

This Fortnight in Arbitration


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(1)

Styling as an interim measure, a Section 9-court cannot make orders amounting to a final adjudication (Delhi High Court)

11 May 2021 | National Highways Authority of India v. Bhubaneswar Expressway Private Limited | FAO (OS) (COMM) 66/2020 | Rajiv Sahai Endlaw & Asha Menon JJ

In an appeal under [Section 37 ACA](#) arising from [Section 9 ACA](#) proceedings, three main questions arose.

The first question was: what was the length of the delay in filing the appeal? The respondent suggested it should be calculated from the day of the refiling because only a bunch of papers not “relatable” to the appeal was initially filed. The argument was rejected. The court found that though grounds had been added in the refiling, documents annexed, and there was a vast difference in the number of pages, a qualitative test—not quantitative—had to be applied. The original filing had a memorandum of appeal, affidavits, *vakalatnama*, court fees, a certified copy of the impugned order. What had been filed constituted a proper appeal. Filing copies of documents with the appeal was only a practice that evolved to decide appeals even on the first date. Moreover, in the times of the pandemic, so many other rules had been relaxed. The overall delay, calculated from the day of the filing, was 25 days.

The second question was: was there sufficient cause to condone the delay? Held, yes, the certified copy was immediately applied for and collected. Of course, the appeal was not filed immediately “as a natural person would have taken,” but it is unrealistic not to consider factors peculiar to the functioning of the Government (though the law of limitation is the same). (Citing *Nagaland v. LipokAo*, (2005) 3 SCC 752).

The third question was: was the Section 9-court right in granting a mandatory order directing NHAI to release to the respondent the claimed termination payment (INR 337,73,19,434.10) subject, however, to the award and furnishing a bank guarantee. The court ruled, no, and set aside the order:

- (a) Though qualified as an “interim measure”, the order is final and amounts to allowing the claim and making an award for the recovery of money. Even in a case, a party admits the other party's entitlement, a final order is the domain of the tribunal and not the Section 9-court.
- (b) Grant of relief in a mandatory form is contrary to settled principles.
- (c) *Jetpur Somnath Tollways Ltd. v. NHAI*, 2017 SCC OnLine Del 9453 was a different case. The liability was admitted (is not admitted here, even the quantum is disputed), part payment also made (not the case here) and the NHAI had withheld the balance because it wanted to adjust its counterclaim.
- (d) The Section 9-court gave conclusive findings on the agreement leaving nothing to the tribunal to decide. A tribunal would hesitate in deciding otherwise, once there is a judicial finding.
- (e) The judgements in *Value Source Mercantile Limited v. Span Mechnotronix*, 2014 SCC OnLine Del 3313 and *Ajay Singh v. Kal Airways Private Limited*, 2017 SCC OnLine Del 8934 cannot be read as entitling a Section 9-court to decide substantive claims.

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

Categories: [Section 9 ACA](#) | [Interim Measure by Court](#) | [Section 37 ACA](#) | [Appealable Orders](#) | [Mandatory Orders](#) | [Interim Mandatory Injunction](#) | [Mandatory Injunction](#) | [Final Relief](#) | [Limitation](#) | [Limitation Under Section 37 ACA](#) | [Admitted Liability](#) | [Securing the Amount in Dispute in Arbitration](#)

(2)

An arbitration clause does not bar a writ petition (Supreme Court of India)

12 May 2021 | Uttar Pradesh Power Transmission Corporation Ltd. and another v. CG Power and Industrial Solutions Limited and another | Special Leave Petition (C) No. 8630 of 2020 | Uday Umesh Lalit & Indira Banerjee JJ

A 2-judge bench of the Supreme Court has made several observations, in our view, *obiter*, on the power of the High Courts to consider a writ petition concerning a contract that has an arbitration clause.

The appellant directed the respondent to remit labour cess under a few construction contracts the latter had been awarded. The direction was challenged in a petition under Article 226 of the Constitution. The High Court allowed the petition.

In the course of the judgment, in paragraph 65, the Supreme Court referred to the arbitration clause on its own (“it is true that the General Conditions contain an Arbitration Clause which is set out hereinbelow”).

Then the court said that the existence of an arbitration clause does not debar the court from entertaining a writ petition. Also, it was settled that where the writ petition: seeks enforcement of a fundamental right, there is a failure of principles of natural justice, the impugned action is wholly without jurisdiction, or the vires of an Act is under challenge, availability of an alternative remedy is not a bar.

Access the judgment [here](#).

Categories: [Article 226 Constitution of India | Power of High Courts to Issue Certain Writs | Power of Superintendence Over All Courts by the High Court | Writ Petition | Alternative Remedy | Power of High Courts to Issue Certain Writs | Extent of Judicial Intervention | Judicial Review in Arbitration](#)

(3)

The period prescribed for filing of a petition under Section 34 is mandatory (Delhi High Court)

13 May 2021 | Directorate of Health Services v. Sarvesh House Keeping Services Pvt. Ltd. | (C) 4330 of 2021 | Prathiba M Singh

An application under [Section 34 ACA](#) was dismissed on limitation (more than 300 days delay). This was challenged in a writ petition. The High Court noted the argument that the writ petition was not maintainable because the correct remedy was an appeal under [Section 37 ACA](#). The court, however, noted the law on limitation and dismissed the petition, ruling that “considering the settled legal position”, the delay was not liable to be condoned.

Access the decision [here](#).

Categories: [Article 226 | Power of High Courts to issue certain writs | Writ Petition | Alternative Remedy | Section 34 ACA | Section 34 \(3\) ACA | Application for Setting Aside Arbitral Awards | Limitation | Limitation Under Section 34 ACA](#)

(4)

Award set aside to the extent the tribunal completely overlooked a claim (Delhi High Court)

13 May 2021 | Gupta and Co. v. DDA | OMP (Comm) 150 of 2021 | Vibhu Bakhru J

The petitioner challenged an arbitral award made in its favour to the extent that the tribunal ignored its claim of pre-reference interest on specific amounts earlier withheld by the DDA.

Held, in a normal circumstance, the inference is that the claim was rejected. But that conclusion cannot be easily drawn here because pre-reference interest had been awarded on the amount released belatedly.

The award completely overlooks the matter, and it appears that it escaped the attention of the tribunal. Accordingly, in the absence of any reasons following, *Dyna Technologies Private Limited v. Crompton Greaves Limited*, (2019) 20 SCC 1 and *SomDatt Builders Limited v. State of Kerala*, (2009)10 SCC 259, the award to that limited extent set aside.

Access the judgment [here](#).

Categories: [Section 34 ACA | Application to Set Aside Arbitral Award | Unreasoned Award | Interest | Pre-reference Interest | Dyna](#)

(5)

Unless the parties consciously agree to waiver application of §12(5) of ACA, it is non-derogable and mandatory (Delhi High Court)

13 May 2021| Chhaya Rai and another v. KLJ Developers Private Limited | OMP (T) (COMM.) 4/2021C | Hari Shankar J

The Delhi High Court has stated that the ineligibility under [Section 12 \(5\) ACA](#) read with the Seventh Schedule can be waived consciously and expressly (citing *JMC Projects (India) Pvt. Ltd. v. Indure Pvt. Ltd.* MANU/DE/1609/2020). It cannot be deemed. Noting the 3-judge bench Supreme Court's decision in *Haryana Space Application Centre v. Pan India Consultants Pvt. Ltd.*, 2021 SCC OnLine SC 33, it added that [Section 12 \(5\) ACA](#) is non-derogable and mandatory.*

Editor's note: [Section 12 \(5\) ACA](#) should not be called mandatory because it can actually be waived!

Read the judgment [here](#).

Categories: [Section 12 ACA](#) | [Section 12 \(5\)](#) | [De jure Ineligibility](#) | [Waiver](#) | [Deemed Waiver](#) | [Seventh Schedule](#) | [Ineligibility of Arbitrator](#) | [Termination of Mandate and Substitution of Arbitrators](#) | [Bharat Broadband](#)

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