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By the Editorial team

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APPOINTMENT OF ARBITRATORS

Pendency of the matter before the labour commissioner is no bar for appointment of arbitrator: Madras High Court

10 November 2021 | India Pistons Limited v. Ganapathi Chandrasekar | Arb OP No. 10 of 2021 | V Parthiban J | Madras High Court | 2021 SCC OnLine Mad 5729

The respondent's employment was terminated by the petitioner. He challenged the termination before the Special Joint Commissioner of Labour under the Tamil Nadu Shops and Establishments Act, 1947.

The petitioner applied for the appointment of an arbitrator, and the respondent resisted that application on the basis that having availed of the statutory remedy, he cannot be compelled to arbitrate.

Leaving the question of maintainability open, the matter was referred to the arbitrator in light of the recent law.

Read the judgment here.

Categories: Section 11 ACA| Section 16 ACA| Appointment of Arbitrators | Competence Competence | Competence of Arbitral Tribunal to Rule on its Jurisdiction | Existence of Arbitration Agreement | Validity | Arbitrability | Jurisdiction of Arbitral Tribunal| Kompetenz Kompetenz | Vidya Drolia

TERMINATION OF MANDATE AND SUBSTITUTION OF ARBITRATOR

In the absence of concurrence on the specific name, an office order appointing an arbitrator is unilateral despite the petitioner's general request earlier to make an appointment. Participation in arbitration is not a waiver of Section 12 (5) ACA: Delhi High Court

12 November 2021 | Delhi Integrated Multi Modal Transit Systems Ltd. v. Delhi Jal Board | OMP (T) (Comm.) 16 of 2021 and IA No. 1482 of 2021 | Vibhu Bakhru J | Delhi High Court | 2021 SCC OnLine Del 4958

A clause in the arbitration agreement required the disputes to be referred to a sole arbitrator appointed by mutual consent. If the parties could not agree, the "arbitrator shall be nominated" by the respondent. The parties did not agree. The petitioner wrote to the respondent to "recommend and appoint" the sole arbitrator. Later, the CEO of the respondent issued an office order appointing Dr RCM, a retired civil servant, as the arbitrator.

The petitioner participated in the proceedings (pleadings were exchanged).

Later the petitioner applied to terminate the mandate.

Vibhu Bakhru J determined that because the appointment was unilateral, the mandate was required to be terminated. He said that the letters sent by the petitioner requesting for the appointment of an arbitrator do not mean that the petitioner had concurred that Dr RCM is appointed by the respondent.

Also, participation in the proceedings did not constitute waiver because Section 12 (5) ACA required express waiver in writing and, per *Bharat Broadband* (2019) 5 SCC 755 (where too there had been participation), the appointment was *void ab initio*.

Another argument on non-disclosure about the arbitrator's appointment as a member of the district consumer forum was rejected because the arbitrator had already rejected the challenge, and the remedy was at the set-aside stage. The argument about violating service rules was not examined because "for violating the said conditions of service would follow. However, that does not mean that the mandate of the learned Arbitrator stands automatically terminated."

Read the judgment here.

Categories: Section 11 ACA | Section 12 (5) ACA | Section 12 ACA | Section 13 ACA | Section 14 ACA | Section 15 ACA | Seventh Schedule | Appointment of Arbitrators | De jure Ineligibility | Grounds for Challenge| Ineligibility of Arbitrator | Waiver | Unilateral Appointment of Arbitrator| Termination of Mandate and Substitution of Arbitrator| Failure or Impossibility to Act| Express Agreement in Writing

INTERIM RELIEF BY COURT AND TRIBUNAL

Not every contract that has a termination clause is determinable: Delhi High Court

8 November 2021 | DLF Home Developers Limited v. Shipra Estate Limited | OMP (I) (Comm.) 209 of 2021 | Vibhu Bakhru J | Delhi High Court | 2021 SCC OnLine Del 4902

In yet another decision, the Delhi High Court considered the question what is contract determinable in its nature? To recall, Section 14 (d) of the Specific Relief Act provides that a determinable contract is not specifically enforceable. The question was considered by Vibhu Bakhru J in *Golden Tobacco* (read here) and by C Hari Shankar J in *ABP Network* (read here).

Bakhru J has now reiterated his views after a survey of the case laws that not every contract that has a termination clause but only contracts that can be terminated by the parties at will, or by reasonable notice, are determinable.

He has also examined the scope of Section 9 ACA after referring to a number of case laws.

Ruling *prima facie* on several issues involved in the case, Bakhru J directed order of *status quo* on the title and possession of the property that was the subject matter of an agreement to sell.

Read the judgment here.

Categories: Determinable Contract | Interim Measures by Court | Section 9 ACA | Termination of Contract | Determinable Contract | Specific Performance | Section 14 Specific Relief Act | Section 42 Specific Relief Act | Negative Covenant | Injunction to Perform Negative Covenant | Contracts Not Specifically Enforceable | Scope of Section 9 ACA

Third party cannot invoke court's Section 9 jurisdiction: Uttarakhand High Court

10 November 2021 | Mohd Yusuf v. Ashish Aggarwal | Appeal From Order No. 188 of 2021 | Raghvendra Singh Chauhan CJ and Alok Kumar Verma J | Uttrakhand High Court | 2021 SCC OnLine Utt 1274

The Uttarakhand High Court has ruled that a person not a party to the arbitration agreement cannot invoke the jurisdiction of the court for the interim relief under Section 9 ACA.

Read the judgment here.

Categories: Interim Measures by Court | Interim Measures Ordered by Arbitral Tribunal | Section 17 ACA | Section 9 ACA | Locus to Apply Under Section 9 ACA

Coaching institute teachers cannot be prohibited from working with a competitor even if they did not serve notice period: Delhi High Court

11 November 2021 | Chem Academy Pvt. Ltd. v. Sumit Mehta with Chem Academy Pvt. Ltd. v. Anoop Lamba | OMP (I) (Comm.) 356 of 2021 & OMP (I) (Comm) 357 of 2021| Sanjeev Narula J | Delhi High Court | 2021 SCC OnLine Del 4985

In October we covered the case of a TV anchor (read here). Another set of cases involve teachers of a coaching institute. The identically worded agreements of two faculty staff members of Chem Academy provided that the appointment was for three years, and they could leave before that but with three months' notice. Another clause provided that during the three-year period they would not associate with a competitor.

They resigned and joined a competitor (Unacademy) without serving the notice period. Chem applied to injunct them from teaching or doing any allied activity in a competing organization, and a mandatory injunction to rejoin.

The latter prayer was given up during arguments, but the court nevertheless found it "imperative to note that, the prayer is even otherwise misconceived" because the agreement was determinable in nature and the

bar contained in Section 14(d) read with Section 41(e) of the Specific Relief Act, 1963 was attracted. Moreover, it was a contract of personal service, and no mandatory injunction could lie in view of Section 14(c) SRA.

The first prayer was also rejected after a detailed discussion for the following main reasons:

(a) Side-lining professional(s) is likely to inflict their prospects and would have adverse impact on their mental wellbeing.

(b) *Niranjan Golikari* AIR 1967 SC 1098 was distinguishable on facts. *Superintendence Company* (1981) 2 SCC 246 also does not apply because restrictive covenant contained in that case was unenforceable post-termination, and the restrictions were found in restraint of trade.

(c) The employment agreements were terminated, rightly or wrongly. But a relief founded on the negative covenant of a terminated contract is not to be granted. [citing *Arvind Medicare* 2021 SCC OnLine Del 2225, a 2-judge bench of Delhi High Court].

(d) The argument that since the negative covenant was enforceable for the full three-year term, there should be an injunction for that period, is misconceived. The term was not a minimum fixed term.

(e) The only dispute could be not serving the notice, for which the remedy is to seek compensation.

(f) Negative covenant need not be necessarily enforced if it would indirectly compel the employees either to idleness or to serve the employer.

(g) To a question if Chem would pay the respondents for the remaining term notwithstanding that they cannot be compelled to join, Chem's answer was that they can join somewhere else than Unacademy. So, grant of injunction would necessarily entail treating the employees as continuing to be with Chem Academy.

Read the judgment here.

Categories: Section 9 ACA | Determinable Contract | Interim Measures by Court | Termination of Contract | Determinable Contract | Specific Performance | Section 14 Specific Relief Act | Section 42 Specific Relief Act | Negative Covenant | Injunction To Perform Negative Covenant | Contracts Not Specifically Enforceable

EXTENT OF JUDICIAL INTERVENTION

Writ dismissed against Section 8 order referring the case to arbitration: Delhi High Court

9 November 2021 | Arun Srivastava v. Larsen & Toubro Ltd. | CM(M) 1520 of 2018 | Amit Bansal J | Delhi High Court | 2021 SCC OnLine Del 4909

In a recovery suit, the defendant applied under Section 8 ACA to refer the matter to arbitration. The application was resisted on the ground that amount was admitted. The application was allowed saying that the existence of the arbitration agreement was not in doubt. The order was challenged in a petition under Article 227 of the Constitution.

The High Court noted that in light of the authorities, especially in *Deep Industries* (2020) 15 SCC 706, no interference was required.

Even otherwise Section 8 ACA was peremptory in nature and once there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties.

Read the judgment here.

Categories: Section 8 ACA | Article 226 Constitution of India | Article 227 Constitution of India | Extent of Judicial Intervention | Judicial Review in Arbitration | Patent Lack of Inherent Jurisdiction | Power of High Courts to Issue Certain Writs | Power of Superintendence Over All Courts by the High Court | Bhaven Construction | Deep Industries | Power of Judicial Authority to Refer Parties to Arbitration

SETTING ASIDE ARBITRAL AWARD

It is patent illegality not to allow parties to present their case to the expert appointed by the tribunal: Kerala High Court

12 October 2021| VG Thankamani v. National Highway Authority of India | Arbitration Appeal No. 31 of 2016 | PB Suresh Kumar and CS Sudha JJ | Kerala High Court | 2021 SCC OnLine Ker 4096

In a case for acquisition of land for National Highway, since the compensation was not acceptable to the appellants, they preferred an application under the National Highways Act for determination of the compensation by the arbitrator appointed by the Central Government. The District Collector was the arbitrator. He called for a report on the value of the land from a District Level Arbitration Committee formed by the government. He was also the Chairman of that Committee. Later, he passed an award enhancing the land value as recommended by the Committee.

Still dissatisfied, the appellants applied to set the award aside under Section 34 ACA. The application was dismissed.

In appeal under Section 37 ACA, several questions were considered.

First, when the arbitrator appoints an expert under Section 26 (1) (a) ACA, is it discretionary or mandatory to require the parties to give the expert any information or document relevant for the purpose of drawing up the report? The court answered:

(a) It is mandatory because if Section 26(1) ACA is not interpreted in that fashion, it would be unfair on the part of the arbitrator to rely on the report. Also, Section 19(3) ACA does not come in the way because that provision clarifies it would apply only subject to other provisions.

Second, whether non-compliance of the requirements in Section 26(1)(b) ACA is a ground to set aside an award? The court concluded, yes:

(a) The ground under Section 34(2)(a)(iii) ACA gets attracted also if a party was otherwise unable to present his case.

(b) This expression needs to be interpreted to include cases where the parties were not able to present their case before the expert appointed under Section 26(1)(a) ACA. Noncompliance of Section 26 (1) (b) would be patent illegality.

Could the report be acted upon? The court answered, no:

(a) The principle that a dispute shall be adjudicated only by a neutral and impartial adjudicator is a principle of natural justice which is deeply embedded in our jurisprudence. It is therefore a fundamental policy of Indian law.

(b) The contention that the objection was not raised earlier is without any substance. The point of violation of the principles of natural justice could be urged at any stage of the proceedings.

Read our Update on the Supreme Court's *M Hakeem* here for a snapshot of the mechanism under the NH Act.

Read the judgment here.

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | Section 37 ACA | Arbitration Appeals | Section 26 ACA | Expert Appointment by Arbitral Tribunal | Section 19 ACA | Fair Hearing | Natural Justice | Otherwise Unable to Present His Case | Section 34 (2) (a) (iii) ACA | Inability to Present Case | Proper Notice | Patent Illegality | Public Policy of India | | Fundamental Policy of Indian Law | Most Basic Notions of Morality or Justice | Independence and Impartiality of Arbitrators | Determination of Rules of Procedure | Flexibility of Procedure | Rules of Procedure | Procedure in Arbitration

Tribunal has a wide discretion to award interest under Section 31(7) ACA: Delhi High Court

9 November 2021 | National Highways Authority of India v. JMC Constructions Pvt. Ltd. | OMP (Comm.) 323 of 2021 | Delhi High Court | Vibhu Bakhru J | 2021 SCC OnLine Del 4916

In this application for setting aside, after a perusal of the records and the award, the court found no infirmity with the award.

It was also contended that the interest at the rate of 10.75% on the awarded amount was excessive. The argument was rejected because as reiterated by the Supreme Court in *Punjab State Civil Supplies Corporation Limited (PUNSUP)* v. *Ganpati Rice Mills*: SLP (C) 36655 of 2016, decided on 20 October 2021, the tribunal has a wide discretion to award interest under Section 31(7) ACA and "it cannot be interfered with unless the same is found to conflict with the public policy of India or is otherwise patently illegal."

Read the judgment here.

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | Section 31 | Form and Contents of Arbitral Award | Section 31 (7) ACA | Interest | Grant of Interest | Award of Interest | Section 31 (7) (a) | Pre Award Interest | Section 31 (7) (b) ACA | Post Award Interest | Hyder Consulting| Public Policy of India | Patent Illegality

ENFORCEMENT AND EXECUTION OF DOMESTIC AWARD

Court can apply patent illegality ground on its own. Award vitiated in this case because patent illegality went to the root of the matter: Supreme Court of India

08 November 2021 | State of Chhattisgarh v. Sal Udyog Private Limited| Civil Appeal No. 4353 of 2010 | NV Ramana CJ & Surya Kant and Hima Kohli JJ | Supreme Court of India | 2021 SCC OnLine SC 1027

The Supreme Court has applied the patent illegality ground to set aside a portion of the award on the reason that the illegality in question went to the "root" of the matter. Because the precise ground had been taken in the appeal, and is available to the court on its own, the court also rejected an objection that the ground was not taken in the set-aside application, hence waived.

We have covered this case in an Update here.

Read the judgment here.

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | Section 37 ACA | Arbitration Appeals | Patent Illegality | Standard for Setting Aside Arbitral Award | Public Policy | Pleading Requirement Under Section 34 ACA | Waiver

EXECUTION OF DOMESTIC AWARDS

Execution petition maintainable in Delhi because assets were located in the court's jurisdiction. Even if a charged asset located in Bombay had to be sold first, it does not matter because the court is not executing a charge: Delhi High Court

09 November 2021 | Matrix Partners India Investment Holdings, LLC v. Shailendra Bhadauria | OMP (ENF) (Comm) 11 of 2021 and Ex. Appl. (OS) 998 of 2021 | C Hari Shankar J | Delhi High Court | 2021 SCC OnLine Del 4917

An application to execute a consent award against some properties located in Delhi was filed in Delhi. The respondent questioned the territorial jurisdiction.

The court rejected the objections applying *Sundaram Finance Ltd.* v. *Abdul Samad* (2018) 3 SCC 622 in which the Supreme Court has ruled that execution of an arbitral award could be sought before any Court within whose territorial jurisdiction the assets of the judgement debtor are located.

Among the arguments rejected was that the consent terms vested jurisdiction in Bombay courts. Such an argument had been accepted in a High Court case that *Sundaram* had overruled.

Another argument was based on Section 100 of the Transfer of Property Act, 1882. It was argued that that the case was *sui generis* because, first, before action against any other property was taken, some property located in Bombay had to be sold in terms of the consent award. Those terms had created a charge on the Bombay property within the meaning of Section 100. Thus, they could be executed only by a court in Bombay (having the territorial jurisdiction).

Hari Shankar J said it completely befuddled him as to how Section 100 TPA could be pressed into service. He examined the consent terms in detail and concluded, for several reasons, that there was no intention, whatsoever, to secure the amounts payable to the petitioners Bombay property. The concept of "security", he added, in commercio-legal terms, as an enforceable asset, predicates an independent right of the creditor to proceed against the security. No such independent right was discernible.

Hari Shankar J gave an additional reason. He said that even if the consent terms were to be interpreted as creating a charge on the Bombay properties, that cannot be a factor which is relevant for the executing court, which is essentially seized with the task of executing a money award and not executing a charge.

Lastly, the argument that having approached the Bombay High Court for execution of the *ad interim* order of the arbitrator, the petitioner's right to approach the Delhi court for execution of the final award was foreclosed, was also rejected. The court noted that as stated in *Sundaram Finance*, Section 42 ACA, the foundation of the submission, does not apply to execution.

Read the judgment here.

Categories: Section 35 ACA | Section 36 ACA | Section 47 CPC | Enforcement | Execution of Arbitral Award | Finality of Arbitral Award | Territorial Jurisdiction | Jurisdiction of Courts | Jurisdiction of Executing Court | Section 42 ACA | Jurisdiction

Award that rejected imposition of liquidated damages on the reasoning that time was not of essence and the LD clause had been worked out on the assumption that it was, not patently illegal:

13 November 2021 | Welspun Specialty Solutions Limited Ltd. v. Oil and Natural Gas Corporation Ltd. | Civil Appeal Nos. 2826-2827 of 2016 | NV Ramana CJ & Surya Kant J | Supreme Court of India | 2021 SCC OnLine SC 1053

Welspun's predecessor Remi had to supply casing steel pipes to ONGC (3, 93,297 meters length). A clause of their contract--purchase orders--stated that the time and date of delivery is of essence. However, ONGC could extend the timeline without prejudice to claim damages

unless it clearly waived its right in writing to recover such damages (with approval of the competent authority). A clause in the GCC of the purchase order gave ONGC the right to levy liquidated damages for delay in supply.

Four purchase orders were issued for different lengths. For each order, ONGC extended the time seven times. In each case, liquidated damages was waived for the first two extensions, but they were levied for the remaining five extensions.

Welspun (Remi) executed the contract. Later it initiated arbitration for refund of liquidated damages deducted by ONGC and a few other claims. ONGC, the respondent in the arbitration, led evidence that it had suffered tangible losses.

The tribunal concluded as follows:

(a) On an overall consideration of the contract, time was not the essence despite a clause stating that it was because, among others, time could be extended by ONGC, it was actually extended on two occasions without levying liquidated damages.

(b) The liquidated damages clause in the contract had been worked out on the assumption that time was of the essence. Since time was not of the essence, the measure of damages specified under the liquidated damages clause could not be regarded as appropriate for determining the loss.

(c) Where time is not of essence, Section 55 of Indian Contract Act (second para) applied under which the promisee is entitled to compensation "for any loss occasioned" by the promisee's failure. In the facts, the loss for delayed supply had to be measured in terms of the actual damage suffered as established by ONGC.

(d) Of the loss that ONGC established, it could not claim any loss for the period in which it had waived the levy of liquidated damages, that is, the time where extension was granted [Ed. This is presumably on the logic that waiving liquidated damages is acceptance that there is no loss].

(e) *ONGC* v. *SAW Pipes* (2003) 5 SCC 705 where the court has considered a similar clause and had upheld award of liquidated damages, was distinguishable because, among others, because the extension in that case was made subject to a specific condition preserving the right to recover the liquidated damages.

(f) Also, subsequent extensions could not be coupled with liquidated damages unless a clear intention was established form the contract.

The set-aside court rejected the set aside petition but in appeal the High Court set-aside the award. It relied on *SAW Pipes* as direct authority on the point.

In considering a challenge to the High Court's order, the 3-judge bench of the Supreme Court has made the following observations on the public policy ground during the course of its examination of the award:

(a) The phrase 'public policy' does not indicate 'a catch-all provision' to challenge awards before an appellate forum on infinite grounds. However, the ambit of the same is so diversly interpreted that in some cases, the purpose of limiting the Section 34 jurisdiction is lost.

(b) This Court's jurisprudence also shows that Section 34(2)(b) has undergone a lot of churning and continue to evolve.

(c) The purpose of Section 34 is to strike a balance between Court's appellate powers and integrity of the arbitral process.

The court then examined the award's reasoning and concluded that its conclusions were plausible views (reasons summarized at para 42 of the SCC Online report).

[Ed. It is difficult to critically read judgments like these where the arbitrator's findings are not set out. To take one example, the court says that

paragraph 14 that "the Arbitral tribunal held that liquidated damages … cannot be granted as there was no breach of contract due to the fact that time was not the essence". A closer reading of the judgment together with the High Court's decision of 14 October 2008 (esp. para 19) suggests that Supreme Court's paragraph 14 is an erroneous description. What the court presumably means to say is that as per the tribunal since the liquidated damages clause assumed that time is of essence, that clause could be not be applied because time was actually not of essence].

Read the judgment here.

Categories: Section 37 ACA | Appealable Orders | Section 34 ACA | Application for Setting Aside Arbitral Award | Section 34 (2A) | Patent Illegality | Arbitrators Interpretation of Contract | Erroneous Application of Law | Fundamental Policy of Indian Law | Perverse Award | Public Policy of India | Setting Aside Arbitral Award | Standard for Setting Aside Arbitral Award | Liquidated Damages | Waiver | Saw Pipes | Scope of Section 37 (1) (c) ACA

ARBITRATION APPEALS

Arbitral tribunal's order of interim relief is discretionary. A sound and reasoned order injuncting encashment of bank guarantee cannot be upset: Madras High Court

01 November 2021 | Chennai Metro Rail Limited v. Transtonnelstroy - Afcons (JV) | CMP No. 9469 of 2021 | Abdul Quddhose J | Madras High Court | 2021 SCC OnLine Mad 5637

While dismissing an appeal against the arbitral tribunal's order injuncting the encashment of bank guarantee, the Madras High Court has applied the "irretrievable injustice" ground and has also summarized the law on the issue.

It said that the relief under Section 17 ACA is discretionary , and the reasons given by the tribunal were sound and justifiable and for those reasons the appellate court would not interfere with an interim order of an arbitral tribunal.

The court also noted that the though the recitals disclosed that the bank a clause made it clear that the indemnification under the guarantee was only for any liability of damages resulting from any defects or shortcomings.

Read the judgment here.

Categories: Section 17 ACA | Interim Measures Ordered by Arbitral Tribunal | Section 37 ACA | Arbitration Appeals | Scope of Section 37 ACA | Bank Guarantee | Encashment of Bank Guarantees | Injunction against Bank Guarantee | Interim Measures by Court | Irretrievable Injury | Section 9 ACA | Special Equities | Egregious Fraud

Unilateral appointment of arbitrator not a ground to set aside the award: Delhi High Court

08 November 2021 | Kanodia Infratech Limited v. Dalmia Cement (Bharat) Limited | OMP (Comm.) 297 of 2021 | Suresh Kumar Kait J | Delhi High Court | 2021 SCC OnLine Del 4883

The Delhi High Court has refused to apply the *Perkins* rule to set aside an award.

In accordance with the agreement, the respondent appointed in 2018 a sole arbitrator (a former Judge of the Punjab and Haryana High Court). His award of March 2021 was challenged by the petitioner mainly on the ground that the arbitrator lacked inherent jurisdiction to entertain and try the disputes because he was, contrary to the *Perkins* discourse, unilaterally appointed by the respondent (in October 2018 before the *Perkins* decision).

The challenge was rejected on the reasoning that the petitioner never objected before the award went against him, and actively participated in the arbitration proceedings in the following manner (among others):

(a) Applying to the Section 9 court but withdrawing the application to apply to the tribunal and making an application under Section 17 ACA.

(b) Applying to the tribunal under Section 16 ACA to challenge composite reference of four agreements.

(c) Filing counterclaim.

Kait J also notes that the *Perkins* decision was handed up on 26 November 2019 during the pendency of arbitral proceedings, but no objection was raised. The objections came later once the award was against the petitioner.

Further, he distinguished several authorities:

(a) *Perkins* 2019 SCC OnLine SC 1517 and *TRF* (2017) 8 SCC 377 were distinguished as cases under Section 11 ACA.

(b) *Proddatur* 2020 SCC OnLine Del 350 was distinguished to say that it deals with the challenge of the arbitrator's mandate under Section 12(5) ACA during pendency of arbitral proceedings. It was then stated that in the case at hand the petitioner did not

claim disqualification under any of the grounds enumerated under Section 12(5) read with Seventh Schedule ACA.

(c) *Bharat Broadband* (2019) 5 SCC 755 as dealing with disqualification under Section 12 (5) ACA.

(d) *Hindustan Zinc* (2019) 17 SCC 82 did not apply because State Commission's authority to make the appointment was under challenge and not unilateral appointment of an arbitrator.

The challenge that the award dealt with different agreements was rejected concluding that the agreements constituted a composite transaction and should be consolidated and heard together.

The challenge that the arbitrator made erroneous findings was rejected relying on *Delhi Airport* 2021 SCC OnLine SC 695.

However, an award of compensation of Rs. 4.00 crore was severed and set aside relying among others on *Bachhaj Nahgar* v. *Nilima Mandal* (2008) 17 SCC 491 (where relief is granted despite no prayer or pleading, miscarriage of justice occurs).

Read the judgment here.

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | Appointment of Arbitrators | Unilateral Appointment of Arbitrator | Section 12 (5) ACA | Section 12 ACA | Seventh Schedule | De Jure Ineligibility | Grounds for Challenge | Ineligibility of Arbitrator | Waiver | Termination of Mandate and Substitution of Arbitrator | Failure or Impossibility to Act | Express Agreement in Writing | Bharat Broadband | TRF | Perkins | Delhi Airport

Award partly set aside for jurisdictional error: Supreme Court of India

9 November 2021 | Pusapati Ashok Gajapathi Raju v. Pusapati Madhuri Gajapathi Raju | Civil Appeal No. 6657 of 2021 and Civil Appeal Nos. 6659-6660 of 2021 | L Nageswara Rao and BR Gavai JJ | Supreme Court of India | 2021 SCC OnLine SC 1030

The Supreme Court has upheld the appellate court's part intervention of an interim award because it agreed with the appellate court that the arbitrator had gone beyond the terms of reference. The matter is an old and legacy dispute concerning division of the property of the estate of Vizianagaram.

Relevant to this highlight, one of the terms of the reference was to determine if 99 diamonds and an emerald ring were the *streedhan* of the respondent Madhuri. If it was not, all the seven parties to the dispute were entitled to 1/7th share equally.

The arbitrator determined that they were the *streedhan* of Madhuri but went on to determine the ownership. The set aside court dismissed the challenge, but the appellate court set aside the relevant portion of the award saying that there was a jurisdictional error. The Supreme Court agreed with the view.

Read the judgment here.

Categories: Section 37 ACA | Arbitration Appeals | Section 34 ACA | Application for Setting Aside Award | Section 34 (2) (a) (iv) ACA | Arbitrability | Dispute Beyond Scope of Submission | Jurisdiction of Arbitral Tribunal | Scope of Reference

Setting aside of shocking and unfair award against Jackie Shroff upheld: Supreme Court of India

10 November 2021 | Ratnam Sudesh Iyer v. Jackie Kakubhai Shroff | Civil Appeal No. 6112 of 2021 | Sanjay Kishan Kaul and MM Sundresh JJ | Supreme Court of India | 2021 SCC OnLine SC 1032

The Supreme Court has affirmed the setting aside of an award against the actor Jackie Shroff. We had covered in our Update here the judgment of the set-aside court. In an extremely neatly written decision SC Gupte J had concluded that the award was the exact opposite of justice. The appellate court had affirmed the setting aside.

Jackie and Ratnam were shareholders in Atlas. Atlas was a shareholder in MSM. Dispute arose concerning sale of Atlas' shares in MSM. Jackie lodged a criminal complaint alleging forgery by Sudesh. The parties sought to settle the dispute and executed a settlement deed. A sum of USD 1,500,000 was kept in escrow to be released to Jackie upon closure or withdrawal of the criminal complaint. An additional amount of USD 2,000,000 was also held in escrow to be paid to Jackie once the sale of Atlas's share in MSM was completed.

A clause obligated Jackie not to make any communication or reference to the subject matter of the settlement deed. Later, Jackie's wife Ayesha, in an email that she copied to a few third parties referred to Sudesh as "forger." Sudesh brought arbitration proceedings on the basis that the emails breached the settlement deed.

An award was made against Jackie directing return of the escrow amount to Sudesh and also granting liquidated damages. The award was emphatically set aside by Gupte J. The appellate court dismissed Sudesh's appeal by a detail judgment.

In the Supreme Court, the bench of Sanjay Kishan Kaul and MM Sundresh JJ discussed first the points of law and noted that:

(a) The award was made in India in an international commercial arbitration because Ratnam was a Singaporean citizen.
(b) The pre-2015 Amendments applied because the set aside proceedings commenced prior to 23 October 2015.
(c) The general phraseology in the agreement of the parties that the arbitration proceedings shall be governed by the 1996 Act "or any amendment thereto" does not have the effect of making the 2015 Amendments apply.

On the facts they emphasized on Justice Gupte's pithy summary of the matter at paragraph 23 of the judgment. Gupte J had noted, "when we see the bizarre outcome it has brought about in the matter, the extent of the fallacy can be realised better." He then very eloquently summed up the matter. Sudesh got practically everything that he wanted from Jackie. And after all that was done, Sudesh even got back his entire money of USD 3,500,000 in the award because Ayesha called him a 'forger' in a private communication made to a couple of acquaintances or associates.

Gupte J had asked rhetorically, "can such award be ever sustained as something a fair and judiciously minded person could have made?" He said, "in my humble opinion, it is the very opposite of justice; it would be a travesty of justice to uphold such award."

The Supreme Court agreed that whatever law applied—whether amended or unamended—the award could not stand.

Read the judgment here.

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | Agent | Damages | Fundamental Policy of Indian Law | Most Basic Notions of Morality or Justice | Patent Illegality | Public Policy of India | Failure of Justice | International Commercial Arbitration | Settlement Agreement | 2015 Amendments | Applicability of 2015 Amendments | BCCI v. Kochi | Ssangyong

Under Section 37 ACA, the appellate court is only required to see if the set-aside court acted in accordance with the limited scope of Section 34: Supreme Court of India

13 November 2021| Punjab State Civil Supplies Corporation Ltd. v. Ramesh Kumar and Company | Civil Appeal No 6832 of 2021 (Arising out of SLP(C) No. 10179 of 2017) | DY Chandrachud and AS Bopanna JJ | Supreme Court of India | 2021 SCC OnLine SC 1056

The set-aside court had rejected a claim of Rs. 4,88,437. In an appeal under Section 37 ACA, the High Court not only set aside the award, but also awarded the claim of the respondents, together with interest. Restoring the award, a 2-judge bench of the Supreme Court held:

(a) [After briefly discussing the award] The award was reasoned.
(b) While considering a petition under Section 34 ACA, the court does not act as an appellate forum. The set-aside

court correctly concluded that the award required no interreference. The High Court seems to have proceeded as if it was exercising jurisdiction in a regular first appeal from a decree in a civil suit.

(c) The jurisdiction in a first appeal arising out of a decree in a civil suit is distinct from the jurisdiction of the High Court under Section 37 ACA.

(d) The High Court was required to determine as to whether the set-aside court acted contrary to Section 34 ACA.

(e) Apart from its failure to do so, the High Court went one step further while reversing the judgment of the set-aside court.

(f) The arbitrator was entitled to draw relevant findings of fact on the basis of the evidence which was adduced by the parties. This was exactly what was done. The award of the arbitrator was challenged unsuccessfully.

(g) In this backdrop, there was no basis in law for the High Court to interfere.

Read the judgment here.

Categories: Section 37 ACA | Appealable Orders | Jurisdiction of Appellate Court | Power of Appellate Court | M Hakeem

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