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INDIAN ARBITRATION

Quarterly Roundup

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Several noteworthy judgments have been rendered by Indian courts in recent times, in matters involving arbitration law. Some of the decisions that discuss and set out the legal position in relation to interpretation and applicability of provisions of the Arbitration and Conciliation Act, 1996 in the fourth quarter of 2020 (October - December 2020) have been summarised below:

**Arun Kumar Kamal Kumar and Ors.
v. Selected Marble and Ors.**

**Civil Appeal No. 8980 of 2017
Supreme Court of India
Decided On: 01.10.2020**

Brief Facts: The Appellants entered into two separate license agreements ("**License Agreements**") whereby it was agreed that the Appellants would operate and run a restaurant cum sweets shop at Respondents' premises against payment on a commission basis. The Appellants contended that the Respondents violated the terms of the License Agreements after the business commenced and raised obstacles in the smooth functioning of the business. The Appellants also alleged that the Respondents had failed to make sufficient arrangements for the supply of electricity, due to which the business could not continue.

"A tenant continues to be liable for rent/damages even if the premises are destroyed and the only option to stop the running of rent is for the tenant to surrender the premises."

The shop premises remained closed for more than five years. Thereafter, the Respondent on account of Appellants' non-payment of commission and failure to handover vacant possession of the shop filed a suit before the High Court of Delhi ("**High Court**") under Section 20 of the Arbitration Act, 1940 ("**Arbitration Act**"). The High Court appointed an arbitrator to adjudicate upon the dispute. Meanwhile, the business was reopened for a few months, after which the Appellants handed over the shop's possession to the Respondents.

During the arbitral proceedings, the arbitrator directed the Appellants to file a statement of accounts calculating the commission that became payable to the Respondents after reopening the business. The Appellants complied with the direction and filed the statement of accounts. Since the Respondents did not raise any objections to the statement of accounts filed by Appellants, the arbitrator calculated the damages payable by the Appellants to the Respondents on the basis of the said statement of accounts. However, the Appellants later stated that certain inadvertent errors had crept in the statement of accounts, which must be corrected before the arbitral award was passed. The arbitrator passed the award rejecting the Appellants' submissions. The Appellants challenged the award before the High Court, which declined to interfere in the matter and made the award the rule of the High Court. The Appellants then appeared before a division bench of the High Court which confirmed the judgment of the single judge, while allowing a reduction of interest rate from 16% per annum to 9% per annum. Hence, the present matter.

Held: The Supreme Court carefully considered submissions on both ends. It was noted that clause 10 of the License Agreements mandated that the Appellants needed to hand the premises over in case of a dispute. However, in the instant matter, the Appellants failed to hand the premises over to the Respondents until the arbitration commenced. Thus, the arbitrator rightly concluded that the Appellants were liable to pay the damages. The Supreme Court also considered the judgment of the single judge of the High Court, wherein it was held that the matter was the case of the tenancy and not of a license. Even the Appellants considered themselves to be the tenants at a rent equivalent to the commission of 11% a month. The single judge also placed reliance upon the case of **State Bank of Patiala v. Chandermohan [1]**, wherein the division bench of the High Court held that a tenant continued to be liable for rent/damages even if the premises are destroyed and the only option of the tenant if desirous to stop the running of rent is to surrender the premises. The Supreme Court concluded that it did not find any error in the findings of the single judge. The Apex Court further held that the single judge was correct in not permitting the Appellants to withdraw their own statement of accounts and raise a contrary plea than what was in their defense. The Supreme Court then concluded by stating that it was inclined to give the Appellants the benefit of reducing the interest rate as held by the division bench of the High Court.

[1] State Bank of Patiala v. Chandermohan 1996 RLR 404.



"Merely because the parties entered into some agreements subsequent to the main contract, it cannot be said that such subsequent agreements supersede the original contract to govern the dispute resolution mechanism amongst the parties."

I Agree ☐

Brief Facts: The Petitioner being a lender entered into a loan agreement with the first respondent to advance a loan to the tune of USD 4,000,000. The loan was disbursed not only on the basis of the loan agreement but also on three subsequent amendments. The second Respondent signed the guarantee deed in favour of the Petitioner. After three years of the loan agreement, an inter-creditor agreement was signed between the Petitioner and UCO bank. As the amount was not paid pursuant to the loan agreement and the guarantee deed executed between the Petitioner and the first and second Respondent, an arbitration was commenced in Finland. The sole arbitrator passed an award after a full contest. The present application of the Petitioner is for the enforcement of the foreign award. The first Respondent's prime contention is that the award is not enforceable since the Respondents could not present their case as they were not given any opportunity for an oral hearing before the arbitrator.

Further, the award was not binding because an appeal was pending before the Supreme Court of Finland. The Respondents also submitted that due to various agreements entered between the Petitioner and the Respondents, the place and law for arbitration were changed to Chennai and Indian law. Therefore, the Respondents contended that the governing law of India was applicable and the courts at Chennai would have exclusive jurisdiction. Lastly, the Respondents relied upon a catena of decisions to contend that the enforcement of the award would be contrary to India's public policy. Hence, the instant case. **[2]**

Held: The High Court of Madras ("**High Court**") noted the first respondent's arguments that the agreements that were signed after the loan agreement such as the inter-creditor agreement had stipulated that Chennai will have exclusive jurisdiction. The High Court held that a reading of the entire hypothecation agreement would indicate that it did not supersede the loan agreement. Instead, the hypothecation agreement was itself executed in furtherance of the loan agreement. Therefore, the obligation arising out of the loan agreement continued to remain binding and enforceable. Further, the guarantee deed also provided for Finland's laws for resolution of any dispute at the Finland Courts. On the issue of jurisdiction, the High Court concluded that merely because some agreements were entered into between the parties, it could not be said that they superseded the original contract.

The High Court on the issue of fair hearing reiterated the law laid in **Renusagar Power Co. Ltd. v. General Electric Co. [3]** to hold that with regard to enforcement of foreign judgments, the position at common law is that a foreign judgment is deemed to be final and conclusive and cannot be impeached for any error, either in fact or in law. The limited ground of challenging a foreign judgment was to show that the judgment was passed in lack of jurisdiction or fraud and would be contrary to public policy.

[2] Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHA) 2019 (15) SCC 131; Automotive Tyre Manufacturers Association v. Designated Authority and Ors. 2011 (2) SCC 258; S.N. Prasad; and Hittek Industries (Bihar) Limited v. Monnet Finance Limited and Ors. 2011(1) SCC 320.

[3] Renusagar Power Co. Ltd., v. General Electric Co., 1994 Supp (1) SCC 644.

Reliance was placed on the decision in **Sohan Lal Gupta v. Asha Devi Gupta [4]** to reiterate the conditions of a fair hearing as follows:

1. Each party must have notice that the hearing is to take place;
2. Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses;
3. Each party must have the opportunity to be present throughout the hearing;
4. Each party must have a reasonable opportunity to present evidence and argument in support of his own case;
5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument;
6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument.

The High Court held that the facts of the case showed that sufficient opportunity had been given to the parties to present their case. In fact, the first and the second Respondent chose not to produce any witness on their side. Therefore, they could not contend that sufficient opportunity was not given to raise their defence. Accordingly, the High Court held that the foreign award was enforceable and the Applicant was at liberty to file an execution petition to realise the award amount as per law as a decree of Civil Court.

**Vishranti CHSL v. Tattva Mittal
Corporation Pvt. Ltd.**

**Arbitration Application (L) No. 3311 of 2020
High Court of Bombay
Decided On: 19.10.2020**

"A general reference to another contract would not incorporate the arbitration agreement under such contract. Section 7(5) of the Arbitration and Conciliation Act, 1996 mandates a particular reference indicating a mutual intention to incorporate the arbitration clause from another instrument into the contract."

Brief Facts: The present case involves an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") by a co-operative society. The Applicant had entered into a development agreement ("**Development Agreement**") with a construction company to redevelop its property in Mumbai. The Development Agreement consisted of an arbitration agreement that established a dispute settlement mechanism between the applicant and the construction company. Several years later, the Applicant and the construction company assigned the development rights through a regular deed ("**Assignment Deed**") to the Respondent.

The Respondent, wanting to proceed with arbitration, sought shelter under Clause 16 of the Assignment Deed which stated that the assignee had an obligation to, "adhere to, observe, perform and fulfill all the terms and conditions stipulated in the Development Agreement." The Respondent contended that the arbitration agreement in the Development Agreement signed between the Applicant and the construction company was assigned to the Respondent. Hence, the present case as to whether the Respondent being the assignee of the development rights under the Development Agreement could call for arbitration.

Held: The High Court of Bombay ("**High Court**") at the outset, noted that none of the clauses within the Assignment Deed expressly referred to the arbitration agreement under the Development Agreement. In the absence of such a specific reference, the High Court held that the law was well settled that a general reference to another contract would not be sufficient to incorporate the arbitration agreement under Section 7(5) of the Arbitration Act. [5] The decision in **MR Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd. [6]** was referred to reiterate that there should be a particular reference indicating a mutual intention to incorporate the arbitration clause from an instrument into the contract. The only exception to this threshold is when the document referred to is a standard form of terms and conditions published and circulated by trade associations or regulatory institutions. In the facts of the instant matter, the High Court concluded that it is inescapable that the arbitration clause in the development agreement was not incorporated as required by the law in the Assignment Deed. Hence, the Respondent could not call for arbitration under the Assignment Deed.

[4] Sohan Lal Gupta v. Asha Devi Gupta (2003) 7 SCC 492

[5] Alimenta SA v. National Agricultural Cooperative Marketing Federation of India Ltd. & Anr. (1987) 1 SCC 615; MR Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd. (2009) 7 SCC 696; Inox Wind Ltd. v. Thermocables Ltd. (2018) 2 SCC 519; and Giriraj Garg v. Coal India Ltd. & Ors. (2019) 5 SCC 192.

[6] MR Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd. (2009) 7 SCC 696.

"Section 9 petitions under the Arbitration and Conciliation Act, 1996 can not be disposed of ex-parte, without giving notice to the respondent therein, especially when coercive orders are to be passed."



Brief Facts: The instant matter involves a writ petition filed under Article 227 of the Indian Constitution. The Petitioner is a company that had purchased 16 vehicles under loan-cum-hypothecation agreements ("**Loan Agreements**") executed with the Respondents. There was a default by the Petitioner in the payment of certain installments of the loan, after which the Respondent filed 16 petitions ("**Petitions**") under Section 9 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The Petitioner calls for the intervention of the High Court of Delhi ("**High Court**") in the extraordinary circumstances whereby the District Judge of Karkadooma Courts ("**Commercial Court**") disposed of the Petitions vide orders passed on various dates which are identical in almost all respects. The Petitions were disposed of on the very first day of the hearing, without issuing notice to the Petitioner.

Further, coercive orders were also passed whereby the Respondent was permitted to take possession of the Petitioner's vehicles. The Petitioner contended that the total dues were only to the tune of INR 87 lakh and taking possession of all the vehicles would bring the business of the Petitioner to a complete standstill. The Petitioner's grievance was that the Petitions were disposed of without notice, and coercive orders of possession were passed without even hearing the Petitioner.

Held: The High Court noted that the Petitions were accompanied with an application for interim ex-parte relief in the form of recovery of possession of the vehicles until the arbitration proceedings. Thus, while dealing with the Petitions, the applications for interim ex-parte relief were allowed without calling upon the Petitioner even to file a reply. The High Court held that Section 9 petitions could not be disposed of ex-parte, without giving notice to the Respondent therein, especially when coercive orders were being passed. [7] The power to pass ad-interim orders under Section 9 of the Arbitration Act were not in doubt. However, disposal of the petitions, without issuing notice and hearing the Respondent and directing coercive orders of possession would be violative of the principles of natural justice. The appointment of a receiver to take possession at the ad-interim stage could lead to the Petitioner's business activities to come to a grinding halt. The High Court opined that the standard required to be satisfied for such an extreme measure should be high. Moreover, it was held that disposal of a Section 9 petition on the first date itself would be contrary to the basic principles that govern the adjudication of such petitions.

The High Court further relied upon the case in **Cholamandalam DBS Finance Ltd. v. Sudheesh Kumar** [8] which laid the guidelines that ought to be followed while dealing with applications under Section 9 of the Arbitration Act concerning the seizure of vehicles. It was reiterated that the person applying should show prima facie case and establish the irreparable injury and the balance of convenience and in case, where a vehicle is to be emergently seized, there should be averments to show why it is just and convenient to seize the vehicle. It is also well settled that the mere recitals of the words in the section is not sufficient. Therefore, under the facts and circumstances, the High Court set aside the impugned orders and remanded the matter back to the Commercial Court.

[7] Sundaram Finance Ltd. v. NEPC India Ltd. (1999) 2 SCC 479; Firm Ashok Traders and another v. Gurumukh Das Saluja and Ors. (2004) 3 SCC 155; and East India Udyog Limited v. Maytas Infra Ltd. & Ors. AIR 2015 AP 118.

[8] Cholamandalam DBS Finance Ltd. v. Sudheesh Kumar 2010 (1) CTC 481.

"Once Section 11 jurisdiction has contractually been conferred on the Courts of a place other than the seat of arbitration, then the Courts of such place would operate to vest an exclusive jurisdiction limited solely to the extent of entertaining an application for the appointment of an arbitrator."



Brief Facts: The instant matter involves a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The Respondent had leased its premises to the Petitioner for running an office. Owing to the intervention of the COVID-19 pandemic, the Petitioner claimed that it had to suspend operations and enforce the force majeure clause to terminate the lease deed. A dispute having arisen, the Petitioner approached the High Court of Delhi ("High Court") for the appointment of an arbitrator under Section 11(5) of the Arbitration Act. The dispute resolution clause amongst the parties stated that either party may approach a court of competent jurisdiction at Haryana to appoint the sole arbitrator. However, the seat of the arbitration was decided to be at New Delhi. The High Court expressed its concerns about how the jurisdiction to appoint an arbitrator could be exercised given that the competent court at Haryana was given the exclusive jurisdiction on this aspect. Both the Petitioner and the Respondent submitted that the seat of the arbitration being at New Delhi, the High Court had exclusive jurisdiction to entertain the present petition. Hence, the present case.

Held: The High Court undertook the academic exercise of going through judicial precedents on the seat of arbitration. It was noted that while it is true that the Supreme Court in various decisions commencing from the case in **BALCO v. Kaiser Aluminium Technical Services [9]** held that a clause fixing the seat of arbitration is akin to an exclusive jurisdiction clause, none of the said decisions pertained to a situation in which the contract contained a separate exclusive jurisdiction clause, conferring jurisdiction on a court in another territorial location solely for the appointment of an arbitrator. The High Court then referred to the decision in **Mankastu Impex Pvt. Ltd. v. Airvisual Ltd. [10]** ("**Mankastu**") which threw some light upon the approach to be adopted in a case as the present. In Mankastu, the Supreme Court held that once the seat of arbitration had been fixed as Hong Kong, if exclusive jurisdiction, for obtaining interim relief, was required to be vested in courts at New Delhi, the agreement had necessarily to specifically so state. Applying the same reasoning to the instant case, the High Court held that once Section 11 jurisdiction had contractually been conferred on the High Court of Punjab and Haryana. Thus, High Court of Punjab and Haryana would operate to vest such exclusive jurisdiction, to the extent of entertaining an application for the appointment of an arbitrator. The High Court held that arriving at any other conclusion would amount to re-writing the contract between the parties. Therefore, for want of territorial jurisdiction, the petition was dismissed.

"Arbitral proceedings can be held at a venue of convenience other than the seat of the arbitration under Section 20(3) of the Arbitration and Conciliation Act, 1996."

Brief Facts: The instant case involves a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The Petitioner and the Respondent entered into an agreement ("**BOO Agreement**") whereby the Petitioner was to supply oxygen, nitrogen, and argon gases to the Respondent by installing a cryogenic air separation plant operational on a build own and operate basis. The BOO Agreement's working led to certain disputes between the parties, which resulted in the commencement of arbitration proceedings held entirely at New Delhi.

[9] BALCO v. Kaiser Aluminium Technical Services (2012) 9 SCC 552.

[10] Mankastu Impex Pvt. Ltd. v. Airvisual Ltd. (2015)12 SCC 225.

The arbitral tribunal rendered the final award post the proceedings conducted under the aegis of Scope Forum of Conciliation & Arbitration based in Delhi. Aggrieved by the rejection of two of its claims, the Petitioner has filed the present petition under Section 34 of the Arbitration Act. Before the High Court of Delhi ("**High Court**"), the Respondent argued that the instant petition was not maintainable. The Respondent stated that the BOO Agreement contained an arbitration clause which stipulated expressly that the arbitration proceedings shall be held in Durgapur, West Bengal, and the courts of Durgapur would have exclusive jurisdiction. The Respondent further contended that any amendment in the BOO Agreement between the parties had to be in writing signed by the parties' representatives. In the absence of any such agreement in writing to modify the arbitration agreement given in the BOO Agreement, the exclusive jurisdiction and choice of seat clause contained in the arbitration agreement would be binding upon the parties. The Respondents relied upon a catena of decisions to contend that merely because the venue of the arbitration was changed for convenience sake, the same would not override the choice of the seat under the arbitration agreement. [11]

On the other hand, the Petitioner contended that the arbitral tribunal's order dated 06.06.2019 ("**Order**") constituted an amendment and novation of the original arbitration clause. In the Order, the Petitioner alleged that both the parties at dispute agreed that Delhi would be the seat of arbitration. Further, the petition stated that the case in **Videocon Industries Ltd. v. Union of India** [12] would not apply to the facts of the instant case since the consent for the change in the seat of arbitration was given only by two out of five parties to the agreement and not all of them. In the present case, unlike *Videocon Industries'* case, all parties had consented to designate New Delhi as the place and venue of the arbitration, which agreement has been recorded, in writing by the arbitral tribunal. The Petitioner further relied on the judgment in **BGS SGS SOMA JV v. NHPC** to contend that mere passing of the award at New Delhi would be sufficient to confer the jurisdiction upon the High Court to exercise the supervisory jurisdiction over the proceedings. Hence, the present case.

Held: The High Court noted that the primary issue in the instant matter was whether the Order had the effect of amending the arbitration agreement contained in the BOO Agreement. The High Court at the outset referred to the case in *Videocon Industries Ltd.* wherein the Supreme Court dealing with a similar set of facts held that mere change in the physical venue of the hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration.



The High Court rejected the contentions of the Petitioner on multiple counts. Firstly, if the parties wanted to amend the arbitration agreement, they could have done it through writing, duly signed by the parties' authorised representatives. The Order made by the arbitral tribunal could not be construed as an amendment in writing by the parties since the authorised representative of the Respondent who signed the initial agreement was not present when the proceedings were held on 06.06.2019. In other words, the authorised representative who was competent to sign the amendment had not consented for the seat of arbitration to be at New Delhi. Secondly, once the parties had agreed, Durgapur to be the seat of arbitration, there was nothing in the Arbitration Act that empowered the arbitral tribunal to change the seat. The High Court noted that Section 20 (3) of the Arbitration Act contemplated holding proceedings at a venue other than the seat of arbitration in view of convenience. Therefore, it was held that New Delhi was agreed to as a venue primarily under Section 20(3) of the Arbitration Act.

Consequently, the Respondent's objection on maintainability was accepted, and it was held that the High Court had no jurisdiction to entertain the case.

[11] BGS SGS SOMA JV v. NHPC (2020) 4 SCC 234; Bharat Aluminium Co. v. Kaiser Aluminium Technical Services 2012 (9) SCC 552; Videocon Industries Ltd. v. Union of India (2011) 6 SCC 161; Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd. (2017) 7 SCC 678; Enercon (India) Ltd. v. Enercon GmbH (2014) 5 SCC 1; Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd. (2011) 6 SCC 179; and Brahmani River Pellets Ltd. v. Kamachi Industries Ltd. (2020) 5 SCC 462.

[12] Videocon Industries Ltd. v. Union of India (2011) 6 SCC 161.

"Section 13(1) of the Commercial Courts Act, 2015 allows for an appeal against the judgment or order of a Commercial Court below the District Judge. Therefore, a Writ Court will not entertain an appeal against an order of the Commercial Court below the level of a District Judge without special reasons for not availing such remedy as provided under Section 13(1) of the Commercial Courts Act, 2015."



Brief Facts: A writ petition was filed in the instant matter under Article 227 of the Constitution of India challenging orders passed by the Commercial Court against the petitioners under Section 9 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The impugned orders allowed for an ad-interim injunction restraining the Petitioners from interfering with the business that the parties at dispute were involved in. The Respondents raised a preliminary objection regarding the maintainability of a petition filed under Article 227 of the Constitution of India. The Respondents contended that Section 13(1) of the Commercial Courts Act, 2015 ("**Commercial Courts Act**") provided for an appeal against orders passed by Commercial Court below the level of a District Judge. Given the alternative and efficacious remedy available to the Petitioners, the Respondents contended that the writ petition was not maintainable. On the contrary, the Petitioners argued that an appeal under Section 13(1) of the Commercial Courts Act was maintainable only against a decree or final judgment passed by a Commercial Court. Since the appeal in the instant matter was against orders passed against the Petitioners, it was stated that a writ was an appropriate remedy. Further, the Petitioners also contended that merely because an alternative and efficacious remedy was available to a person, it did not pose an absolute bar to entertain a petition under Article 227 of the Constitution of India. Hence, the present matter.

Held: The High Court of Kerala ("**High Court**") read through the relevant provisions applicable in the case. It was observed that on a plain reading of the provision in the amended Section 13(1) of the Commercial Courts Act, it was evident that the judgment or order of a Commercial Court below the District Judge's level was indeed appealable. The High Court then considered the argument of the Petitioners that the heading of Section 13 of the Commercial Courts Act stated, "Appeals from Commercial Courts and Commercial Divisions" and therefore, an appeal under Section 13(1) of the Act would only lie from a decree and final judgment passed by the Commercial Court. The High Court held that there was no merit in this contention of the Petitioners. It was held that the first and primary rule of statutory interpretation was that the legislature's intention must be found in the statute's words. Therefore, when Section 13(1) of the Commercial Courts Act expressly mentioned the word "order", taking the Petitioners' argument would render the bare provision otiose and redundant. A reference was made to the decision in **Karnataka Rare Earth v. Senior Geologist [13]** to reiterate that heading of a statute had a limited role to play in the construction of a statute.

Moreover, it was emphasised that in case of conflict between the plain language of the provision and the meaning of the heading or title, the heading or title would not control the meaning which is clearly and plainly discernible from the language of the provision thereunder **[14]**. The High Court also noted that the Petitioners did not show any reason for not availing the remedy of appeal against the order under the Commercial Courts Act. In such circumstances, the High Court held that it was not inclined to interfere with the impugned order by invoking powers under Article 227 of the Constitution of India. Hence, the petition was dismissed.

[13] Karnataka Rare Earth v. Senior Geologist AIR 2004 SC 2915.

[14] Raichurmatham Prabhakar v. Rawatmal Dugar AIR 2004 SC 3625.

"The law governing the challenge to arbitration shall be the law of the seat. If the legal or juridical seat of arbitration is outside India, then Part-I of the Arbitration and Conciliation Act, 1996 shall be inapplicable to such arbitrations even if the arbitral award was rendered prior to the BALCO dictum."



Brief Facts: The Respondent, Jindal Drugs Limited entered into four related agreements with Engineering Chur AG ("**Enco**") to establish an ascorbic acid plant in India. Enco later assigned these agreements to the Appellant with the consent of the Respondent. Disputes arose between the Appellant and the Respondent, as a result of which the Respondent terminated the agreements and claimed damages. The Respondent proceeded for arbitration under one of the agreements, before the International Chamber of Commerce ("**ICC**"). The ICC delivered a partial award rejecting the Respondent's claims and awarding 44,33,416 Swiss Francs favouring the Appellant. The ICC further directed the parties to present written representations on interest and costs in terms of Article 20 of the ICC Rules of Arbitration for making the final award. The Respondent challenged the ICC's partial award before the High Court of Bombay ("High Court"). The High Court admitted the petition and passed an interim injunction restraining the Appellant and ICC from continuing the proceedings. The ICC held that the High Court's interim order was not binding upon it and consequently proceeded further. The Appellant filed its written submissions on interest and cost. The Respondent did not make any submissions.

Consequently, the ICC delivered the final award in favour of the Appellant. The Respondent challenged the final award under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). After rounds of litigation, the Respondent's challenge reached the division bench of the High Court. During the pendency of Respondent's appeal, the Appellant applied for enforcement of the partial and final awards under Sections 47 and 48 of the Arbitration Act. The enforcement petition was allowed by the single judge of the Court in favour of the Appellant except for some quantum of money claimed by the Appellant. Hence, the parties filed cross-appeals impugning the enforcement order.

On the other hand, the division bench passed the impugned judgment in favour of the Respondent further setting aside the enforcement order. The division bench of the High Court held that a foreign award could be challenged through a petition preferred under Section 34 of the Act. Hence, the instant appeal was filed before the Supreme Court of India. The Appellant relied heavily on **Bharat Aluminium Company v. Kaiser Aluminium Technical Services [15]** ("**BALCO**") which had overruled the decisions in **Bhatia International [16]** and **Venture Global Engineering [17]** that were relied upon by the division bench of the High Court. The Appellant further contended that pre-BALCO awards wherein the arbitration was not seated in India and the governing law was not Indian law would not be guided by the BALCO dictum. The Respondent sought the umbrage of Bhatia International case stating that instant matter dated before the BALCO judgment and therefore, the Division Bench was correct in relying upon Bhatia International's decision. The Respondent further clarified that while the arbitration was supposed to occur in London, the governing law was Indian law.

Held: The moot question before the Supreme Court was whether a foreign arbitral award could be challenged under Section 34 of the Arbitration Act given that the award was delivered before the BALCO dictum?

[15] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services 2012 (9) SCC 552.

[16] Bhatia International v. Bulk Trading S.A. and Anr. (2002) 4 SCC 105.

[17] Venture Global Engineering v. Satyam Computer Services Ltd. and Anr. 2008 (4) SCC 190.

The Supreme Court noted that while the decisions in *Bhatia International* and *Venture Global Engineering* had ruled that resort to remedies under Part I of the Arbitration Act could be made in respect of foreign awards, despite the clear dichotomy in the enactment between domestic and foreign awards. This understanding was revisited in the BALCO decision. The BALCO dictum and a catena of decisions [18] were referred to establish the present position in law which states that law governing the challenge to an arbitration shall be the law of the seat. The Supreme Court further reiterated that the law of the seat shall be the law of the place where the arbitration has been held. Therefore, Part I of the Arbitration Act would stand excluded if it is found that the juridical seat of the arbitration was outside India or the law governing the arbitration was a law other than Indian law. [19] Reliance was also placed on the recent judgments in *BGS SOMA JV v. National Hydro Electric Power Corporation* [20] and *Government of India v. Vedanta Ltd.* [21] which held that the selection of seat of arbitration would amount to an exclusive jurisdiction clause.

The Apex Court noted that the seat of the arbitration was in London where the arbitration proceedings were held. The Supreme Court concluded that since both partial and final awards in the instant matter were foreign awards, the provisions of Sections 47 and 48 were correctly invoked by the appellant to enforce the said awards. Hence, the impugned judgment of the division bench of the High Court was not sustainable.

**Dhargalkar Technoosis (I) Pvt. Ltd. v.
Mumbai Metropolitan Regional
Development Authority**

**Arbitration Petition (L) No. 55 of 2020
High Court of Bombay
Decided On: 03.12.2020**

What are the essential ingredients of a binding arbitration agreement?

Brief Facts: The present matter involves an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The Respondent accepted the applicant's bid, whereby the Applicant was empanelled as a consultant to overlook the Respondent's construction projects. The Applicant and Respondent entered into a formal contract specific to the parties ("**Agreement**"), and there were also a set of general conditions ("**General Conditions**"). The dispute settlement clause in the General Conditions stated that for any dispute, the matter would be referred to the Joint Metropolitan Commissioner and Project Director, MMRDA and his decision will be final. The only moot point in the present dispute was whether the said dispute settlement clause in the General Conditions qualified as an arbitration clause. The Applicant contended that the dispute settlement clause constituted a sufficient arbitration clause. At the same time, the Respondent contended that there existed no arbitration clause for the Applicant to seek the appointment of an arbitrator.

Held: The High Court of Bombay ("**High Court**") in its analysis reiterated the law in *Jagdish Chander v. Ramesh Chander & Ors.* [22] which states the ingredients for a binding arbitration agreement. These ingredients were: (a) the agreement must be in writing; (b) the parties must have agreed to refer any present or future disputes to the decision of a private tribunal; (c) the private tribunal should be empowered to adjudicate upon the disputes impartially, giving the parties due opportunity to put forth their respective cases; and (d) the parties should have agreed that the decision of the private tribunal in respect of the disputes will bind them.

The High Court held that as a general truism, every arbitration is a form of alternate dispute resolution ("**ADR**"), but not every ADR is necessarily and only by arbitration. There are other modes of ADR known to the law, including mediation and conciliation. It was noted that the impugned dispute settlement clause only said that any dispute was to be referred to the Joint Metropolitan Commissioner and Project Director of MMRDA, whose decision would be final. The High Court concluded that it could not be unequivocally said that the dispute settlement clause was an arbitration agreement and nothing else. Crucially, the dispute settlement clause did not meet the test laid in *Jagdish Chander*. Therefore, the application was rejected.

[18] Union of India v. Reliance Industries, (2015) 10 SCC 213; and Roger Shashoua v. Mukesh Sharma, (2017) 14 SCC 722.

[19] Videocon Industries Ltd. v. Union of India (2011) 6 SCC 161; Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd. (2011) 6 SCC 179; Yograj Infrastructure Ltd. v. Ssang Yong Engg. and Construction Co. Ltd. (2011) 9 SCC 735; Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603; and Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. (2015) 9 SCC 172.

[20] BGS SOMA JV v. National Hydro Electric Power Corporation 2020 (4) SCC 234.

[21] Government of India v. Vedanta Ltd. AIR 2020 SC 4550.

[22] Jagdish Chander v. Ramesh Chander & Ors. (2007) 5 SCC 719.



"Landlord-tenant disputes are arbitrable under the Arbitration and Conciliation Act, 1996 unless covered by a special enactment which specifically calls for adjudication of the disputes at a particular Court/Forum."

Brief Facts: The instant matter involves a dispute that revolves around a tenancy agreement. The landlord in the present matter had applied before the High Court of Calcutta ("**High Court**") for the appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The tenant's primary contention was that tenancy matters were not arbitrable. During the pendency of the case, the Supreme Court in the decision of **Himangni Enterprises v. Kamaljeet Singh Ahluwalia [23]** held that a tenant's application for referring the matter to arbitration was dismissed properly since the arbitrator did not have the jurisdiction to decide a rent/ eviction dispute. The tenant in the instant matter took the umbrage of the decision in Himangni to contend its case. Eventually, the present matter reached before the two-judge bench of the Supreme Court of India which was of the view that the decision in Himangni was wrongly decided, and hence the matter was referred to a larger bench of three judges. Hence, the present case.

Held: Amongst the several noteworthy observations that the Supreme Court made in the present matter were the fourfold test for determining a subject matter's arbitrability. The fourfold test is as follows:

1. When the cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem;
2. When the cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable;
3. When the cause of action and subject matter of the dispute relates to the inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and
4. When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

The bench attached a cautionary note stating that these tests were not watertight compartments. However, if applied holistically and pragmatically, they would help determine the arbitrability of a matter.

On the arbitrability of tenancy disputes, the Supreme Court held that landlord-tenant disputes governed by the TPA were arbitrable. Such disputes were not actions in rem but pertained to subordinate rights in personam that arose from rights in rem. Therefore, in general, tenancy disputes would not affect third-party rights or have erga omnes effect or require centralised adjudication. Moreover, landlord-tenant matters were held not to be inalienable to the sovereign functions of the State. The only exception to the general rule was where a landlord-tenant dispute was covered by a special enactment which specifically called for adjudication of the disputes at a particular Court/Forum. Therefore, the decision in Himangni was overruled.

[23] Himangni Enterprises v. Kamaljeet Singh Ahluwalia (2017) 10 SCC 706.

"Tenancy matters governed by special statutes where a Court/ Forum is conferred exclusive jurisdiction under the statute are non-arbitrable."



Brief Facts: The facts of the case are such that the Petitioner had sub-leased his property to the Respondent. In respect of the sub-lease, certain disputes emerged between the parties. The sub-lease deed between the parties provided for the resolution of the disputes through arbitration. Therefore, the Petitioner being a foreign citizen approached the Supreme Court under Section 11(5) and 11(9) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") for appointing a sole arbitrator. The Petitioner also submitted that the instant case was arbitrable since the tenancy in the instant case was not created under or governed by a special statute. Thus, the Petitioner asserted that there would be no impediment for resolving the dispute through arbitration. The Respondent had chosen not to appear and oppose the instant petition. Hence, the present matter.

Held: The Supreme Court of India before proceeding with the plea of the Petitioner seeking appointment of arbitrator held that it was imperative to consider the arbitrability of the disputes relating to lease/tenancy when such lease was governed by the Transfer of Property Act, 1882 ("**TPA**"). The case of **Vidya Drolia and Ors. v. Durga Trading Corporation [24]** was referred to hold that in tenancy matters governed by special statutes where a Court/ Forum was conferred jurisdiction under the statute, the Court/Forum named alone could adjudicate the matters. Hence, the dispute under such enactments would be non-arbitrable. If the special statutes did not apply to the property and the lease/tenancy and if an arbitration clause governed such transaction; then the dispute between the parties was arbitrable, and there shall be no impediment whatsoever to invoke the arbitration clause. Therefore, the Supreme Court allowed the petition and appointed an arbitrator.



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