Volume 8 Issue 1
October 2024

IMC
Chamber of Commerce and Industry

IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated

Table of Contents:

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated

AN ARBITRAL AWARD CANNOT BE CHALLENGED ON THE GROUND OF "PATENT ILLEGALITY" WITHOUT A DISTINCT TRANSGRESSION OF LAW

By Sanjay Reddy

The Single Judge Bench of the Hon'ble High Court of Delhi presided over by Justice Chandra Dhari Singh in *Dedicated Freight Corridor Corporation of India Ltd v. Tata Aldesa JV*,[1] held that a party cannot challenge an arbitral award on ground of patent illegality merely because the award is against the said party as it requires a distinct transgression of law.

FACTUAL MATRIX

The present petition was filed challenging the arbitral award dated 11/09/2020 under Section 34 of Arbitration and Conciliation Act, 1996. The petitioner herein is a Special Purpose Vehicle (*"SPV"*) established in 2006 under the administrative control of the Ministry of Railways for the purpose of planning, developing, building, maintaining and operating dedicated freight corridor. The respondent herein is an unincorporated joint venture comprising of Tata Projects Ltd, having its head office in Secunderabad, India, and Aldesa Constructions, a private company incorporated in accordance with the Spanish Laws having its registered office in Spain.

The petitioner and respondent entered into a contract based on the bid submitted by the respondent to the project undertaken by the petitioner for *"Design and Construction of Civil, Structures and Track Works for Double Line Railway involving formation in Embankment/ Cuttings, Ballast on formation, Track Works, Bridges, Structure, Buildings including Testing and Commissioning on Design-Build Lump Sum Basis for Bhaupur-Khurja Section of Eastern Dedicated Freight Corridor"*.

The dispute in the present case was pertaining to the sizes of boxes to be used for crossing roads below railway tracks i.e., Roads under Bridges (*"RUBs"*) as the requirements sought by the Petitioner herein were

[1] 2023 SCC OnLine Del 5243.

'variations' under the Contractual Agreement and it might result in additional time and costs to be incurred by the Respondent herein.

After mutually accepting the 'variation' and incorporating the same in the RUBs designs, the Respondent herein sent the alignment plan and profile to the Petitioner herein for approval with the note that variations in cost and time relating would be provided later. However, the Engineer appointed by the Petitioner herein rejected the claims raised by the Respondent herein with respect to the increase in number and changes in size of the RUBs. The reason for such decision was that the General Arrangement Drawings ("GADs") provided as part of the bidding document were indicative and were to be finalized after validation of the survey in compliance with the provisions of applicable Codes which cannot be considered a reason for any significant increase in the quantities. The Respondent herein once again sent the approval request *qua* the aforesaid claim, however, the same was also rejected by the Engineer.

Aggrieved by the same, the Respondent herein brought action against the Petitioner herein. The following disputes were raised for adjudication:

i) Whether additional Costs are payable in relation to variation in removal of unchartered utilities;

ii) Whether additional costs are payable in relation to increase in earthwork due to introduction of new structures; and

iii) Whether additional costs were incurred due to increase in scope of work arising from change in sizes/type of listed structures built by respondent/claimant, related earthwork and allied works, which amount to 'variation' in terms of the Contract Agreement.

The first two issues were directly referred for the Arbitration and stands adjudicated. However, the third issue was referred to the Dispute Adjudication Board ('DAB'). The DAB granted the claim in favor of the Respondent herein. However, dissatisfied with the decision of the DAB both the parties, invoked the arbitration clause as stipulated in the agreement. The arbitral tribunal too granted the claim in favour of the Respondent herein.

Aggrieved by the award of the arbitral tribunal, the Petitioner herein filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996.

IMC
Chamber of Commerce and Industry

IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated

QUESTION OF LAW

Whether the arbitral award dated 11.09.2020 allowing the claim of the Respondent herein seeking reimbursement of the additional costs incurred by him due to increase in size of certain structures, related earth work and allied works arising from change in size of certain structures as a result of variation in the firm list of structures provided in the contract, is valid, or no?

CONTENTION OF THE PETITIONER

It is the contention of the Petitioner that the impugned award suffers from patent illegality on the face of it and deserves to be set aside. In particular, the Petitioner contended that the Tribunal had failed to note that the Respondent herein had accepted the terms of the bidding document while the tender was awarded and he was required to take due diligence with all the documents and other relevant factors impacting the Respondent's design and inspect the site for construction of earthwork. Further, the Petitioner contended the Tribunal had failed to note that the Respondent herein had failed to notify the Engineer about the error, fault or other defects in the Employer's requirements within a prescribed time, and therefore the same cannot be considered as 'variation' for the purpose of Clause 13.3 of the General Conditions of Contract.

CONTENTION OF THE RESPONDENT

The Respondent herein denied the contentions raised by the Petitioner herein. In particular, the Respondent herein contended that the Petitioner was intimated about the changes in the sizes and structures, therefore, categorizing the said changes as 'variation' under the contract. However, despite such intimate, Engineer appointed by the Petitioner denied the claims made. The Respondent reiterated that the Tribunal primarily focused on the issue of acceptance of claim as amounting to 'variation' in detail and it observed that the Petitioner had raised the said ground as an afterthought and that the terms of the contract were wrongly interpreted. Further, the Respondent reiterated that the Petitioner's plea of patent illegality is untenable as the Petitioner has failed to show any sign of patent illegality in the award which goes to the root of the award.

JUDGEMENT AND ANALYSIS

The Hon'ble High Court noted that the ground of patent illegality to set aside an arbitral award requires minimal scope of intervention and that a ground of such nature cannot be raised by a party merely because

the award was against them. The Hon'ble High Court placed reliance on two landmark decisions of the Hon'ble Supreme Court, namely *ONGC Ltd. v. Saw Pipes Ltd*.[2] and *State of Chhattisgarh v. Sal Udyog (P) Ltd*.[3], and held that the present case does not warrant the intervention of the Hon'ble High Court as the ground for patent illegality raised by the Petitioner is non-existent. The Hon'ble High Court justified the decision by stating that the Arbitral Tribunal had relied on the relevant evidence and had fairly delt with the term 'variation'. Hence, the Petition was dismissed for lack of patent illegality.

CAN THE DISSENTING OPINION IN AN ARBITRAL AWARD BE CONSIDERED AS AN AWARD IF THE MAJORITY OPINION IS QUASHED – HINDUSTAN CONSTRUCTION COMPANY v. NATIONAL HIGHWAY AUTHORITY OF INDIA, 2023 SCC ONLINE SC 1063, DECIDED ON 24/08/2023.

By Sanjay Reddy

The Division Bench of the Hon'ble Supreme Court of India at Delhi presided over by Justice Ravindra Bhatt and Justice Aravind Kumar in *Hindustan Construction Company v. National Highway Authority of India*[4] dealt with a batch of civil appeals concerning a dispute pertaining to interpretation of contracts. In the said batch matter, the Hon'ble Supreme Court also dealt with the relevance of dissenting opinions in arbitral awards and their impact on the parties if the majority award is set aside.

FACTUAL MATRIX

The Appellant herein and the Respondent herein had entered into a contract for construction of the Allahabad bye-pass

[2] (2003) 5 SCC 705
[3] (2022) 2 SCC 275

[4] 2023 SCC Online SC 1063, Decided On 24/08/2023.

project. The dispute was pertaining to interpretation of the contract and its conditions, particularly, the condition which required the measurement of quantities used for payment for construction of an embankment with either soil or pond ash.

The Appellant herein contended that the measurement is to be made by measuring the *composite cross section* of the embankment in entirety and determine the volume by incorporating the average end area method. On the contrary, it was the contention of the Engineer appointed by the Respondent herein that the measurement is to be made by *bifurcating and determining* which area of the embankment cross section is would account for the area occupied by soil and pond ash, and accordingly the quantum of the embarkment has to be determined into two items.

The Appellant contended that this interpretation of the Respondent appointed Engineer is contrary to the technical specifications provided in the contract, and they approached the Dispute Resolution Board (*"DAB"*) seeking clarification on the same. Dissatisfied with the DAB's opinion, the Appellant initiated arbitration proceedings.

In the arbitral proceedings, three technical personals were appointed as arbitrators. Even though the arbitrators gave a unanimous award in favour of the Appellant herein, yet in certain issues there were dissenting opinion of one arbitrator.

Aggrieved by the arbitral award, the Respondent herein challenged the award before the Hon'ble High Court of Judicature at Delhi. The Single Bench at the Hon'ble High Court opined that the decision of the tribunal pertaining to the measurements of the embankment were reasonable and did not call for any interference.

The Respondent herein, aggrieved by the said order of the Hon'ble Single Bench, appealed the matter before the Hon'ble Division Bench at the High Court of Delhi. The Division Bench upon hearing the matter, set aside the decision of the Single Bench upholding the Arbitral Award as it deemed that the Tribunal's majority view and the award were based on implausible interpretation of contracts. Hence, the present appeal was filed by the Appellant herein.

CONCLUSION AND ANALYSIS

The Hon'ble Supreme Court opined that the arbitrators appointed were technical experts and they were well-versed with the subject matter, hence their conclusion i.e., to adhere to the composite measurement method, is valid. However, it questioned the relevance

and role of the Courts to intervene under Section 34 of the Arbitration and Conciliation Act, 1996.

To substantiate the value of having expert personnel as arbitrators, the Hon'ble Supreme Court relied on the case of *Voestapline Schienen GmbH v. Delhi Metro Rail Corpn Ltd*[5]. Further, the Hon'ble Supreme Court opined that Section 34 does not provide a corrective lens to the Judges, and in cases pertaining to interpretation of contracts, the Courts cannot through process of primary interpretation, formulate new understandings under the guise of Section 34.

Further, with regards to the relevance of dissenting opinions in arbitral awards, the Hon'ble Supreme Court opined that a dissenting opinion in an arbitral award cannot be treated as an award. The Hon'ble Supreme Court substantiated this observation by placing reliance on the case of *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd*[6] , and other texts such as *Gary B.Born's commentary on International Commercial Arbitration.*[7]

In conclusion, the Hon'ble Supreme Court observed and clarified that a dissenting opinion cannot be treated as an award if the majority award is set aside. The Hon'ble Supreme Court also observed that the dissenting opinion could provide useful clues during procedural issues and hearings.

MEDIATION ACT, 2023 AND ITS CONTEMPORANEOUS RELEVANCE

By Suhas M S

INTRODUCTION

Mediation, believed to be one of the oldest methods of dispute resolution, seems to have gained wider traction in the present litigious world, perhaps due to long and overburdening rigmaroles ingrained in litigation. The introduction of judicial procedures and unfortunately long drawn disputes, litigants are tending towards alternative dispute resolution such as arbitration, mediation and conciliation.

[5] (2017) 4 SCC 665.
[6] (2021) 7 SCC 657
[7] Gary Born, *International Commercial Arbitration*, Wolters Kluwer, Edn. 2009, Vol. II, p. 2466 & 2469

Before delving into the concept, practices and procedures involved in mediation, it may be pertinent to understand the meaning of mediation. Although, the term mediation has been defined under Section 89 of the Code of Civil Procedure, 1908, the same is vague and requires a conjoint reading of the Afcons judgement[8], in which the Hon'ble Supreme Court, pointed at the draftsman's error and weeded out the anomaly as hereunder –

> *"16. In view of the foregoing, it has to be concluded that proper interpretation of section 89 of the Code requires two changes from a plain and literal reading of the section. Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or re-formulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. Secondly, the definitions of 'judicial settlement' and 'mediation' in clauses (c) and (d) of section 89(2) shall have to be interchanged to correct the draftsman's error. Clauses (c) and (d) of section 89(2) of the Code will read as under when the two terms are interchanged:*
>
> *(c) for "mediation", the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;*
>
> *x(d) for "judicial settlement", the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."*

It can thus be gathered from the above that mediation is process in which, the court refers a matter under Section 89 of the Code of Civil Procedure, 1908, to an Institution or to a person so designated under the aegis of the District Legal Services Authority, or to any person appointed under an agreement between the parties.

[8] Afcons Infrastructure Ltd. and Anr. V. Cherian Varkey Construction Co., 2010 SCC OnLine SC 777.

Besides the judicial correction, until 2023, mediation was not regulated by any codified law. In the year 2023, a major legislative breakthrough befell the Indian mediation i.e., the Mediation Act, 2023 **(*'The Act'*)**[9]. After nearly 21 months of legislative deliberation, the Act received the president's assent on 15/09/2023. Mediation has been regarded as the most amicable, cost-effective and autonomous way of resolution of disputes. With the introduction of the new law, one of the most significant questions, arising for consideration is, Whether the Mediation Act, 2023 causes procedural hindrance in mediation of disputes?

WHETHER THE MEDIATION ACT, 2023 CAUSES PROCEDURAL HINDRANCE IN MEDIATION OF DISPUTES?

In a nutshell, the Mediation Act, 2023 is enacted with a legislative objective, *inter alia*, to facilitate mediation in a broader manner, encompassing disputes from civil, commercial and familial.[10] The Act paves way for a systematic administration of mediation and enforcement of mediated settlement agreement thereof. The procedure contemplated under the Act streamlines mediation by avoiding possible derailing the proceedings.

Chapter V of the Act enunciates the procedure for initiating mediation proceedings, appointment of mediator, conduct of mediation and most significantly, the Act provides for statutory time limit for completion of the proceedings.

The question whether the Act causes procedural hindrance in the process of mediation, requires analysis of Chapter V of the Act. Most significantly, Chapter V of the Act contemplates – a) wider party autonomy; b) process of mediation; c) time limit of 120 + 60 days; and d) registration of mediated settlement agreements. A bare perusal of the provisions under Chapter V suggests a quicker disposal, with an option of registering the mediated settlement agreements with the authority competent to register such agreements. Such registration may not be necessary in court referred mediations, the award of which is drawn by the Lok Adalat. Further, the Act has now recognized mediation outside of the Court,

[9] Soumya Gulati, Shweta Sahu & Sahil Kanuga, *"Decoding the Mediation Act, 2023"*, Nishith Desai Associates, (11/08/2024, 10:59 PM), https://www.nishithdesai.com/NewsDetails/10748.

[10] Burgeon Law, https://burgeon.co.in/blog/an-analysis-of-the-mediation-act-2023/#:~:text=After%20nearly%2020%20months%20since,the%20Gazette%20of%20India%20on, (Last Visited on 12/08/2024).

where parties can appoint a mediator of their choice and secure their mediated settlement through registration under Section 20 of the Act. Therefore, the question under review may safely be answered in the negative.

CONTEMPORARY RELEVANCE

There has been significant increase in the number of cases before the courts, severely overburdening the courts and contributing to the already concerning record of backlogs. It is in such times, the Act as discussed above, comes to our rescue. Most of the disputes before courts can be settled outside of a court, through mediation. However, mediation seems to be sidelined for reasons attributable to all the stakeholders.

The Hon'ble Supreme Court, in its *Mediation Training Manual of India*,[11] emphasizes on the relevance of mediation, by referring to a statement made by Mr. Joesph Grynbaum, Principal Mediator, Mediation Resolution LLC., "An ounce of mediation is worth a pound of arbitration and a ton of litigation". This statement of Mr. Grunbaum goes far and deep to suggest the consumption of time, money and space in mediation of disputes in juxtaposition with arbitration and litigation. In view of the observation made above, one cannot but admit the contemporary significance of mediation.

CONCLUSION

Mediation, as a process of dispute resolution has been prevalent in India since time immemorial. Particularly, in rural areas and villages), people still resort to amicable resolution of disputes, with an elderly gentleman facilitating such process. Particularly, with the introduction of a new law, the significance of mediation in the present day has gained wider traction. However, there is one particular aspect, which requires a minor amendment in the Act i.e., Section 5. Section 5 of the Act contemplates pre-litigation mediation of civil disputes, albeit not mandatory, as in the case of commercial disputes under the Commercial Courts Act, 2015. In the opinion of the Author, many civil disputes knocking at the door of a court, can be settled with rather less hassle. Although, the Act provides an option for parties to attempt a settlement before proceeding with trial, many parties choose to ignore with a sole intention of delaying and derailing the proceedings. It is the suggestion of the Author that a statutory amendment shall be introduced to the Mediation Act, 2023, which shall

[11] Supreme Court of India, https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf, (Last Visited on 12/08/2024).

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated

consequentially introduce pre-litigation mediation as a mandatory pre-requiste for initiating a civil suit. This may filter at least 25-30 % of the petty claims from entering the courts.

UNILATERAL APPOINTMENT OF ARBITRATORS – A PARADOX?

By Suhas M S

INTRODUCTION

Alternative dispute resolution, as we know it today, has been underscored and identified under different names in different jurisdictions. Even till date, people inhabited in and around countryside in India have always sat across each other with an elderly gentleman to facilitate an amicable resolution of disputes.

It can be gathered from history as a backdrop, against which the statutes regulating alternative dispute resolution have been rolled out, that the mainstay of nurturing and codifying the age-old practices of resolving disputes, is the mutuality and amicability ingrained in each of the different kinds of alternative dispute resolution methods prevalent today.

Although, it may be relevant to deliberate upon each of the different alternative dispute resolution methods, the scope of discussion in this Article is limited to the conundrum of legal validity of unilateral appointment of arbitrators. This Article sets out to analyze the validity of the unilateral appointment of arbitrators, which in the hypothesis of the Author, is paradoxical.

It may be pertinent to recount and underscore that thus far party autonomy and mutuality, were hand in glove. Besides, Section 11 and 12 of the Arbitration and Conciliation Act, 1996 ***('The Act')*** underscores principles of party autonomy and mutuality in appointment of arbitrators. However, the contemporaneous developments in arbitration, seem to suggest otherwise i.e., when all the parties to a contract, albeit, agree to allow one of such parties to decide on appointment of arbitrator/s, will such arbitral proceedings stand on the principles of party autonomy and mutuality?

In this backdrop, this Article endeavors traverse through the judicial trajectory and capture in brief, the judicial understanding and interpretation accorded to the conundrum expressed in the foregoing paragraphs.

JUDICIAL TRAJECTORY

There have been different scenarios before the India Courts pertaining to appointment of arbitrators. In each of these cases, the Hon'ble Courts have attributed different interpretations to the dispute of unilateral appointments. This Articles hinges on the following landmark judgements to analyze the conundrum around unilateral appointments.

1. ***TRF Ltd. v. Energo Engg. Projects Limited***[12] – The Hon'ble Supreme Court seized of a dispute pertaining to an arbitration clause that provided for appointment of the Managing Director of the Buyer or his nominee as the Arbitrator, emphasized on the ineligibility of related parties to act as arbitrators and negated appointment of any other person by such ineligible person as inconceivable in law.

2. ***Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Limited***[13] - In this case, the arbitration clause provided for appointment of three arbitrators from the panel of engineers nominated by the purchaser i.e., the Delhi Metro Rail Corporation Limited (DMRCL). The Hon'ble Supreme Court opined that the panel nominated by the Purchaser/Respondent i.e., DRMCL was wide enough for the Petitioner to nominate an arbitrator. Further, the Hon'ble Court noted that panel members were not in any way related to Respondent company. In light of this, the Hon'ble Court dismissed the Petition directing the Petitioner to nominate an arbitrator from the panel.

   A thin line of difference between the two judgements discussed above is that the in TRF[14], the Court found lack of discretion for the Appellant i.e., TRF in the process of appointment of an arbitrator.

[12] (2017) 8 SCC 377. See also – Bhumika Indulia, "*To Appoint or Not to Appoint: A Critical Study of Unilateral Appointment of Arbitrators under the Arbitration Act, 1996*", SCC ONLINE TIMES, [11/08/2024, 3:32 PM), https://www.scconline.com/blog/post/2022/03/14/a-critical-study-of-unilateral-appointment-of-arbitrators-under-the-arbitration-act-1996/#_ftn22.
[13] 2017 SCC OnLine SC 172.
[14] (2017) 8 SCC 377.

However, in Voestalpine[15], the Court observed that the Appellant i.e., Voestalpine had larger discretion in terms of nomination of an arbitrator from a wide panel of engineers. Further, the two arbitrators nominated by each of the parties, were to nominate a presiding arbitrator.

3. ***Perkins Eastman Architects DPC and Another v. HSCC (India) Limited*[16] -** The Supreme Court, placing reliance on TRF[17], observed that an arbitrator appointed by one party will always have an element of exclusivity to chart the course of the proceedings.

4. ***Lombardi Engineering Ltd. v. Uttarakhand Jal Vidyut Nigam Limited*[18] *and ICOMM Tele Limited v. Punjab State Water Supply and Sewerage Board and Another*[19] -** The Supreme Court in both these cases, has discussed the doctrine of unconscionability in contracts. The Court has observed that any clause that lays unequal bargaining power on the parties to a contract is both unconscionable and violative of the *Grund Norm*.[20]

Taking a cue from the precedents established by the Hon'ble Supreme Court few intriguing judgements have been passed by the Delhi[21] and the Bombay High Courts[22], which essentially boil down to whether the parties to a contract have mutuality and sufficiently broad discretion in appointment of arbitrators.

[15] 2017 SCC OnLine SC 172.
[16] 2019 SCC OnLine SC 1517.
[17] (2017) 8 SCC 377.
[18] 2023 SCC OnLine SC 1422.
[19] 2019 SCC OnLine 361.
[20] INDIA CONST. art. 14.
[21] Proddatur Cable TV Design Services v. Siti Cable Network Limited, 2020 SCC OnLine Del 350; Iworld Business Solutions (P) Ltd. v. Delhi Metro Rail Corpn. Ltd., 2020 SCC OnLine Del 1958; and Taleda Square Private Limited v. Rail Land Development Authority, 2023 SCC OnLine Del 6321. See also – Abhijnan Jha, Bhagya Yadav and Pranav Tomar, '*Unilateral Appointment of Arbitrators -Varying Approaches Taken by Indian Courts', AZB & Partners, (11/08/2024, 5:57 PM), https://www.azbpartners.com/bank/unilateral-appointment-of-arbitrators-varying-approaches-taken-by-indian-courts/#_ftn13.*
[22] ITD Cementation India Ltd. v. Konkan Railway Corporation Ltd., 2019 SCC OnLine Bom 5349; and Afcons Infrastructure Ltd. v. Konkan Railway Corporation Ltd., 2020 SCC OnLine Bom 681. See also - Bhumika Indulia, "*To Appoint or Not to Appoint: A Critical Study of Unilateral Appointment of Arbitrators under the Arbitration Act, 1996*", (11/08/2024, 6:04 PM), https://www.scconline.com/blog/post/2022/03/14/a-critical-study-of-unilateral-appointment-of-arbitrators-under-the-arbitration-act-1996/#_ftn78.

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated

CONCLUSION

Arbitration as a method of dispute resolution has always been regarded for its convenience, mutuality and autonomy. The Act under Section 11 and 12, highlights the relevance of mutuality and autonomy of the parties to agree on the procedure to appoint an arbitrator. However, we accost several instances with uneven or unequal bargaining power between the parties to a contract.

A party's acquiescence to allow the other party to appoint an arbitrator may satisfy the principle of party autonomy. However, such a clause will fly in the face of the mutuality, conscionability and the *Grund Norm* i.e., the Constitution of India.[23]

The judicial observations in brief boil down to two ways of appointing an arbitrator – 1) Mutuality in appointment of arbitrators; or 2) Nomination of arbitrators from broad-based panel. What can be concluded from the above is that there is no place for unilateral appointment of arbitrators and each arbitration clause shall adhere to principles of mutuality and conscionability.

CAN A RETIRED GOVERNMENT SERVANT BE APPOINTED AS AN ARBITRATOR IN A DISPUTE WHERE THE GOVERNMENT IS ALSO A PARTY TO THE PROCEEDINGS?

By Vrishab Puranik

INTRODUCTION:

Arbitration has become the most preferred method of resolving disputes, particularly in commercial and contractual matters, due to its time saving process, efficiency and also the confidentiality of the disputes it offers. Having said that, the integrity of the arbitration process hinges significantly on the independent and impartial nature of the arbitrators appointed to adjudicate disputes professionally. The appointment of arbitrators, thus, requires a careful

[23] Lombardi Engineering Ltd. v. Uttarakhand Jal Vidyut Nigam Limited, 2023 SCC OnLine SC 1422 and ICOMM Tele Limited v. Punjab State Water Supply and Sewerage Board and Another, 2019 SCC OnLine 361.

consideration to ensure that they are not only fair but also avoids a potential conflict of interest between the parties and the arbitrator. A contentious issue that has often arisen over the years and also in this context is whether a retired government servant can be appointed as an arbitrator, given their past affiliations with the government when one of the parties to the arbitration is the government. The 246th Law commission also observed the issues relating to contracts by the government authorities, by mentioning that it is necessary for an impartial and independent adjudicator to be appointed to resolve the disputes. This article delves into a recent Supreme Court judgment addressing this very issue, examining the legal nuances and the implications for the arbitration process in India.

BRIEF FACTS

The dispute between *Glock Asia Pacific and Union of India*[24]arose from a contractual disagreement, which eventually led to the arbitration clause being invoked and. As per the arbitration clause in the contract, an arbitrator was to be appointed to adjudicate the matter. However, there was a contention raised by the applicant when the appointed arbitrator was found to be a retired government servant. The applicant being apprehensive about a potential bias and prejudice challenged the appointment of the arbitrator due to the arbitrator's previous employment with the government. This case was brought before the Supreme Court to determine the validity of appointing a retired government servant as an arbitrator under the Arbitration and Conciliation Act, 1996.

ISSUES

The key issue for determination by the Supreme Court was whether the appointment of a retired government servant as an arbitrator would lead to justifiable doubts regarding the arbitrator's independent decision making and impartiality. The fundamental legal and a moral concern was whether such an appointment could violate the principles of fairness and neutrality expected in an arbitration. Specifically, the court had to consider the implications of the arbitrator's prior government service on the integrity of the arbitration process, as mandated by section 12(5) read with Sch. VII of the Arbitration and Conciliation Act, 1996.

ANALYSIS

The Supreme Court carried out a comprehensive analysis of the legal framework governing arbitration in India,

24. **2023 8 SCC 226**

particularly focusing on Section 12 of the Arbitration and Conciliation Act, 1996. This section provides that any person who is approached for appointment as an arbitrator must fully disclose any circumstances that may give rise to justifiable doubts regarding its independent decision making or impartiality. The Act is designed to ensure that the arbitration process is conducted in a manner that is free from bias and upholds the principles of natural justice.

The court examined previous judgments and legal doctrines that emphasize the importance of an arbitrator's independence and the perception of impartiality. The concept of 'likelihood of bias' was central to the court's analysis, which refers to a situation where there is a reasonable apprehension that the arbitrator might not act fairly due to their present or past associations. The court reiterated that the mere fact of a past association with the government does not automatically disqualify an individual from serving as an arbitrator. However, the nature of the relationship and the specific facts of each case must be carefully scrutinized to determine whether a reasonable person would perceive the arbitrator as biased.

In the present case, the court considered the arbitrator's previous role in the government and evaluated whether this could lead to a conflict of interest or a lack of neutrality. The court also referenced international arbitration standards, which similarly stress the need for actual impartiality and the guise of impartiality to maintain the credibility of the arbitration process. By doing so, the court ensured that its ruling was consistent with best practices in arbitration across the world.

In light of these considerations, the court concluded that while a retired government servant can be appointed as an arbitrator, such an appointment must be carefully evaluated to ensure that it does not undermine the fairness of the arbitration process. The court's analysis highlighted the importance of transparency in arbitration proceedings, emphasizing that all potential conflicts of interest should be disclosed upfront and prior to the commencement of the arbitration proceedings to allow for informed decisions regarding the appointment of arbitrators.

CONCLUSION

The Supreme Court's decision in this case underscores the critical importance of maintaining both the reality and perception of impartiality in arbitration. By allowing the appointment of a retired government servant as an arbitrator, the court reaffirmed that such appointments are not inherently problematic. However, the judgment also served as a cautionary note, emphasizing the need for rigorous scrutiny of the arbitrator's

background and the circumstances of the case to avoid any potential conflict of interest. This decision reinforces the judiciary's commitment to upholding the integrity of the arbitration process in India, ensuring that it remains a trusted and effective means of resolving disputes.

ADDUCING EVIDENCE AT ANY STAGE OF ARBITRATION PROCEEDINGS: FROM THE EYES OF THE SUPREME COURT.

By Vrishab Puranik

Arbitration, is mostly known for its flexibility and efficiency and it is the most preferred alternative to litigation. Having said that, the procedural framework of arbitration sometimes raises challenges, particularly when one party seeks to adduce evidence at a stage that appears too late in the proceedings. A recent Supreme Court decision has provided clarity on this contentious issue by affirming that evidence may be adduced at any stage of arbitration proceedings, provided certain conditions are met and the same is convincing enough to the Learned Arbitrator.

RELEVANT FACTS

The case in hand involved a contractual dispute between two parties. During the arbitration proceedings, after the arguments had been presented, one of the parties sought to introduce fresh evidence. This evidence, according to the party, was vital for a just adjudication of the dispute. The opposite party resisted, contending that introducing new evidence post-arguments would breach the efficiency and finality of arbitration.

The arbitral tribunal initially refused to admit the evidence, stating that allowing it after arguments would unsettle the procedural order. However, the matter escalated to the Supreme Court, where the fundamental question concerned the stage at which evidence can be introduced in arbitration and under what conditions.

KEY ISSUE

The core issue before the Supreme Court was whether the arbitral tribunal has the authority to allow the introduction of evidence at any stage of the arbitration, including after the completion of arguments. The challenge was to reconcile the need for procedural flexibility with the integrity and finality of arbitration.

LEGAL PRINCIPLES

The Arbitration and Conciliation Act, 1996 grants wide procedural discretion to arbitral tribunals. Section 19(1) of the Act explicitly provides that tribunals are not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, thereby allowing tribunals to structure the proceedings as they deem appropriate. However, this discretion is not absolute. It must be exercised judiciously and in consonance with the principles of natural justice, such as ensuring that both parties have a reasonable opportunity to present their case and that proceedings are fair and impartial.

In *Fertilizer Corporation of India Ltd. v. IDI Management*[25] the Supreme Court held that arbitral tribunals have wide discretion regarding procedural matters, including the admission of evidence, but they must not act arbitrarily and must ensure that parties are afforded a reasonable opportunity to be heard. The discretion vested in arbitral tribunals must balance the need for efficient proceedings with the obligation to reach a fair decision.

PRECEDENTS

The courts have consistently upheld that while tribunals have procedural flexibility, the overarching objective remains fairness in the resolution of disputes. In Sohan *Lal Gupta v. Asha Devi Gupta,*[26] the Supreme Court affirmed that arbitral tribunals have broad procedural discretion, but this flexibility must be used judiciously. Similarly, in Oil *& Natural Gas Corporation Ltd. v. Saw Pipes Ltd* [27]., the Court emphasized that arbitral tribunals must not adopt a rigid approach to procedural rules, especially when doing so would prevent the admission of evidence crucial to resolving the dispute.

The ability to introduce evidence at any stage was further reinforced in *M/s. Datar*

25 Fertilizer Corporation of India Ltd. v. IDI Management, (1978) 4 SCC 385.

26 Sohan Lal Gupta v. Asha Devi Gupta, (2003) 7 SCC 492.

27 Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705.

Switchgears Ltd. v. Tata Finance Ltd [28]., where the Court held that tribunals must prioritize substantive justice over procedural technicalities. This principle has been a recurring theme in arbitration jurisprudence, underscoring the necessity of considering all relevant materials, even if introduced late in the proceedings.

The recent Supreme Court judgment in *Alpine Housing Development Corporation Ltd. v. Union of India*[295] reaffirmed this principle by holding that evidence, if crucial to the resolution of the dispute, may be admitted at any stage of the arbitration. The Court emphasized that tribunals must focus on substantive justice and fairness.

OUTCOME OF THE JUDGMENT

In the present case, the Supreme Court concluded that evidence may be adduced at any stage of arbitration, including after arguments have concluded. The Court noted that while arbitration is intended to be efficient and expeditious, these objectives should not come at the cost of justice. The Court cautioned, however, that the arbitral tribunal must ensure that allowing late evidence does not prejudice the other party or unduly prolong the proceedings.

ANALYSIS AND CONCLUSION

The Supreme Court's judgment is a significant development in arbitration law, reaffirming the flexibility inherent in arbitration while also highlighting the importance of fairness. Allowing parties to adduce evidence at any stage aligns with the principle that arbitration should focus on the merits of the dispute rather than rigid procedural timelines. This judgment is particularly relevant in complex disputes where additional evidence may emerge late in the process.

However, this flexibility is not without limits. Arbitral tribunals must remain vigilant to ensure that such discretion is not misused to the detriment of the opposing party. As the Supreme Court cautioned, late admission of evidence should not become a tool for procedural gamesmanship or a cause for undue delay.

In conclusion, this judgment serves as a critical guide for arbitral tribunals, emphasizing that while arbitration is free from the strictures of formal court

28 M/s. Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151.
29 Alpine Housing Development Corporation Ltd. v. Union of India, 2023 SCC Online SC 55.

procedures, it is still bound by the principles of fairness and equity. The decision strikes a balance between procedural flexibility and the need to maintain efficiency in arbitration, ultimately reinforcing the idea that substantive justice should prevail.

SCOPE OF INTERIM RELIEF UNDER SECTION 9 OF THE ARBITRATION AND CONCILIATION ACT.

By Tanishq Kashyap

The current legal framework governing arbitration in India, the Arbitration and Conciliation Act, 1996, ('the Act') aims to protect the interests of parties involved in arbitration. This Act provides for the granting of interim relief to safeguard these interests. Interim measures can be sought under Section 9 and Section 17 of the Act, with a distinction between the two provisions being the forum and the stage at which the application for interim measures can be made.

Section 9 of the Act empowers the court to grant interim relief both before and during arbitral proceedings, as well as after the issuance of the arbitral award, subject to certain restrictions. Section 17, on the other hand, allows parties to request interim relief from the Arbitral Tribunal during the arbitration process.

When considering the granting of interim relief, general principles are taken into account. These principles include

a) establishing a prima facie case,
b) ensuring a balance of convenience in favor of granting interim relief, and
c) demonstrating irreparable injury or loss to the party seeking such relief.

While the Arbitral Tribunal is not strictly bound by the Code of Civil Procedure, 1908, it does consider these general principles when making decisions.

This raises questions regarding the court's scope, especially in relation to the provisions of the Civil Procedure Code, and whether it can entertain applications under Section 9 of the Act after the Arbitral Tribunal has been constituted.

IMC
Chamber of Commerce and Industry

IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated

In the case of Essar House (P) Ltd. v. ArcelorMittal Nippon Steel India Ltd., the Supreme Court clarified that the provisions of the Civil Procedure Code are not entirely binding Section 9 of the Act, and relief cannot be denied on mere technicalities. In this specific case, the Bombay High Court allowed ArcelorMittal Nippon Steel India Limited to file an application under Section 9 of the Act, directing Essar Services to deposit Rs 47.41 crores with the High Court.

Essar Services had filed an appeal before the Supreme Court challenging the aforesaid order. The Hon'ble Supreme Court held as follows:

48. Section 9 of the Arbitration Act confers wide power on the court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. All that the court is required to see is, whether the applicant for interim measure has a good prima facie case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.

49. If a strong prima facie case is made out and the balance of convenience is in favour of interim relief being granted, the court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5 CPC.

50. Proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending arbitral award is not imperative for the grant of relief under Section 9 of the Arbitration Act. A strong possibility of diminution of assets would suffice. To assess the balance of convenience, the court is required to examine and weigh the consequences of refusal of interim relief to the applicant for interim relief in case of success in the proceedings, against the consequence of grant of the interim relief to the opponent in case the proceedings should ultimately fail.

The Arbitration and Conciliation Act 1996, is a specialized legislation and therefore is not limited by the provisions of the Civil Procedure Code. Therefore, attempting to apply the standards of the Civil Procedure Code to restrict the court's authority under any provision of the Act would not be appropriate. This principle has been

reaffirmed by numerous High Court judgments and was appropriately upheld by the Supreme Court in the aforementioned case of Essar House (P) Ltd. v. ArcelorMittal Nippon Steel India Ltd.

This interpretation grants far greater scope of authority to the courts when exercising their powers under Section 9 of the Act. It is now clear that the courts are not strictly bound by the provisions of Order 38 Rule 5 or Order 39 Rule 1 and 2 when granting relief under Section 9 of the Act. The scope of Section 9 is broad, and the courts have the discretion to provide a wide range of interim measures that it deems just and appropriate. However, it is up to the Courts to exercise this discretion judiciously and not arbitrarily

ANALYSIS OF BGS SOMA JV VS NHPC – JURISDICTION OF SECTION 34 AND SECTION 37 APPEALS AND SEAT OF ARBITRATION

By Tanishq Kashyap

The present case concerns a contract for the construction of a hydropower project in Assam and Arunachal Pradesh between the Petitioner and a Respondent. The contract included a dispute resolution clause, which stipulated that arbitration proceedings would take place in New Delhi or Faridabad, and the language for communication would be English.

After a dispute arose, arbitration proceedings were initiated, with 71 sittings held in New Delhi between August 2011 and August 2016. The arbitration tribunal delivered a unanimous award in favor of the Petitioner. Subsequently, the Respondent filed an application under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award before the Court in Faridabad.

In response, the Petitioner filed an application to return the Section 34 petition and challenge the award in the court at New Delhi. The Commercial Court at Gurugram allowed the Petitioner's application, returning the challenge petition to the court in New Delhi.

Following this decision to return the petitioner to New Delhi, the Respondent filed an appeal under Section 37 of the Act before the Punjab & Haryana High Court. The High Court ruled in favor of the Respondent, stating that the appeal was maintainable. It further held that New Delhi was merely a convenient venue for the arbitration proceedings and not necessarily the seat of the arbitration. The High Court determined that Faridabad courts had jurisdiction over the matter, as the cause of action had arisen in Faridabad.

In response to the High Court's decision, the Petitioner filed a special leave petition before the Supreme Court, seeking the Supreme Court's review and decision on the matter.

The Hon'ble Supreme heard the matter and framed the following 3 issues:

a) Whether the appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 before the High Court of Punjab and Haryana was maintainable?

b) Whether the seat of the designation was New Delhi or Faridabad?

c) Whether the term "seat" is similar to exclusive jurisdiction?

Regarding appeals under Section 37 of the Arbitration Act, the court emphasized that appeals are permissible only based on the grounds explicitly specified in that section.

The court clarified that Section 13 of the Commercial Courts Act does not create an independent right of appeal but serves as a forum for such appeals. The Commercial Court's order does not imply a refusal to set aside an arbitral award but merely signifies that the Commercial Court lacks jurisdiction to address a challenge to the award. Consequently, the appeal filed before the High Court was considered not maintainable under Section 37 of the Arbitration Act.

The Supreme Court referenced its prior decision in BALCO and Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and Ors., stating that in the present case, the arbitration provision indicated the venue of arbitration proceedings, not the seat of arbitration. The court concluded that when parties designate the seat of arbitration, it confers limited jurisdiction on the courts at the chosen seat for interim requests and challenges to the

award. In terms of Section 42 of the Arbitration Act, the Supreme Court noted that it provides exclusive supervisory jurisdiction over all arbitral proceedings to a single court. When a seat has been designated, only the courts at the seat possess jurisdiction, and all subsequent applications must be made to that court under Section 42.

However, when a seat has not been designated, and only a convenient venue is specified in the arbitration agreement, multiple courts may have jurisdiction based on where part of the cause of action has arisen. An application for interim relief before the start of arbitration under Section 9 of the Arbitration Act can then be filed in any court where part of the cause of action has occurred. The first court in which such an application is submitted will be deemed to have exclusive jurisdiction, and all further applications must be made to that court under Section 42 of the Arbitration Act. The Supreme Court cited the English decision in Roger Shashoua & Ors. v. Mukesh Sharma to assert that when a venue for arbitration proceedings is specified, it implies that the venue should be considered the seat of arbitration proceedings.

The use of the phrase "shall be held" at a specific venue signifies that the arbitral proceedings are tied to that location, indicating that it is the seat of arbitration. Given that there was no contrary indication in the agreement, the Supreme Court held that either New Delhi or Faridabad could be designated as the seat under the arbitration agreement, and it was up to the parties to choose the arbitration location. The Supreme Court determined that the parties had effectively selected New Delhi as the seat of arbitration under Section 20 of the Arbitration Act due to all proceedings being conducted there and the final award being signed in New Delhi.

In summary, the Supreme Court dismissed the judgment of the High Court and held that the petition under Section 34 of the Arbitration Act should be heard in the courts in New Delhi.

IMC
Chamber of Commerce and Industry

IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated

Mr. Vyom D. Shah
Ms. Sneha Phene
Mr. Rishi Kumar Dugar

(*Please send in your entries to legal@imcnet.org.*)

****

Note from the editorial: Credits to all the members for encouraging and offering suggestions for this bulletin. Thank you for making this possible. Though the issue is being circulated in November 2023, we have covered recent developments from previous months.

Committee Members for Bulletin:

Mr. Prashant Popat

Ms.Sneha Phene

Mr.Rishi Kumar Dugar