreme Court repeatedly, choosing a seat of arbitration is akin to an exclusive jurisdiction clause. Where parties do not use the word “seat” but designate a “venue” or “place” of arbitration in the arbitration agreement, such venue/place will be considered to be the seat in the absence of any contrary indication in the agreement.

11. When a contract provides for the payment of interest but the rate of interest is blank, the concerned party is obligated to pay the same.

In an interesting case, a division bench of the Supreme Court, in *Oriental Structural Engineers Pvt. Ltd. v State of Kerala*,²¹ held that an arbitral tribunal’s award of interest to a party in a contract (under whose terms the rate of ‘payment of interest’ is not expressly provided for) is valid unless the contract specifically excludes it. Consequently, such an award of interest by a tribunal cannot be subject to judicial interference on the grounds of ‘patent illegality’. When a contract specifically provides for payment of interest, but the rate of interest is blank, the concerned party is obligated to pay the same. A person deprived of legitimately entitled money must be compensated in the form of interest or damages.

²¹ *Oriental Structural Engineers Pvt. Ltd. v State of Kerala* Civil Appeal No. 3454 of 2021.

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12. If the relevant statutory enactment has introduced a period of limitation, Section 2(4) of the Arbitration Act would not provide protection against rigours of limitation.

The Bombay High Court in the case of *Satish K. Narang & Co. v Jamnadas Morarje Secs. Ltd.*²² held that in view of Section 2(4)²³ of the Arbitration Act, the limitation period for arbitration wasn't applicable to the transactions entered into between the Appellant and the Respondent, as they were under a different enactment. The transactions happened prior to 29th August 1998, when the provisions of the Limitation Act, 1963, were extended to the arbitral proceedings under the Stock Exchange Bye-laws.

However, the Appellant's contention that despite the applicability of the provisions of the Limitation Act, he would continue to be subject to no period of limitation in view of Section 2(4) of the Arbitration Act was rejected. It was held by the court that as the limitation period was introduced by the amendment to the Bye-Laws on 29th August 1998, the Appellant should have instituted arbitral proceedings within three years from the date of the amendment, which are statutory by-laws. Even if the cause of action arose before the said amendment, the court ruled that because no arbitration had been instituted, the provisions of the amendment would be applicable in case of limitation.

13. While exercising powers under Section 84 of the Multi States Cooperative Societies Act, 2002, no powers are vested with the Registrar of Cooperative Societies to pass any interim orders.

The Delhi High Court, in the case of *National Federation of Fishermen Co-Operative Ltd. v Union of India*,²⁴ set aside the interim order of the Central Registrar of Co-operative Societies who had referred the parties to arbitration under Section 84²⁵ of the Multi States Cooperative Societies Act, 2002 [**"MSCS Act"**]. The court ruled that while Section 84 allowed the Registrar to refer certain disputes to arbitration, the section also provided that the provisions of the Arbitration Act would apply to the arbitration under the MSCS Act. It was also held that under Section 9²⁶ or Section 17

²² *Satish K. Narang & Co. v Jamnadas Morarje Secs. Ltd.* 2021 SCC OnLineBom 652.

²³ Arbitration and Conciliation Act 1996, s 2(4).

²⁴ *National Federation of Fishermen Co-Operative Ltd. v Union of India* 2021 SCC OnLine Del 2265.

²⁵ Multi State Cooperative Societies Act 2002, s 84.

²⁶ Arbitration and Conciliation Act 1996, s 9.

of the Arbitration Act,²⁷ the powers to grant interim orders or protection were available with the court or with the arbitrator, respectively. The court ruled that it was clear that no powers are vested with the Registrar to pass any interim orders while exercising its powers under Section 84 of the MSCS Act to refer the disputes to arbitration.

14. Appointment of an arbitrator cannot be done for enforcement of a void agreement.

The Delhi High Court, in the case of *Banga Electronics Pvt. Ltd. v Jagmohan Singh*,²⁸ dismissed the petition to appoint an arbitrator. The court found that the agreement between the parties for the sale of immovable property, which contained the arbitration clause, was in violation of a stay order for the property passed before the execution of the said agreement. The court ruled that as the agreement was in violation of the stay order, it was not enforceable by law and, thus, void as per Section 2(g) of the Indian Contract Act.²⁹ It was held by the court that under Section 11 of the Arbitration Act,³⁰ the court has to consider the validity and existence of the arbitration agreement and, therefore, was of the view that an arbitrator cannot be appointed to enforce a void agreement.

15. There should be an express repudiation of liability to attract arbitration for a dispute as provided in the contract.

The Delhi High Court in *Geo Chem Laboratories Pvt. Ltd. v United India Insurance Co. Ltd.*³¹ received a petition for the appointment of an arbitrator where the arbitration clause in the insurance policy stated that if the company (Respondent) has disputed or not accepted the liability under the policy, the dispute won't be referred to arbitration. The Respondent contended that the petition was premature as they had never admitted any liability, but the Petitioner contended it to be a case of deemed admission.

It was held by the court that as the Respondent had not denied or disputed the liability till date and as the Petitioner cannot be left remediless while the Respondent delays the decision, for the limited purpose of determining arbitrability under Section 11, the bar contained in the arbitration clause won't be attracted. The court proceeded to appoint an arbitrator. To protect the Respondent's rights under the contractual clause, the court ruled that in the event the Respondent ultimately repudiates the Petitioner's claim, the consequences as per the arbitration clause will be

²⁷ Arbitration and Conciliation Act 1996, s 17.

²⁸ *Banga Electronics Pvt. Ltd. v Jagmohan Singh* 2021 SCC OnLine Del 2401.

²⁹ The Indian Contract Act 1872, s 2(g).

³⁰ Arbitration and Conciliation Act 1996, s 11.

³¹ *Geo Chem Laboratories Pvt. Ltd. v United India Insurance Co. Ltd.* 2021 SCC OnLine Del 3054.

followed, as ruled in *United India Insurance Co. Ltd. v Hyundai Engg. & Construction Co. Ltd.*³² and other judgements.

16. Section 34(4) of the Arbitration Act has a limited scope and cannot be relied upon to allow the arbitrator to cure certain defects.

The Delhi High Court in *Airports Authority of India v Bentwood Seating System (P) Ltd.*,³³ set aside the arbitral tribunal's award, which granted specific performance of the contract, on the ground that the tribunal had failed to decide on one of the principal issues, i.e., whether the contract had been obtained by fraud. The court ruled that specific performance of the contract couldn't be granted, despite not being one of the reasons in the termination letter, if it was proved that the contract had been obtained by fraud.

The Respondent had contended that the court proceedings should be adjourned to resume the arbitration as there were no reasons on the issue of fraud. But the court rejected this contention and held that the case was about the arbitral tribunal failing to decide one of the principal disputes between the parties, and the same couldn't be cured by adjourning the proceedings and enabling the arbitral tribunal to issue clarifications as the scope of Section 34(4) of the Arbitration Act³⁴ was limited. Thus, the court set aside the award but gave liberty to the Respondent to refer the dispute to arbitration.

17. Granting compound interest per se is not against the fundamental policy of Indian law.

The Delhi High Court in *Steel Authority of India Limited . Jaldhi Overseas Pte. Ltd.*³⁵ repudiated the Respondent's argument contending that the award of a 12% rate of interest per annum compounded quarterly was against the fundamental policy of Indian law. The court pointed out that there are several Indian legislations that provide for compound interest, including the Micro, Small and Medium Development Act, 2006. The court also stated that in cases where contracts, trade practices or statutes provide for payment of interest on a compound basis, the same is required to be paid. Thus, the court ruled that per se, compound interest doesn't go against Indian law.

³² *United India Insurance Co. Ltd. v Hyundai Engg. & Construction Co. Ltd.* (2018) 17 SCC 607.

³³ *Airports Authority of India v Bentwood Seating System (P) Ltd.* 2021 SCC OnLine Del 2853.

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

³⁵ *Steel Authority of India Limited vJaldhi Overseas Pte.Ltd.* 2021 SCC OnLine Del 3002.

18. Under the Insolvency and Bankruptcy Code, 2016, an award holder cannot seek enforcement of an arbitral award following the announcement of a moratorium.

The Calcutta High Court in *Sirpur Paper Mills Ltd. v I.K. Merchants Pvt. Ltd.*³⁶ dealt with an application to set aside an arbitral award under Section 34 of the Arbitration Act.³⁷ During the pendency of the proceedings, corporate insolvency resolution proceedings were initiated against the petitioner along with a moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 [“IBC”].³⁸ The contention of the petitioner was that the proceedings under Section 34 of the Arbitration Act had become infructuous as the award holder's claim was frustrated by the approval of the resolution plan under Section 31 of the IBC.³⁹

The court noted that the Respondent had ample opportunities to get appropriate relief, and thus, there was an obligation on their part to take active steps under the IBC instead of waiting for the proceedings under Section 34 of the Arbitration Act. Thus, the court held that upon the approval of the resolution plan under Section 31 of the IBC, the claim of the award holder had been extinguished.

19. The scope of judicial interference under Section 37(2) of the Arbitration Act is not wider than under Section 34.

The Delhi High Court in *Raghuvir Buildcon Pvt. Ltd. v Ircan International Ltd.*⁴⁰ rejected the contention of the Appellant that the scope of judicial interpretation under Section 37(2) of the Arbitration Act⁴¹ would be wider than under Section 34. The court held that, on the contrary, the scope of interference against the interlocutory orders is traditionally far more limited than the scope of interference against the authority's final decision. Further, the court also noted that Section 37(2), like Section 34, was in Part I of the Act and, thus, came under the ambit of Section 5 of the Act,⁴² which forbids judicial intervention. As a result, in exercising jurisdiction over the impugned Arbitrator's order under Section 37(2)(a), the court would only consider whether the order contains any patent illegality or perversity or is otherwise unconscionable in law on the facts. The court held that it doesn't, therefore, re-arbitrate the application decided by the Arbitrator.

³⁶ *Sirpur Paper Mills Ltd. v I.K. Merchants Pvt. Ltd.* 2021 SCC OnLine Cal 1601.

³⁷ Arbitration and Conciliation Act 1996, s 34.

³⁸ Insolvency and Bankruptcy Code 2016, s 14.

³⁹ Insolvency and Bankruptcy Code 2016, s 31.

⁴⁰ *Raghuvir Buildcon Pvt. Ltd. v Ircan International Ltd.* 2021 SCC OnLine Del 2491.

⁴¹ Arbitration and Conciliation Act 1996, s 37(2).

⁴² Arbitration and Conciliation Act 1996, s 5.

20. The existence of an arbitration clause does not prevent the court from entertaining a writ petition.

The Supreme Court in *Uttar Pradesh Power Transmission Corp. Ltd. v CG Power & Industrial Solutions Ltd.*⁴³ held that the High Court may entertain a writ petition despite the availability of alternate remedies. The Respondent had entered into a contract with the Petitioner where the contract contained an arbitration clause for resolving all disputes and differences between the parties. The Allahabad High Court had entertained the Respondent's petition, against which the petitioner filed a Special Leave Petition before the Supreme Court. The court also ruled that under Article 226⁴⁴ of the Indian Constitution, relief may be granted in cases arising out of a contract even if the contract contains an arbitration clause.

⁴³ *Uttar Pradesh Power Transmission Corp. Ltd. v CG Power & Industrial Solutions Ltd.* 2021 SCC OnLine SC 383.

⁴⁴ The Constitution of India 1950, art 226.

JUNE

21. The Limitation Act, 1963 applies to arbitration proceedings conducted under the MSMED Act.

The Supreme Court in *M/s Silpi Industries etc. v Kerala State Road Transport Corp.*⁴⁵ held that a simple reading of Section 43 of the Arbitration Act revealed that the Limitation Act of 1963 applied to arbitrations in the same way as it did to court proceedings. The respondents, Kerala State Road Transport Corporation, in this case, issued a request for proposals for thread rubber for tyre rebuilding. The purchase orders were handed to the appellants, who were the claimants before the arbitrator. According to the purchase orders, the appellants/claimants would get 90% of the entire purchase price upon receipt of materials, with the remaining 10% contingent on the final performance report.

The appellants herein addressed the Industrial Facilitation Council (now the Micro and Small Enterprises Facilitation Council created under the Micro, Small and Medium Enterprises Development Act when the ten percent balance money was not paid as per the purchase order. The parties were referred to arbitration after attempts at conciliation failed, and the award was in favour of the appellants. Following that, the awards were challenged under Section 34 of the 1996 Arbitration and Conciliation Act. Respondents took the matter to the High Court of Kerala in an appeal under Section 37 of the 1996 Act after the applications were dismissed. The court ruled that if the parties are unable to reach an agreement, the Council may refer the case to arbitration under clause (3) of Section 18 of the MSMED Act.

22. The criterion of minimal curial intervention could not be interpreted as to allow an arbitral tribunal to take shortcuts and make unjustified decisions based solely on speculation, leaving the reasons to the imagination.

In *BCCI v Deccan Chronicle Holding Ltd.*⁴⁶, the High Court of Bombay made it clear that an arbitrator may only function as an amiable compositeur if the underlying contract allowed it. However, if the parties did not specifically agree to have the dispute resolved *ex aequo et bono* under Section 28 of the Arbitration Act, the arbitrator cannot consider issues of justice and fairness. The court further

⁴⁵ *M/s Silpi Industries etc. v Kerala State Road Transport Corp.* 2021 SCC OnLine SC 439.

⁴⁶ *BCCI v Deccan Chronicle Holding Ltd.* 2021 SCC OnLineBom 834.

held that only when the underlying contract allows, then only, it might function as an amiable compositeur.

In the present case, Deccan Chronicle Holdings Ltd. and the Board of Cricket Control in India signed a ten-year Franchise Agreement in 2008. The Respondent was awarded the right to operate the Deccan Chargers, a cricket franchise based in Hyderabad, as part of the Agreement. However, due to Respondent's alleged contractual breaches relating to non-payment of player salaries and a 'bankruptcy event' under the Agreement, the parties became embroiled in a dispute. The Petitioner terminated the Agreement in August 2012 due to the Respondent's refusal to correct the aforementioned contractual defaults. Former Supreme Court Justice C K Thakker, was appointed as an arbitrator by the court in the matter.

The order was issued in favour of the Respondent by the Arbitrator. The Petitioner was ordered to pay an amount of Rs. 4814,67,00,000 plus interest at a rate of 10% per year from the start of the arbitration procedures until it was completed. The Petitioner, who was dissatisfied with the verdict, filed this case under Section 34 of the Arbitration Act. The High Court ruled that the present arbitration case could not be considered from a public law viewpoint because the arbitrator was constrained by the terms of the agreement. When the Respondent did not press for specific performance in the first place, it was not possible to grant damages instead of specific performance. The criterion of limited curial interference could not be interpreted as authorising an arbitral tribunal to take shortcuts and make unjustified awards based solely on speculation, leaving explanations to the imagination. An arbitral award should be self-evident. As a result, it was illegal for a party to provide grounds that were not included in the award in the first place.

23. An award holder cannot seek the enforcement of an arbitral award post the announcement of a moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016.

The case of *Sirpur Paper Mills v I.K. Merchants*⁴⁷ was concerned with an application to set aside an arbitral decision made in proceedings between I.K. Merchants Pvt. Ltd. and Sirpur Paper Mills Ltd. under Section 34 of the Arbitration and Conciliation Act, 1996. During the course of the proceedings, the Petitioner was subjected to a Corporate Insolvency Resolution Proceeding ["CIRP"], and a moratorium was imposed under Section 14 of the Insolvency and Bankruptcy Code, 2016. The award debtor, i.e., the Petitioner, argued that the proceedings under Section 34

⁴⁷ *Sirpur Paper Mills v I.K. Merchants* 2021 SCC OnLine Cal 1601.

of the Arbitration Act had become futile. The Petitioner's justification was that under the IBC, a resolution plan for the Petitioner's insolvency resolution had been authorised. As a result, the award holder's claim was thwarted by the resolution plan's approval under Section 31 of the IBC. The court remarked that the Respondent, in this case, had ample options, including an option to apply to the National Company Law Tribunal ["NCLT"] for appropriate relief. As a result, rather than waiting for the application to be adjudicated under Section 34 of the 1996 Act, the Respondent was required to take active steps under the IBC. Thus, the appropriate forum for this case is NCLT under IBC and not an application under Arbitration Act.

24. Court cannot venture into deciding the disputes arising between the parties at a preliminary stage.

In *IMZ Corporate Pvt. Ltd. v Telematics Pvt. Ltd.*⁴⁸, the Delhi High Court decided that the court's jurisdiction under Section 11 of the Arbitration Act is limited to determining whether an arbitration agreement exists and whether there are arbitral disputes that need to be resolved. The court was also told that at this point in the proceedings, it couldn't decide on the parties' disagreements. It was noted that the court would only initiate a judicial inquiry if the arbitration agreement appeared to be manufactured ex-facie and that a simple claim of fraud is insufficient.

25. Disputes arising from an agreement to assign a trademark are Arbitrable.

In *Golden Globe Pvt. Ltd. v Golden Tobacco Ltd.*⁴⁹, the Delhi High Court concluded that trademark assignment conflicts do not come within the legislative limitations of the Trademark Act, 1999, but rather within the domain of contract and so are arbitrable. It was also decided that trademark assignment is done through a contract rather than a statutory fiat, and therefore it does not involve the exercise of sovereign powers. The court found that the right to use a trademark was acquired by a specific agreement, not the grant, registration, or infringement of trademarks, in this case.

26. The prior consent of the Central Government is not necessary under Section 86(3) of the Code of Civil Procedure to enforce an arbitral award against a foreign State.

In *KLA Const. Technologies Pvt. Ltd. & Ors. v The Embassy of Islamic Republic of Afghanistan & Ors.*⁵⁰ The High Court of Delhi held that a foreign State cannot claim sovereign immunity against the

⁴⁸ *IMZ Corporate Pvt.Ltd. v Telematics Pvt. Ltd.* ARB P 204/2021.

⁴⁹ *Golden Globe Pvt. Ltd. v Golden Tobacco Ltd.* CS(COMM) 178/2021.

⁵⁰ *KLA Const. Technologies Pvt. Ltd. & Ors.v The Embassy of Islamic Republic of Afghanistan & Ors.*2021 SCC OnLine Del 3424.

enforcement of an arbitral award arising out of a commercial transaction. The case involves two enforcement petitions in which the petitioners were seeking to have arbitral judgements enforced against the respondent foreign states. In the first petition, the petitioner sought to have an arbitral award issued on November 26, 2018, against the Embassy of the Islamic Republic of Afghanistan enforced. In the second case, the petitioner sought to have an arbitral ruling against the Federal Democratic Republic of Ethiopia's Ministry of Education enforced.

The respondents in both of the above cases did not participate in the arbitration proceedings, resulting in the ex-parte arbitral rulings. The court held that the Central Government's consent is not required to enforce an arbitral judgement against a foreign state under Section 86(3) of the Code of Civil Procedure. An arbitral award arising out of a commercial transaction cannot be enforced if a foreign state claims sovereign immunity.

Section 36 of the Arbitration Act treats an arbitral award as a decree of the court for the limited purpose of enforcing an award under the Code of Civil Procedure, and it cannot be interpreted in a way that contradicts the Arbitration Act's underlying rationale, namely, the prompt, binding, and legally enforceable resolution of disputes between parties. The court went on to say that once a foreign state assumes the role of a commercial enterprise, it is bound by the norms of the commercial legal ecosystem and is not authorised to claim any immunity that it might otherwise have in its sovereign position. If they are allowed to obtain immunity, this would be a direct violation of the International Commercial Arbitration.