

## **This Fortnight In Arbitration**

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(1)

**Article 227 petition against tribunal's order allowed to prevent miscarriage of justice (Calcutta High Court)**

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19 July 2021 | Satyendra Nath Ray v. VCK Share & Stock Broking Services Limited | CO No.1235 of 2021 | Sabyasachi Bhattacharyya J | 2021 SCC OnLine Cal 2096

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In an arbitration, it was alleged that some documents and signatures were forged. The tribunal recorded in one of the proceedings that appointing a handwriting expert was not in its jurisdiction, thus refusing permission to apply for the appointment. The petitioner challenged this decision in a petition under [Article 227 of the Constitution](#).

The court recognised that its jurisdiction under [Article 227](#) to intervene in the arbitral process was limited given the Supreme Court's judgments, including *Deep Industries Limited v. ONGC Ltd. & another* (2020) 14 SCC 706, and *Bhaven Construction v. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. & another*, 2021 SCC OnLine SC 8.

However, it ruled that its limited jurisdiction should be exercised in this case because:

- (a) [Section 26 ACA](#) confers power explicitly on the arbitral tribunal to appoint experts. The bye-laws of the National Stock Exchange under which the arbitration was conducted empowered the concerned authority to prescribe the terms subject to which the arbitrator may appoint an expert. [*Ed.* Possibly, by referring to the NSE rules, the court meant to emphasise the existence of the power to appoint an expert].
- (b) Thus, the tribunal “patently refused to exercise jurisdiction vested in law in precluding the petitioner ...”
- (c) The refusal, particularly at the rudimentary stage of the proceedings when the arbitrator's procedural rules had yet to be determined, resulted in a gross miscarriage of justice.

- (d) The remedy to challenge the finding at the set-aside stage would be illusory in the absence of a formal application and a decision on it.

The court, therefore, allowed the petitioner to make an application and directed the arbitrator to decide it on merits.

Access the court's decision [here](#).

**Categories:** [Section 26 ACA](#) | [Expert Appointed by Arbitral Tribunal](#) | [Article 227 Constitution of India](#) | [Article 226 Constitution of India](#) | [Section 5 ACA](#) | [Extent of Judicial Intervention](#) | [Judicial Review in Arbitration](#) | [Power of High Courts to Issue Certain Writs](#) | [Power of Superintendence Over All Courts by the High Court](#) | [Deep Industries](#) | [Bhaven Construction](#)

(2)

**Power to set aside an award does not include an ability to modify it (Supreme Court of India)**

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20 July 2021 | Project Director, National Highways Authority of India v. M Hakeem and another | Civil Appeal No. 2797 of 2021| RF Nariman and BR Gavai JJ | SCC OnLine SC 473

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Does [Section 34 ACA](#) also include a power to modify the award?

Answering no, the 2-judge bench noted that the point “stands concluded” by three prior decisions of the Supreme Court. The court gave several other reasons as well. However, exercising power under [Article 142 of the Constitution of India](#), the court upheld the modification of the awards in question.

We have covered this case in our Update section [here](#).

Access the decision [here](#).

**Categories:** [Section 34 ACA](#) | [Application for Setting Aside Arbitral Award](#) | [Article 142 Constitution of India](#) | [Article 34 Model Law](#) | [Finality of Arbitral Award](#) | [Modification of Arbitral Award](#) | [Recourse Against Arbitral](#)

[Award](#) | [Remand of Award](#) | [Remission of Award](#) | [UNCITRAL Model Law](#)

(3)

**A mandatory interim injunction should be granted on well-known principles, not special equities (Delhi High Court)**

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22 July 2021 | DLF Ltd. v. Leighton India Contractors Private Ltd. | FAO (OS) (Comm.) 63 of 2020 | Rajiv Sahai Endlaw & Asha Menon JJ | 2021 SCC OnLine Del 3772

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DLF gave Leighton a contract for around INR 1,438 crores to develop a residential project, “The Camellias”, at Gurugram. Leighton furnished six bank guarantees issued by ICICI and Axis bank: two for retention money for approximately 78 crores and four performance bank guarantees for around 144 crores.

On receiving an email from Axis in May 2020 informing that DLF had invoked the guarantees, Leighton applied to the court the next day, asking for several reliefs in a petition under [Section 9 ACA](#). Leighton sought an order against DLF from encashing the guarantees, an order against the banks from paying, or in the alternative, if the banks had already released the amount, orders directing DLF to pay back the amount or to furnish appropriate securities to secure the amount.

Since the banks had already credited the amounts to DLF, the single judge considered only the alternative prayer. She was of the view, after a detailed *prima facie* consideration of the facts, that “special equities” existed in Leighton’s favour. She also said that the court had appropriate powers under [Section 9 ACA](#). Read the single judge’s order [here](#). So, she made an ad-interim arrangement for the amount covered by the performance guarantee (approx. 144 crores), directing DLF to create a fixed deposit in the name of the court’s Registrar General. The petition was listed for further hearing after a few weeks.

Both parties appealed. With the consent of the parties, the appellate court treated the Section 9 petitions as disposed of.

Because DLF was directed to furnish security, the court noted, “we may consider whether the court would be guided by the principles of [Order XXXVIII Rule 5, CPC](#), even if it was

passing an order under Section of the A&C Act.” Asha Menon J, writing for the bench, set aside the single judge’s order concluding that no case was made out for refund of security. The court’s reasons were as follows:

- (a) In an application under [Section 9 ACA](#), the court cannot ignore the principles underlying [Order XXXIX Rules 1 & 2 CPC](#) and [Order XXXVIII Rule 5 CPC](#).
- (b) Not only the court is required to be satisfied that a valid arbitration agreement exists, but the powers could also be exercised only for matters set out in [Section 9 \(ii\) \(a\) to \(e\) ACA](#). In other words, the order must relate to the preservation of property till the tribunal decides. Moreover, the court cannot extend the scope of relief to direct the specific performance of the contract itself.
- (c) Well-known rules govern the grant of interim prohibitory or interim mandatory injunction. The concept of “balance of convenience”, “prima facie case”, “irreparable injury” applies while passing interim measures. [citing *Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.*, (2007) 7 SCC 125].
- (d) The single judge’s had to be founded on Order XXXVIII Rule 5 CPC, which it is not. She did not look at the issue from this angle and passed orders based on “special equities.”
- (e) Principles governing the grant of a mandatory injunction would be relevant for Leighton’s case that, in effect, sought a mandatory injunction to restore the *status quo ante*.
- (f) It should be tested on the guidelines of the Supreme Court recorded in *Dorab Cawasji Warden v. Coomi Sorab Warden*, (1990) 2 SCC 117: (i) a higher standard than a *prima facie* case is usually required for a prohibitory injunction, (ii) necessity to prevent severe or irreparable injury which generally cannot be compensated in

terms of money, (iii) balance of convenience.

- (g) [Considering the rival claims], no strong case for grant of mandatory instructions was made out. The injury, if any, can be compensated in terms of money by placing a claim before the arbitral tribunal. The “balance of convenience” is in permitting the tribunal to determine the mutual liabilities and claims.
- (h) Though the nature of an interim measure of protection that would appear to the court to be “just and convenient” would undoubtedly vary from case to case, the court ought not to venture into the determination of liabilities and the interpretation of clauses and grant interim reliefs that would amount to final relief. [citing *National Highways Authority of India v. Bhubaneswar Expressway Private Limited*, 2021 SCC OnLine Del 2421]
- (i) A *prima facie* opinion of whether guarantees were wrongly invoked is to be done in a substantive proceeding. [citing *CRSC Research and Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corporation of India Limited*, 2020 SCC OnLine Del 152].
- (j) It would be beyond jurisdiction to direct restitution in Section 9 proceedings because that by its very nature involves a final determination of rival contentions even if it were to appear just and proper to do so.

DLF’s appeal was allowed. Leighton’s appeal was dismissed. The interim order was set aside

Access the judgment [here](#).

**Categories:** [Section 9 ACA](#) | [Interim Measures by Court](#) | [Section 37 ACA](#) | [Appealable Orders](#) | [Conditions for Grant of Interim Measure](#) | [Encashment of Bank Guarantees](#) | [Injunction](#) | [Grant of Injunction](#) | [Mandatory Injunction](#) | [Order XXXVIII CPC](#) | [Order XXXIX CPC](#) |

[Mandatory Orders](#) | [Interim Mandatory Injunction](#) | [Mandatory Injunction](#) | [Final Relief](#) | [Securing the Amount in Dispute in Arbitration](#) | [Just and Convenient](#) | [Adhunik Steels](#)

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### **What is the limitation period to apply for an appointment under Section 11? (Delhi High Court)**

23 July 2021 | Golden Chariot Recreations Pvt. Ltd. v. Mukesh Panika & others | Arb. Pet. 593 of 2020 | Sanjeev Narula J | 2021 SCC OnLine Del

The Delhi High Court dismissed a petition under [Section 11 ACA](#) because it was filed beyond three years. The court said that the period of three years under [Article 137 of the Limitation Act, 1963](#) started to run 30 days from the receipt by the respondent of the notice of arbitration.

A co-ordinate bench had already rejected a prior petition for appointment on the same ground. The second petition was based on the argument that there was a fresh cause of action because another notice of arbitration had been sent regarding the actual sale of a property as opposed to an attempt to sell earlier. Narula J noted that the distinction between the so-called causes of action was illusory and superficial.

The reader would benefit by noting here the following points on the structure of [Section 11 ACA](#):

- a. Parties are free to agree on a procedure for the appointment of arbitrators. [[Section 11 \(2\) ACA](#)]. So, this agreed procedure can set any time limit, less or more than 30 days.
- b. Where there is no agreed procedure, and the parties fail to agree within 30 days of receiving a request by the other party, an application can be made under [Section 11 \(6\) ACA](#).
- c. However, if the agreed procedure fails, an application could be made to the court under [Section 11 \(6\) ACA](#).
- d. The Supreme Court’s judgment in *BSNL v. Nortel Networks*, (2021) 5 SCC 738 lays down the law on the

limitation governing [Section 11 ACA](#). But for better clarity as to when time starts to run for the different subsections of [Section 11 ACA](#), the judgment should be read with the SCC's editorial note under paragraph A of their report.

Read the judgment [here](#).

**Categories:** [Section 11 ACA](#) | [Section 21 ACA](#) | [Commencement of Arbitral Proceedings](#) | [Appointment of Arbitrators](#) | [Arbitrability](#) | [Vidya Drolia](#) | [Existence of Arbitration Agreement](#) | [Competence](#) | [Kompetenz-Kompetenz](#) | [Limitation](#) | [Limitation Under Section 11 ACA](#) | [Nortel Networks](#) | [Cause of Action](#)

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### **Which is the proper court to extend the time limit for an arbitral award? (Orissa High Court)**

23 July 2021 | Sri Liladitya Deb v. Tara Ranjan Pattanaik and another | WP (C) No. 19068 of 2019 | Biswanath Rath J | 2021 SCC OnLine Ori

The Orissa High Court rejected an argument that the District Judge, Bhubaneswar, did not have the jurisdiction to extend the arbitrator's mandate because the High Court had appointed the arbitrator. It was argued that only the High Court had the power to extend his mandate.

The court ruled that [Section 2 \(1\) \(e\) ACA](#) contains an exhaustive definition of "Court", and there can be no other "court" for Part I of the ACA.

Read the judgment [here](#).

**Categories:** [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Court](#) | [Definitions](#) | [Section 2 ACA](#) | [Section 2 \(1\) \(e\) ACA](#) | [Section 29A ACA](#) | [Time Limit for Arbitral Award](#)

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### **Sole arbitrator appointed because the tribunal was reconstituted six times in 13 years (Delhi High Court)**

24 July 2021 | Mohd. Iqbal v. Union of India | Arb. P. 84 of 20021 | Sanjeev Narula J | 2021 SCC OnLine Del 3776

The Delhi High Court appointed a sole arbitrator in a "never-ending arbitration" case where six arbitral tribunals had earlier been constituted. The application had been made because there was no tribunal in place then. The officers who had comprised the tribunal from time to time resigned, retired, or were transferred.

After the last tribunal had been "terminated", the petitioner made "several requests", but the respondent did not reconstitute the tribunal.

Narula J rejected the argument that the petitioner was to be blamed for the delay because he did not agree to the Railways' proposal in 2019 to apply the new (post-2015 Amendments clauses) of the general conditions of contract and have the dispute adjudicated by a sole arbitrator.

He noted *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523, where the Supreme Court had "expressed its anguish at how the Railways repeatedly furnished panels containing names of officers who were due for transfer in the near future." Further, he said that in exceptional circumstances—and this case was one—the contractual appointment procedure could be overridden (citing *North Eastern Railways v. Trippl Engineering Works*, (2014) 9 SCC 288. He also noted the law that the respondent lost the right to appoint once a petition for the appointment was filed.

A sole arbitrator was thus appointed.

Access the judgement [here](#).

**Categories:** [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Sole Arbitrator](#) | [Right to Appoint Arbitrator](#) | [Forfeiture of Right to Appoint](#) | [Delay](#)

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### **An award that was based on no evidence and unilaterally altered the contract rightly set aside (Supreme Court of India)**

28 July 2021 | PSA Sical Terminals Pvt. Ltd. v. Board of Trustees & others | Civil Appeal Nos. 3699-3700 of 2018 | RF Nariman & BR Gavai JJ | 2021 SCC OnLine SC 508

While recognising the limits to the court's interference with the arbitral awards, the Supreme Court upheld an order of the High Court setting aside the award. The 2-judge bench found that the award was based on no evidence and without considering the relevant evidence. So, there was perversity as explained in *Associate Builders v. DDA*, (2015) 3 SCC 49.

Secondly, the award substituted the “royalty payment module” for the “revenue-sharing module.” The evidence showed that this was what SICAL always wanted, but the other party opposed it. Thus, the tribunal created a new contract. This attracted:

- (a) The ground conflicted with the public policy of India because the unilateral alteration was against the most basic notions of justice and fell in the exceptional category set out in *Ssangyong Engineering and Construction Company Limited v. National Highway Authority of India (NHAI)*, (2019) 15 SCC 131.
- (b) The patent illegality ground because the arbitrator travelled beyond the contract the acted without jurisdiction (citing *Bharat Coking Coal Ltd. v. Annapurna Construction*, (2003) 8 SCC 154 on the role of arbitrator to arbitrate within the terms of the contract, and distinguishing error within the jurisdiction and in excess of jurisdiction). Also, because an arbitrator's order is not the order of a court of law that can exercise powers *ex debito justitiae*.

Access the judgment [here](#).

**Categories:** [Section 34 ACA](#) | [Application for Setting Aside Arbitral Award](#) | [Section 34 \(2\) \(b\) \(ii\) ACA](#) | [Public Policy of India](#) | [Most Basic Notions of Morality or Justice](#) | [Perversity](#) | [Section 34 \(2A\) ACA](#) | [Perverse Award](#) | [Patent Illegality](#) | [Associate Builders](#)

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