

Arbitration Law

Recent Judgments

1. **BOARD OF CONTROL FOR CRICKET IN INDIA V. KOCHI CRICKET PVT. LIMITED, [CIVIL APPEAL No. 2879-2880 OF 2018 (Arising out of SLP (C) Nos.19545-19546 of 2016), JUDGMENT DELIVRED ON 15.03.2018]**

In the present case, the dispute pertained to a franchisee agreement dated 12.03.2011. A sole arbitrator was appointed, who delivered two arbitral awards against the appellant and in favor of the respondents. The appellants filed an application under Section 34 of the Act in the Bombay High Court challenging the aforesaid arbitral awards. Further, the respondents filed two execution applications in the High Court for payment of the amounts awarded under the two awards, pending enforcement of such awards. These were resisted by two chamber summons filed by the appellants praying for dismissal of the aforesaid execution applications stating that the old Section 36 would be applicable, and, therefore, there would be an automatic stay of the awards until Section 34 proceedings are decided. The chamber summons were argued before a Single Judge, who dismissed the aforesaid chamber summons and found that the amended Section 36 would be applicable in the facts of this case.

When the matter came in appeal before the Supreme Court, the court observed that under Section 36 of the 1996 Act, the award is deemed to be a decree and shall be enforced under the Code of Civil Procedure as such. It further observed that “enforcement” in Section 36 is to treat the award as if it were a decree and enforce it as such under the Code of Civil Procedure, which would only mean that such decree has to be executed in the manner indicated. Also, a stray sentence in a judgment in a particular context cannot be torn out of such context and applied in a situation where it has been argued that enforcement and execution are one and the same, at least for the purpose of the 1996 Act.

2. **KANDLA EXPORT CORPORATION & ANR. Vs. M/S. OCI CORPORATION & ANR. [CIVIL APPEAL NO. 1661-1663 OF 2018 @ SLP (CIVIL) No. 28582-28584 of 2017, JUDGMENT DELIVERED ON 07.02.2018]**

In this case an important question as to whether an appeal, not maintainable under Section 50 of the Arbitration and Conciliation Act, 1996, is nonetheless maintainable under Section 13(1) of the Commercial Courts Act, 2015 was raised.

The issue involved in this case was in relation to the Foreign Award. The Supreme Court held that in all arbitration cases of enforcement of foreign awards, it is Section 50 alone that provides an appeal. Having provided for an appeal, the forum of appeal is left “to the Court authorized by law to hear appeals from such orders”. Section 50 properly read would, therefore, mean that if an appeal lies under the said provision, then alone would Section 13(1) of the Commercial Courts Act be attracted as laying down the forum which will hear and decide such an appeal.

3. **EMKAY GLOBAL FINANCIAL SERVICE LIMITED V. GIRIDHAR SONDHI, [CIVIL APPEAL NO. 8367 OF 2018, JUDGMENT DELIVERED ON AUGUST 20, 2018]**

In the aforesaid case, an award was passed against the Respondent by the Sole Arbitrator. The award was challenged by the Respondent under Section 34 of the Act before the District Court of Delhi, which was

rejected in view of the exclusive jurisdiction clause. In Appeal, the High Court of Delhi referred back the parties to the District Judge, to first frame issues and then decide on evidence, including the opportunity to cross examine witnesses who give depositions. The question before the Supreme Court was whether there is any requirement to lead evidence in an application to challenge an award under the Act?

After referring to certain judgments and provisions of the Arbitrations and Conciliation (Amendment) Bill, 2018, the Supreme Court held that "An application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the Arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2) (a), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties."

4. K. KISHAN V. VIJAY NIRMAN COMPANY, [CIVIL APPEAL NO. 21824 OF 2017, JUDGMENT DELIVERED ON AUGUST 14, 2018]

The question before the Supreme Court in this case was whether the Insolvency and Bankruptcy Code, 2016 can be invoked in respect of an operational debt where an arbitral award has been passed against the operational debtor, which has not yet been finally adjudicated upon. The Supreme Court inter alia held that filing of a petition under Section 34 of the Act against an arbitral award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process under Sections 34 and 37 has taken place. The Court further observed:

- That there may be cases where a Section 34 petition challenging an Arbitral Award may clearly and unequivocally be barred by limitation, in that it can be demonstrated to the Court that the period of 90 days plus the discretionary period of 30 days has clearly expired, after which either no petition under Section 34 has been filed or a belated petition under Section 34 has been filed. It is only in such clear cases that the insolvency process may then be put into operation.
- That there may also be other cases where a Section 34 petition may have been instituted in the wrong court, as a result of which the petitioner may claim the application of Section 14 of the Limitation Act to get over the bar of limitation laid down in Section 34(3) of the Arbitration Act. In such cases also, it is obvious that the insolvency process cannot be put into operation without an adjudication on the applicability of Section 14 of the Limitation Act.
- Section 238 of the Code would apply in case there is an inconsistency between the Code and the Arbitration Act. In the present case, we see no such inconsistency. On the contrary, the Award passed under the Arbitration Act together with the steps taken for its challenge would only make it clear that the operational debt, in the present case, happens to be a disputed one.
- Even if it be clear that there be a record of an operational debt, it is important that the said debt be not disputed. If disputed within the parameters laid down in ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353***, an insolvency petition cannot be proceeded with further."

5. STATE OF BIHAR V. BIHAR RAJYA BHUMI VIKAS BANK SAMITI [CIVIL APPEAL NO. 7314 OF 2018, JUDGMENT DELIVERED ON JULY 30, 2018]

The amended Section 34(5) of the Act, inserted by Amending Act 3 of 2016, provides that an application to set aside arbitral award shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

In the present case, a Section 34 petition challenging an award was filed on 05.04.2016 before the Patna High Court, in which notice was issued to the opposite party by the Court on 18.07.2016. Despite the coming into force of Section 34(5), the common ground between the parties was that no prior notice was issued to the other party in terms of the said Section, nor was the application under Section 34 accompanied by an affidavit that was required by the said sub-section. The Single Judge of the Patna High Court, held that the provision contained in Section 34(5) was only directory.

A Letters Patent Appeal to a Division Bench yielded the impugned order by which it was held that the mandatory language of Section 34(5), together with its object, made it clear that the sub-section was a condition precedent to the filing of a proper application under Section 34, and, on the analogy of a notice issued under Section 80 of the Code of Civil Procedure, 1908, being a condition precedent to the filing of a suit against the Government. The Division Bench held that since this mandatory requirement had not been complied with, and as the period of 120 days had run out, the Section 34 application itself would have to be dismissed. It allowed the appeal and set aside the judgment of the Single Judge.

The question before the Supreme Court was whether Section 34(5) of the Arbitration and Conciliation Act, 1996 is mandatory or directory.

The Supreme Court, inter alia, held that to construe such a provision as being mandatory would defeat the advancement of justice as it would provide the consequence of dismissing an application filed without adhering to the requirements of Section 34(5), thereby scuttling the process of justice by burying the element of fairness. It was further held that the provision is procedural, the object behind which is to dispose of applications under Section 34 expeditiously.

The Court however added that it shall be the endeavor of every Court in which a Section 34 application is filed, to stick to the time limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every Court shall endeavor to dispose of the Section 34 application within a period of one year from the date of filing of the said application.

6. CHERAN PROPERTIES LIMITED V. KASTURI AND SONS LIMITED AND ORS. [CIVIL APPEAL NO. 10025-10026 OF 2017, JUDGMENT DELIVERED ON 24.04.2018]

The issue before the Supreme Court in this case was whether a non-signatory to an arbitration agreement is bound by the same or not? The Court held that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. The Court's observation was that the fact that the appellant was not a party to the arbitral proceedings will not conclude the question as to whether the award can be enforced against it on the ground that it claims under a party.

The Three Judge Bench of the Supreme Court made the following observations in the case:

The Court opined that in holding a non-signatory bound by an arbitration agreement, the Court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance.

The Court also made reference to the group of companies doctrine to state that the doctrine essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

7. KERALA STATE ELECTRICITY BOARD AND ANR. V. KURIEN E. KATHILAL [CIVIL APPEAL NO. 3164-3165 OF 2017, JUDGMENT DELIVERED ON 09.03.2018]

The Supreme Court held that if no arbitration agreement exists between the parties then without a joint memo or a joint application of the parties, the parties cannot be referred to arbitration. Under Such circumstances, the procedural mechanism as enumerated under Section 89 Code of Civil Procedure is to be adhered to.

In the case, the Appellant State Electricity Board had entered into an agreement with respondent contractor for construction of a composite dam in connection with Banasura Sagar Scheme. Later in view of the revised minimum wages of labors, the respondent contractor claimed labor escalation charges. However, the Government of Kerala referred the matter to the industrial tribunal for adjudication of the dispute with regard to the said claim of workmen. While the adjudication with reference to the concerned issue was pending, the Appellant terminated the contract with the contractor. When the case came before the High Court, the Court referred the matter to arbitration to resolve the dispute relating to items which they could not amicably resolve.

The issue for consideration by the Supreme Court was whether the High Court was right in referring the parties to arbitration on the oral consent given by the counsel without written instructions from the party?

- The Supreme Court noted that the Jurisdictional pre-condition for reference to arbitration under Section 7 of the Arbitration and Conciliation Act is that the parties should seek a reference or submission to arbitration.
- That so far as reference of a dispute to arbitration under Section 89 Code of Civil Procedure (settlement of dispute outside the Court), the same can be done only when parties agree for settlement of their dispute through arbitration in contradistinction to other methods of alternative dispute resolution mechanism stipulated in Section 89 Code of Civil Procedure,1908. That for reference of the parties to arbitration, oral consent given by the counsel without a written memo of instructions does not fulfill the requirement under Section 89 Code of Civil Procedure,1908.

- That under Section 89 Code of Civil Procedure, 1908, referring the parties to arbitration could be made only when the parties agree for settlement of the dispute through arbitration by a joint application or a joint affidavit before the Court.
- That referring the parties to arbitration has serious civil consequences. Once the parties are referred to arbitration, the proceedings will be in accordance with the provisions of Arbitration and Conciliation Act and the matter will go outside the stream of the civil court. Under Section 19 of Arbitration and Conciliation Act, the arbitral tribunal shall not be bound by the CPC and the Indian Evidence Act. Once the award is passed, the award shall be set aside only under limited grounds. Hence, referring the parties to arbitration has serious civil consequences procedurally and substantively.
- That when there was no arbitration agreement between the parties, without a joint memo or a joint application of the parties, the High Court ought not to have referred the parties to arbitration.

8. M/S EMAAR MGF LAND LIMITED & ANR. V. AFTAB SINGH [REVIEW PETITION (C) Nos. 2629-2630 OF 2018 IN CIVIL APPEAL NOS. 23512- 23513 OF 2017 JUDGMENT DELIVERED ON 10.12.2018]

In this case, the National Consumer Dispute Redressal Commission (NCDRC) took up a batch of petitions wherein the subject matter pertained to complainants who had booked residential villas/flats/plots in Projects of the Builder to be developed in Gurgaon/Mohali and accordingly executed Buyers' Agreements. The cause of action in the case arose when Complainants approached the Consumer Forum alleging that the Builder had failed to deliver possession of these villas/flats/plots under the Project by the date committed in the Buyers Agreement and hence, sought directions to the Builder for delivery and possession of the villas, etc. along with compensation.

However, the Builder in the case filed a set of applications under Section 8 of the Arbitration Act praying therein that the parties be referred to Arbitration as per the Buyers' Agreements executed between them.

The Builder relied upon Section 8 (1) of the Arbitration Act, as amended by the Arbitration & Conciliation (Amendment) Act, 2015 to make their claim for a reference to Arbitration.

The issue before the NCDRC was whether the newly inserted Sub-Section (1) of Section 8 of the Arbitration Act mandates Consumer Forums, constituted under the Consumer Act, to refer parties to Arbitration in terms of valid Arbitration Agreement, notwithstanding other provisions of the Arbitration Act and the provisions of the Consumer Act?

The NCDRC had ruled that an Arbitration Clause in Buyer's Agreement cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act.

The Supreme Court, after examining the legal provisions, held that in light of the overall architecture of the Consumer Act and Court-evolved jurisprudence, amended sub-section (1) of Section 8 cannot be construed as a mandate to the Consumer Forums, constituted under the Act, to refer the parties to Arbitration in terms of the Arbitration Agreement.

Moreover, an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act.