

This Fortnight in Arbitration

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(1)

The defaulting party has no locus to suggest the name of an arbitrator to the court (Delhi High Court)

06 April 2021 | Fivestar Dehydration Private Limited v Union of India | C Hari Shankar J | 2021 SCC OnLine Del 2657

The respondent did not object to the petitioner's application to appoint an arbitrator but wanted to "suggest some names, out of which the Court could give anyone as arbitrator."

The court rejected the suggestion and said that once the respondent defaults in complying with the arbitration clause and the petitioner approaches the court, the respondent's locus to suggest any name stands foreclosed. Hari Shankar J said that the "position is well-settled" by the Supreme Court's *Datar Switchgears Ltd. v. Tata Finance Ltd.*, (2000) 8 SCC 151.

Read the judgment [here](#).

Categories: [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Right to Appoint](#) | [Forfeiture of Right to Appoint](#) | [Foreclosure of Right to Appoint](#)

(2)

Whether the parties novated the underlying contract requires a detailed consideration by the tribunal and not the court (Supreme Court of India)

06 April 2021 | Sanjiv Prakash v Seema Kukreja and others | RF Nariman, BV Gavai and Hrishikesh Roy JJ | 2021 SCC OnLine 282

The High Court had refused to appoint an arbitrator saying that since the agreement containing the arbitration clause was novated, the arbitration clause also fell with it.

Following the recent precedent and in particular paragraph 148 of *Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1, the court set aside the judgment. It ruled that the matter required a "detailed consideration of the clauses of the two Agreements, together with the surrounding circumstances and a full consideration of the law on the subject", which could not be done in exercise of a limited *prima facie* review."

Also, the case did not fall "within the category of cases which ousts arbitration all together, such as matters which are *in rem* proceedings or cases which, without doubt, concern minors, lunatics or other persons incompetent to contract."

Read the judgment [here](#).

Categories: [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Arbitrability](#) | [Kompetenz-Kompetenz](#) | [Competence](#) | [Competence of Arbitral Tribunal to Rule on its Jurisdiction](#) | [Existence of Arbitration agreement](#) | [In Personam](#) | [In Rem](#) | [Nonarbitrability](#) | [Vidya Drolia](#) | [Prima Facie Review](#)

(3)

Arbitrator appointed in the absence of material establishing a prior alleged settlement (Supreme Court of India)

08 April 2021 | V Sreenivasa Reddy v BL Rathnamma | SA Bobde CJ, AS Bopanna & V Ramasubramanian JJ | 2021 SCC OnLine SC 294

The High Court dismissed an application to appoint an arbitrator, saying that the dispute had been settled and was recorded by the High Court in an earlier round of litigation.

Reversing and appointing an arbitrator, the Supreme Court found no definite material to indicate a concluded settlement. There was only a prior order of the court that recorded a submission that the dispute was settled. Neither the so-called settlement itself was recorded nor made part of the order. The High Court did not consider sworn statements or that not adhering to the proposed settlement itself was a dispute. In any event, if the dispute subsisted or was settled, and whether the claim was within limitation are matters to be considered in arbitration proceedings.

Read the judgment [here](#).

Categories: [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Kompetenz-Kompetenz](#) | [Competence](#) | [Competence of Arbitral Tribunal to Rule on its Jurisdiction](#) | [Settlement](#) | [Accord and Satisfaction](#)

(4)

Time taken by counsel to prepare petition is sufficient cause under Section 34 (3) ACA, but delay in refiling cannot be condoned without reasonable explanation (Delhi High Court)

08 April 2021 | Delhi State Industrial & Infrastructure Development Corporation Ltd. v M/s Mapsa Tapes Pvt Ltd. | OMP (Comm) 489 of 2019 | Vibhu Bakhru J

An award was made on 24 December 2018. DSIIDC filed on 12 April 2018 a [Section 34 ACA](#) application with defects and a delay of 17 days (beyond three months but within the grace period of 30 days). Somehow not knowing this, DSIIDC made another Section 34 application, but again defective, on 02 August 2018. Treated ultimately as a refiling, the delay in refiling was 113 days under the rules of the court. The defects were finally cured and a proper petition made with a further delay of 117 days in November 2019.

Dismissing the petition, the court held, the delay of 17 days is liable to be condoned not because of the time-taking departmental procedures but because counsel took time to prepare the petition. However, the delay in refiling could be condoned because there is no reasonable explanation. The total delay was over 7 months (from April to November), and condoning would “debilitate” the objective of expeditious disposal of Section 34 applications.

Nonetheless, as submissions were heard, it was considered “apposite to decide the issues on merits as well.” But the court found no patent illegality or violation of the fundamental policy of Indian law. It reiterated the scope of examination under Section 34 ACA (no analysis of evidence, no review on merits).

Read the judgment [here](#).

Categories: [Section 34 ACA](#) | [Application for Setting Aside Arbitral Award](#) | [Condonation of Delay](#) | [Sufficient Cause Under Section 34 \(3\) ACA](#) | [Speedy Disposal](#) | [Merit-Based Review](#) | [Fundamental Policy of Indian Law](#)

(5)

A new plea cannot be raised in set-aside proceedings (Delhi High Court)

12 April 2021 | Steel Authority of India Limited v. M/s Mohan Steel Limited | Vipin Sanghi & Rekha Palli JJ | 2021 SCC OnLine Del 2633

SAIL did not plead a point before the arbitral tribunal. So, it did not form the basis of the award. The issue was brought before the set-aside court for the first time but not addressed by it. The award was, however, set aside. In appeal, SAIL complained that the set-aside court did not consider its plea.

The court ruled that it was for SAIL to raise its defences before the arbitral tribunal. None could have been added at the set-aside stage, and the court was not obliged to deal with the point. The set-aside court does not sit in appeal over the award; even in an ordinary appeal, the court may not permit fresh pleas.

Read the judgment [here](#).

Categories: [Section 37 ACA](#) | [Appealable Orders](#) | [Power of Appellate Court](#) | [New Plea](#)

(6)

Parties may shift the seat of arbitration by mutual agreement (Supreme Court of India)

13 April 2021 | Inox Renewables v Jayesh Electricals | Civil Appeal No. 1556 of 2021 | RF Nariman & Hrishikesh Roy JJ

The arbitration clause in a purchase order between Inox’s predecessor and Jayesh provided that “[T]he venue of the arbitration shall be Jaipur [State of Rajasthan].” Later, Inox bought the business of its predecessor. The business transfer agreement (to which Jayesh was not a party) provided that the seat of the arbitration would be at Vadodara [State of Gujarat].

In a dispute that arose from the purchase order, the tribunal made a finding on the seat. It said that “the parties have mutually agreed, irrespective of a specific clause as to the venue at Jaipur, that the place of the arbitration would be at Ahmedabad [State of Gujarat].”

However, the commercial court at Ahmedabad, relying on the purchase order’s clause, returned

Inox's set-aside petition saying it did not have the jurisdiction. The High Court (in a petition under [Article 227](#) of the Constitution) affirmed the finding.

Setting aside, the Supreme Court sent the matter back to the Ahmedabad court. It gave the following reasons:

- a. The tribunal's finding shows that the parties "specifically shifted the venue/place of arbitration from Jaipur to Ahmedabad." The shift is with reference to [Section 20 \(1\) ACA](#) and not [Section 20 \(3\) ACA](#) as it has been made clear that Jaipur as a venue is gone, and Ahmedabad is the seat designated by the parties, not merely a venue to hold meetings.
- b. *BGS SGS Soma v. NHPC Ltd.*, (2020) 4 SCC 234 shows that the moment the seat is chosen, it is akin to an exclusive jurisdiction clause.
- c. *Videocon Industries v. Union of India*, (2011) 6 SCC 161 does not apply because it had a specific clause that authorised an amendment only by a written instrument signed by the parties. However, there is no such clause in this case.
- d. The parties may change the seat of arbitration by mutual agreement.
- e. Neither party has challenged the determination of the seat.

Access the decision [here](#).

Categories: [Section 20 ACA](#) | [Place of Arbitration](#) | [Seat of Arbitration](#) | [Venue](#) | [Shifting Seat of Arbitration](#) | [BGS Soma](#) | [Determination of Seat](#)

(7)

Allowing electronic evidence in arbitration without Section 65B affidavit is okay (Delhi High Court)

15 April 2021 | Megha Enterprises & others v M/s Haldiram's Snack Pvt. Ltd. | Vibhu Bakhru J | 2021 SCC OnLine Del 2641

A dispute arose out of a sale and purchase transaction. The tribunal found that the

petitioner had not paid for the goods purchased and awarded consideration with interest.

In its set-aside petition, the petitioner asserted that the claim was barred by limitation, and the tribunal erred in accepting evidence (that too without an affidavit under Section 65 B of the Indian Evidence Act, 1872) that an acknowledgement of the debt due had been made before the limitation expired.

Rejecting the arguments, the Delhi High Court ruled that:

- (a) an arbitral tribunal cannot be said to have "grossly erred" if it allows electronic proof without a [Section 65B](#) affidavit because (a) per [Section 1](#) of the Indian Evidence Act, the enactment does not apply to proceedings before an arbitrator (ii) no such objection was taken before the arbitral tribunal.
- (b) A delay in claim bars the remedy, not the right. The tribunal evaluated the material and awarded what was legitimately due. This approach does not offend morality or public policy as used in [Section 34 \(2\) \(b\) ACA](#).
- (c) As apparent from paragraph 33 of *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, the set-aside court cannot interfere with an award even if the court may have taken a different view and does not concur with the tribunal's inference from the evidence led.
- (d) The tribunal took a plausible view on [Section 18](#) of the Limitation Act. But, in any case, a mere erroneous application of the law does not make the award patently illegal.

Access the judgement [here](#).

Categories: [Section 34 ACA](#) | [Application for Setting Aside Arbitral Awards](#) | [Section 34 \(2\) \(b\) ACA](#) | [Patent Illegality](#) | [Morality](#) | [Reappreciation of Evidence](#) | [Interference with Award](#) | [Associate Builders](#) | [Ssangyong](#) | [Section 65B Evidence Act](#) | [Applicability of Evidence Act](#) | [Limitation](#) | [Effect of Acknowledgement in Writing](#)

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