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WHETHER A PARTY CAN DIRECTLY INVOKE THE ARBITRATION CLAUSE WITHOUT FULFILLING THE PRE-ARBITRAL STEPS?

By Anagha Nagathan

Arbitration is considered as one of the most efficient forms of remedy for settlement of disputes between parties. A recent judgment of the High Court of Madhya Pradesh *in Dharamdas Tirathdas Constructions Pvt Ltd v. Government of India*[1] provides clarity on whether a party to an arbitration agreement can invoke the arbitration clause without fulfilling the pre-arbitral steps.

Factual Matrix

The Petitioner Company (Dharamdas Tirathdas Constructions Private Limited) is a company engaged in construction work. The Petitioner entered into an agreement with the respondent for the construction of 60 T 3 quarters for GPRA at Bilore Compound, Indore. The total period of completion of work was 18 months, which was liable to be extended by the Respondent. Clause 25 of the contract provides for resolution of any dispute arising between the parties by way of arbitration.

Certain disputes arose between the parties leading to the invocation of the said Clause 25 by the Petitioner. The Respondent questioned the validity of invoking the arbitration clause on the premise that the other criteria constituting pre-requisites for invoking the arbitration clause were not met. The Respondent also rejected the reference of the dispute to arbitration on the premise of non-fulfilment of the condition precedent and also on the ground of delay in raising the dispute beyond a period of 120 days. The Respondent stated that as per Clause 25, the Petitioner had to approach the Superintendent Engineer within 15 days and thereafter the Chief Engineer by way of appeal and only thereafter seek appointment of arbitrator under Clause 25. Accordingly, if the Contractor does not make any demand for the appointment of arbitrator within 120 days of receiving the intimation from the

[1] *Dharamdas Tirathdas Constructions Pvt Ltd v. Government of India*, MANU/MP/1355/2022.

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Engineer in Chief that the final bill is ready for payment, the claim of the Contractor will be deemed to have been waived and treated as time barred. An application was filed by the Petitioner with the Chief Engineer Western Zone, Bhopal for appointment of the arbitrator to resolve the dispute. Respondent No. 3 informed the Petitioner that the application for appointment of the Arbitrator was rightly rejected by the Competent authority as the condition precedent for seeking arbitration was not fulfilled.

Contentions of the Parties

The learned Counsel for the Petitioner argued that as per Clause 25, it was necessary on the part of the Respondents to refer the dispute for adjudication by way of arbitration. It was further argued that the issue of limitation was to be decided by the Arbitrator and the Respondent had wrongly rejected the appointment of arbitrator as being time barred.

The learned Counsel for the Respondent submitted *inter alia* that without complying with the pre-requisites under Clause 25, arbitration proceedings could not be commenced.

Question of Law

- Whether a party can directly invoke the arbitration clause without fulfilling the pre-arbitral steps?

Judgment

The High Court of Madhya Pradesh held that prior to invoking the arbitration clause in the agreement, the pre-requisites ought to be complied. It was held that the Contractor was first required to submit a claim within 15 days before the Superintending Engineer, in writing, following which the Superintending Engineer was to give a decision within a period of one month. The Court observed that it was clear from Clause 25 of the Agreement that the parties had agreed to a certain and specific procedure before invoking the above-mentioned clause i.e., the Contractor is required to submit a claim within 15 days before the Superintending Engineer in writing following which the Superintending Engineer was to give a decision within a period of one month. Thereafter, if the Contractor is dissatisfied with such decision, he may challenge it by filing an appeal before the Chief Engineer within 15 days of the date of the decision of the Superintending Engineer. Thereafter, the Chief Engineer was to give a decision within

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30 days and in the event the Contractor is dissatisfied with the said decision, he was to give notice to Chief Engineer for appointment of an arbitrator. The Court held that the Petitioner having directly invoked the arbitration clause had failed to fulfill the conditions precedent and therefore the Respondent was right in rejecting the application for appointment of arbitrator.

Analysis

The judgment makes it clear that the conditions precedent must be fulfilled before invoking the arbitration clause, where such pre-conditions are provided. The other party has the full right to reject any application or claim if the condition precedent seeking arbitration is not followed by the party seeking reference.

NAVIGATING ARBITRATION IN INDIA AND ITS GROWTH AS AN ARBITRATION HUB:

A COMPREHENSIVE GUIDE

By Gayathri Sriram

Introduction:

Arbitration in India has witnessed significant growth and transformation in recent years, becoming a preferred method for resolving commercial disputes. With the aim of reducing the burden on traditional court systems and promoting efficiency, the Indian government has taken substantial measures to create a robust arbitration framework. This article explores the nuances of arbitration in India, providing valuable insights for businesses and individuals seeking to engage in or understand the arbitration process.

Evolution of Arbitration Laws in India:

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Erstwhile India had the system of Panchayat for resolving disputes. As days passed, the Indian judicial system witnessed a considerable change and one among them was settlement of disputes through arbitration. The course of arbitration flourished in India since the nineteenth century. The earliest recognised legislation for arbitration was the Indian arbitration Act, 1899 which was confined only to the presidency towns Madras, Bombay and Calcutta. However, the Act of 1899 and provisions of Code of Civil Procedure, 1908 were injudicious and more technical and thus, the Arbitration Act, 1940 came into existence and repealed the earlier Arbitration Act, 1899. Eventually as people started to choose Tribunals/Courts to resolve their disputes, arbitration was codified in Section 89 and Schedule II of the Code of Civil Procedure, 1908.

After enactment, the Arbitration Act, 1940 received a lot of criticism and the 1991 economic reforms hit hard, which resulted in the need for a well codified legislation on arbitration, as there was a need for foreign investments in India and a comfortable business environment. Thus, the Arbitration and Conciliation Act, 1996 came into force, which is based on the UNCITRAL Model Law on International commercial Arbitration, 1985 that covers both domestic as well as international arbitration. The Arbitration and Conciliation Act, 1996 was amended several times.

Some of the most crucial amendments in 2015 are as follows:

- A proviso to Section 2(2) was added which provided that subject to an agreement to the contrary, the provisions of Section 9, 27 and clause (a) of sub-section (1) and sub- section (3) of Section 37 shall also apply to international commercial arbitration.
- Section 9 was also amended to state that once the arbitral tribunal is constituted, the Court shall not entertain an application unless circumstances demand so, thereby, minimizing the intervention of the Court.
- Section 17 was also amended which gave the arbitral tribunal all powers of the Court under Section 9.
- Time limit of 12 months was fixed for making an arbitral award after the arbitral tribunal was constituted and

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this was inserted in the Act of 1996 by virtue of Section 29A.

- Scope of interference by Courts was reduced by virtue of Section 34 of the Act of 1996.

Some of the most crucial amendments of 2019 are as follows:

- Arbitration Council of India (ACI) was introduced for the advancement of various forms of alternative dispute resolution like conciliation, mediation, and arbitration.
- Grading of arbitral institutions by ACI
- Time period of 30 days for appointment of the arbitrator.
- The 8th Schedule was inserted providing various norms, qualifications and experiences for endorsement of arbitrators.
- Section 29A was amended to modify the timelines for carrying out the process ofarbitration.

Advantages of arbitration as a method of resolving commercial disputes.

- Efficient and flexible: quick resolution
- Less complicated
- Confidentiality
- Not partial since the place and arbitrator is chosen by the parties

Role of the Judiciary in Arbitration:

There are three main situations where the judicial authority is given the power to intervene in arbitral proceedings:

- Section 11 - When the method envisaged by the parties for appointment of arbitration fails.
- Section 27 - Assistance in acquiring evidence
- Section 14(2) - Whether the mandate of the arbitrator stands terminated due to inability to perform his functions or failures to proceed without undue delay.

Reasons for Hindrance in Growth of Arbitration in India

Conventional thinking and ignorance of people about laws is witnessed widely in developing countries like India. Changing their mindset requires an effective mechanism that can eliminate ignorance and promote awareness about existing laws and the rights enshrined in legislation.

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India's Growing Embrace of Arbitration

In the recent years, India has taken several steps to promote and strengthen the system of arbitration. After enactment of the Arbitration and Conciliation Act, 1996, a legislation based on the UNCITRAL Model Law, provides a comprehensive framework for arbitration, ensuring party autonomy, minimal judicial intervention, and enforceability of arbitral awards. Additionally, India has established dedicated arbitration institutions and centres, such as the Mumbai Centre for International Arbitration (MCIA) and the Delhi International Arbitration Centre (DIAC), which have played a crucial role in fostering the growth of arbitration. These institutions provide a platform for efficient and impartial arbitration proceedings, attracting both domestic and international parties.

India as a Global Arbitration Hub: Indian Government's efforts for making India as a hub for International Commercial Arbitration

The Government of India transformed focus to make India as not only a domestic hub but also a global hub for International Commercial Arbitration for the settlement of cross border commercial issues. The Government of India has taken commendable efforts to provide friendly cross-border business by conducting international conferences on arbitration. Under these conferences, national initiative to make a stronger arbitration law and its enforcement in India specially for cross border disputes. These interactive sessions focused on all processes involved in creating a robust and cost-effective arbitration ecosystem.

Conclusion:

The aforementioned few concepts would now make it clear that Arbitration in India has come a long way, evolving into a preferred dispute resolution mechanism for businesses. Understanding the intricacies of the Indian arbitration framework is essential for individuals and organizations looking to resolve their disputes efficiently. By shedding light on the arbitration process, legal developments, and the challenges faced, this article aims to equip readers with valuable knowledge to navigate the complexities of arbitration in India.

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APPLICATION OF ARBITRATION CLAUSE BETWEEN AGREEMENTS FORMING A SINGLE COMPOSITE TRANSACTION – M/s BESTPAY SOLUTIONS PRIVATE LIMITED Vs. M/s RAZORPAY SOFTWARE PRIVATE LIMITED

By Malavika. C

The Single Judge Bench of Justice Suraj Govindraj, Hon'ble High Court of Karnataka, rendered yet another noteworthy judgement on 6th, July, 2022, in M/S Bestpay Solutions Private Limited v. M/S Razorpay Software Private Limited[2]. The matter pertained to a Civil Miscellaneous Petition filed by M/s Bestpay Solutions Private Limited (Petitioner) against M/s Razorpay Software Private Limited (Respondent) for appointment of an arbitrator. The Court took the view that an arbitration clause in an agreement can be extended to disputes arising out of another agreement, provided both agreements lead to the formation of a single composite transaction.

Factual Matrix

A Service Agreement was entered into between the Petitioner and the Respondent on 18/11/2020 under which the Respondent was to provide gateway services to the Petitioner. Subsequently, another Tripartite Agreement dated 15/01/2021 was entered into whereby the Petitioner and ICICI Bank engaged the payment gateway services of the Respondent.

In furtherance of the terms set forth in the Tripartite Agreement, the Respondent set-off alleged dues outstanding from ICICI Bank by utilizing the funds available in the account held by the Petitioner.

Aggrieved by such set off, the Petitioner issued a notice dated 29/06/2021 calling upon the Respondent to refund the amount deducted from the accounts held by the Petitioner. On receiving no satisfactory resolution from the Respondent, the Petitioner invoked the arbitration clause

[2] *M/s Bestpay Solutions Private Limited v. M/s Razorpay Software Private Limited.,* Civil Misc. Petition NO.565 OF 2021.

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provided for in the Service Agreement. The Respondent issued a reply notice dated 01/07/2021 stating that the set-off was in accordance with the Tripartite Agreement, which is not covered in the arbitration clause under the Service Agreement, and hence would be beyond the scope of the proposed arbitration. In view of the said Reply, the Petitioner approached the Hon'ble Court seeking the appointment of an arbitrator.

Question of Law

Whether the arbitration clause can be extended to a dispute involving a third party arising out of another agreement?

Contentions of the Petitioner

The learned counsel for the Petitioner contended that the deduction of the amount from the account of the Petitioner standing under the Service Agreement was illegal and hence would be covered under the arbitration clause under the Service Agreement.

Contention of the Respondent

The Respondent argued that the deductions were made in view of a lien. The Respondent contended that it had charged reduced commission fee. It was further contended that the Tripartite Agreement provided the Respondent with the right to set-off any amount against the account of the Petitioner via ICICI Bank. Therefore, the deduction was made in furtherance of the terms under the Tripartite Agreement and not the Service Agreement containing the arbitration clause. The Respondent further stated that the usage of the term "this agreement" in the arbitration clause restricts any interpretation and the arbitration clause cannot cover matters beyond the ambit of the Service Agreement. The Respondent further contended that a commercial suit had been set in motion by the Respondent with respect to the set-off and other related matters, and as such the adjudication of the core dispute cannot take place in two fora.

Judgement and Analysis

The Hon'ble Court was of the view that considering the numerous references to ICICI Bank and the Tripartite Agreement in the arbitration notice dated 29/06/2021 issued by the Petitioner, and taking into consideration the dispute of set-off which concerned all three parties, the transaction under both the agreements constituted a composite transaction. Taking such a view, the Court held that ICICI Bank is a necessary party and held that the Petitioner

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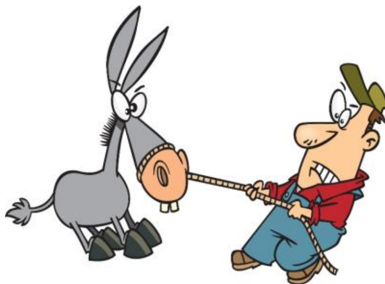
ought to have issued a notice to ICICI Bank in accordance with Section 21 of the Arbitration and Conciliation Act, 1996. In view of the same the court dismissed the petition reserving the liberty to the Petitioner to issue proper notices to all concerned parties.



WHETHER AN ARBITRATION AGREEMENT/AWARD CAN BE BINDING ON THE NON – SIGNATORIES TO THE AGREEMENT? - CHERAN PROPERTIES LIMITED VS KASTURI AND SONS LIMITED.

By Declyn Gomes

The Hon'ble Supreme Court was burdened while dealing with the fact as to whether an Arbitral Award could and if in that case would be binding upon a third party to the Arbitration Agreement. The Apex Court of India further examined the scope of Section 35 of the Arbitration and Conciliation Act to determine the extent of the terminology 'Claiming through or under' while examining the law set out in the landmark case of *Chloro Chemicals* and whether the said judgement would be applicable or not to the case at hand.

Factual Matrix

Sporting Pastime India Limited (SPIL), Kasturi Sons and Limited (KSL) and K.C. Palanisamy (KCP) entered into an agreement, whereby SPIL was to allot 240 lakh equity shares to KSL. In turn, KSL had offered to sell 243 lakhs equity shares to KCP. The reasoning behind this was that while the allotted shares had been transferred to KCP, KCP had agreed to take over the business, shares as well as the liabilities of SPIL as per the agreement entered into.

KCP failed to comply with the agreement which they had entered into and therefore KSL initiated Arbitration proceedings against KCP and SPIL. The Tribunal directed KCP and SPIL to return the share certificates. The Arbitral Tribunal further directed KSL to pay an amount of Rs. 3,58,11,000/-. The crux of the issue arose when KSL initiated proceedings to enforce the award against Cheran which is a

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nominee of KCP. The National Company Law Tribunal upheld the proceedings on the ground that Cheran is a nominee of KCP.

Point of Law

- Whether an arbitral award is binding on a third party?

Judgement and Analysis

As per Section 35 of the Arbitration and Conciliation Act, an arbitral award is binding on the parties and persons claiming through them. The issue was whether a nominee to a party would be considered to be claiming through them which would in essence make the award binding upon them or if they are not considered to fall under the terminology of 'claiming through or under', then whether the said award would not be enforceable against the non – signatories parties. The judgement in *Chloro Chemicals* holds its stead as it laid the foundation for the 'Group of Companies Doctrine'. The underlying principle behind the 'group of companies' doctrine is that a non – signatory party could be subjected to the arbitration provision in the agreement or could also have an arbitral award enforced against it. The essential requirement that would eventually back up the said doctrine would be the intention of the parties in question. The Court in the matter at hand held that upon an examination of the facts of the case, the Court would then examine the relationship of the signatories and non – signatories to the agreement.

If there was to be a company that is merely a subsidiary company or a mother company or a sister company of a particular parent company, an arbitral award could be enforced upon all of the abovementioned companies by virtue of the Group of Companies Doctrine. The rationale behind this is that the mother company or the sister company would have the same intention as that of the parent company. Once the intention of the parties has been determined the Group of Companies Doctrine could be brought into effect to hold the arbitral award or the arbitration agreement binding on the non – signatory parties.

The enforcement of the arbitral award has been sought against the appellant on the basis that it claims under KCP and is bound by the award. Section 35 of the Arbitration and Conciliation Act 1996 postulates that an arbitral award shall be final and binding on the parties and persons claiming under them respectively. The Appellants had received the shares of SPIL through an

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agreement entered into between SPIL and KCP. The said Appellants received the shares as per the agreement entered into between SPIL and KCP. Given that there was no separate agreement and that the previous agreement had no changes, it is well within the bounds of law that the Appellants would fall under the definition of Section 35 of the Arbitration and Conciliation Act. Therefore, given that the intention of the parties was the same, the Group of Companies Doctrine was used while holding that the arbitral award would also be binding on the non – signatories to the agreement.

CAN INDIA BE A GLOBAL HUB FOR ARBITRATION?

By Anagha Nagathan

Arbitration being one of the most efficient, and less-time consuming methods of Alternative Dispute Resolution is paving its route to a very different level for speedy settlement of disputes between the parties. Arbitration has its own advantages and disadvantages with respect to procedures involved, time-frames, autonomy of parties, etc. The international businesses and corporations are keen on finding ways to resolve their disputes efficiently and quickly. The enforcement of contracts is paramount and any non compliance of contractual obligations has financial implications on the impacted party. Therefore, adopting a simple, efficient method of resolving disputes is of great importance.

India is one of the fastest growing countries in the world and efforts are being made by the Government to make India a hub for Arbitration. The Arbitration and Conciliation act, 1996, ("the Act") is one such effective enactment. However, the question related to its enforcement still remains unanswered. In India, parties are opting to include arbitration agreements in their contracts *which would enable avoidance of traditional courts*. Most of the arbitrations that take place in India are *ad hoc* and not institutional arbitration. The government is taking various steps to make India a hub for arbitration and expand the scope of arbitration. The Arbitration and

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Conciliation (Amendment) Act, 2019, which was based on the recommendations of the B.N. Srikrishna Committee, aimed to institutionalize Arbitration in India. It also provides for establishment of an Arbitration Council of India under Sections 43-A to 43-M.[3]

Initiatives taken by the Indian Government

The Indian Government is making appreciable efforts to establish and standardize arbitration procedures in India. The Indian Council of Arbitration is an Apex body in arbitration matters and has handled a huge number of arbitration cases in India. The Delhi International Arbitration Centre situated at New Delhi is an institutional arbitration Centre which has its own rules and regulations with respect to fees payable to arbitrators, administrative expenses, rules of the institution and so on. The legislature has time and again made amendments to the Act in accordance with the changing times and difficulties faced by the parties as well as decisions laid down by the Apex Court of India.

Conclusion

India has all the requisites to become a global hub for arbitration provided that the loopholes and other points are addressed. The problems that are faced by the parties are that recourse against arbitral awards is ultimately the courts, that is, judicial intervention is still an issue. The problem with Arbitration is that it cannot stand independently and be separated from Courts. The entire purpose of Arbitration is not to overburden the already burdened Courts in India. Further, promoting institutional arbitration will not only help to resolve the disputes in a professional and systematic, way but will automatically invite foreign entities to resolve their disputes in India.

India is an emerging market for investors and it is clearing the road for various commercial contracts between parties globally. Under such circumstances, effective enforcement of awards, professionalism of arbitrators and other few aspects can help India witness a great change in its scenario when it comes to

[3] Tariq Khan, *Making India a Hub of Arbitration: Bridging the Gap Between Myth and Reality*, SCC Online, 17/02/2021, 2021 SCC OnLine Blog Exp 10 https://www.scconline.com/blog/post/2021/02/17/making-india-a-hub-of-arbitration-bridging-the-gap-between-myth-and-reality/.

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arbitration and its scope of becoming a hub for arbitration.

ANALYSIS OF M/S B AND T AG v. MINISTRY OF DEFENCE (2023 SCC OnLine SC 657)

By Gayathri Sriram

Introduction:

In a recent landmark decision, the Supreme Court of India delivered a judgment in the case of M/s B and T AG v Ministry of Defence, which has far-reaching implications for contract law. The case involved a dispute between M/s B and T AG, a prominent Defence contractor, and the Ministry of Defence, concerning a breach of contract. The judgment delivered by the Supreme Court sheds light on several crucial aspects of contract interpretation, performance, and remedies. This article aims to provide a comprehensive analysis of the case and its significance in shaping contract law jurisprudence in India.

Background:

M/s B and T AG had entered into a contract with the Ministry of Defence to supply advanced radar systems for military use. However, due to certain delays and technical issues, the delivery of the radar systems was delayed beyond the agreed-upon timeline. As a result, the Ministry of Defence terminated the contract and initiated legal proceedings against M/s B and T AG for the breach of contract.

Key Issues and Court's Reasoning:

1. *Interpretation of Contract Terms:*

One of the crucial issues before the Hon'ble Supreme Court was the interpretation of the contract terms. The Hon'ble Supreme Court emphasized the need to give effect to the intention of the parties while interpreting the contract. It held that the contract must be read as a whole, and the words should be given their ordinary meaning unless a contrary intention is evident. The Hon'ble Court also emphasized the importance of considering the surrounding circumstances and commercial purpose of the contract in interpreting its terms.

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In the case of M/s B and T AG v Ministry of Defence, the Court analysed the language used in the contract and the conduct of the parties. It considered the specific provisions related to delivery timelines and any provisions allowing for extensions or force majeure events. The Court also examined the correspondence between the parties during the performance of the contract. Based on this analysis, the Court determined that certain delays in delivery were caused by unforeseen technical issues beyond the control of M/s B and T AG.

2. *Performance of Contract:*

The Court looked into the question of whether M/s B and T AG's delay in delivering the radar systems amounted to a breach of contract. It acknowledged that certain delays were caused by unforeseen technical issues and concluded that the delays did not necessarily amount to a breach. The Court adopted a practical approach and considered whether the delays were substantial and whether they caused significant prejudice to the Ministry of Defence.

In this case, the Court considered the complexity of the project and the nature of the technical issues faced by M/s B and T AG. It noted that the delays were not caused by any willful negligence or deliberate actions of the contractor. Additionally, the Court examined the steps taken by M/s B and T AG to rectify the delays and found that they were actively working towards fulfilling their contractual obligations. Based on these considerations, the Court held that the delays did not constitute a breach of contract.

3. *Remedies for Breach of Contract:*

In determining the appropriate remedy for the breach of contract, the Court considered the principle of restitution. It noted that the purpose of restitution is to restore the aggrieved party to the position it would have been in, if the breach had not occurred. The Court held that in cases where the breach is not fundamental and the defaulting party can cure the breach, a decree of specific performance may be granted instead of terminating the contract altogether.

In this case, the Court found that the delays in delivering the radar systems were not fundamental breaches and could be rectified by M/s B and T AG. Therefore, instead of terminating the contract, the Court ordered specific performance, directing M/s B and T AG to complete the delivery of the radar

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systems within a specified timeframe. The Court considered this remedy as fair and appropriate, as it allowed the Ministry of Defence to receive the contracted goods while giving M/s B and T AG an opportunity to fulfill their obligations.

The Verdict

The major issue before the Court was whether the application under Section 11 of Arbitration Act for appointment of arbitrator was barred by limitation.

The Court opined that the Arbitration Act does not prescribe any time period for filing an application under Section 11(6) for appointment of Arbitrator. Thus, the limitation of three years provided under Article 137 of the Limitation Act, 1963 would apply to such proceedings. The time limit of three years would commence from the period when the right to apply accrues.

Further the Court opined that negotiations in disputes may continue for ten or twenty years after the cause of action had arisen for appointment of an arbitrator. However, the limitation period of three years for filing an application under Section 11(6) of Arbitration Act would not be defeated on the ground that the parties were negotiating. The Court noted that disputes between the Parties had cropped up in 2014 itself. Thus, the Petitioner cannot contend that the limitation period stood extended as it continued to negotiate till 2019. The Court rejected the arbitration petition for being hopelessly barred by time.

Importance of the Judgment:

- The judgment in M/s B and T AG v Ministry of Defence, 2023, marks a significant development in contract law in India.
- It provides clarity on the interpretation of contract terms, emphasizing the importance of giving effect to the intention of the parties.
- The Court's emphasis on a practical approach to evaluating the performance of contracts acknowledges the complexities and uncertainties that can arise in executing large-scale projects.
- By recognizing the principle of restitution and offering specific performance as a remedy, the Court strikes a balance between protecting the rights of the aggrieved party and allowing the defaulting party an opportunity to rectify the breach.

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Conclusion:

The Supreme Court's decision reaffirms the importance of interpreting contracts in a manner that reflects the true intent of the parties involved. Moreover, the judgment provides valuable guidance on evaluating contract performance and choosing appropriate remedies for breaches. This case will undoubtedly shape future contract law jurisprudence and contribute to the development of a more nuanced and equitable legal framework for contractual relations in India. The decision highlights the Court's inclination towards a practical and fair approach in dealing with breaches of contract, ultimately promoting justice and upholding the sanctity of contractual obligations.

WHETHER AN APPLICATION UNDER SECTION 11(6) CAN BE DISMISSED DUE TO INACTION OF THE PARTY MAKING SUCH APPLICATION? - M/S DURGA WELDING WORKS VS. CHIEF ENGINEER,

RAILWAY ELECTRIFICATION,

ALLAHABAD AND ANOTHER

By Malavika. C

"That's your best advice? Play nice!"

In the case of *M/s Durga Welding Works Vs. Chief Engineer, Railway Electrification, Allahabad and Another*[4], the Division bench of the Supreme Court of India comprising Justices Ajay Rastogi and Abhay S Oka by way of its judgement dated 04/01/2022 held that the inaction of the Appellant in its own Arbitration Petition justified the dismissal of the application to appoint an Arbitrator.

[4] *M/s Durga Welding Works Vs. Chief Engineer, Railway Electrification, Allahabad and Another,* Civil Appeal No(S).54 Of 2022, decided on 04/01/2022.

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Factual Matrix

The said appeal was filed by M/s Durga Welding Works against the Order dated 26/07/2019 passed by the High Court of Orissa declining to appoint an arbitrator in a petition filed under the Act.

The undisputed facts of the matter are that a tender was floated by the Railway Electrification Authority. The acceptance of the tender quoted by the Appellant was communicated vide letter dated 30/11/2006. In furtherance of the same, a contract was executed between the parties. Clauses 63 and 64 of the said contract provided for settlement of disputes or claims by way of arbitration.

In order to seek the unsettled claims, the Appellant issued a notice dated 3rd August 2009 for appointment of an arbitrator without any particular reference to clauses 63 and 64 of the contract. On failure of the Respondents to appoint an Arbitrator, the Appellants filed an Arbitration Petition (ARBP No.61of 2009) on 23/10/2009 before the High Court of Orissa for appointment of an Arbitrator under Section 11(6) of the Act. However, the Appellants failed to take any further action and the Respondents were not notified of the institution of the said Petition.

Unaware of the Petition before the High Court of Orissa and in response to the letter dated 30th November 2006, the Respondents issued a letter dated 28/01/2010 to the Appellant nominating two names to be appointed as arbitrator.

Pursuant thereto, the Appellant filed a Miscellaneous Case No. 4 of 2010 in the said Arbitration Petition No.61 of 2009 seeking an order restraining the appointment of an Arbitrator by the Respondents. However, no orders were passed in the said Miscellaneous Case. In the meanwhile, by letter dated 28/08/2010, the Appellants selected two persons from the panel of four suggested by the Respondents and an Arbitral Tribunal was constituted. Subsequently, the parties submitted their statement of claim and defence before the Tribunal.

On 27/12/2011, the Appellant appeared before the Tribunal and challenged the constitution of the Arbitral Tribunal on the ground that the stipulated time had lapsed. As the constitution of the Tribunal was with the consent of the Appellant, on failure of the Appellant to appear on several instances, the Tribunal passed an ex-parte award dated

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21/06/2013 rejecting the contention of the Appellant.

Due to inaction on the part of the Appellant in prosecuting the Arbitration Petition No.61/ 2009 for appointment of arbitrator, the High Court of Orissa issued notice after a lapse of 3 years from the date of issuance of the ex-parte award dated 21/06/ 2013. On becoming aware of the peculiar facts and circumstances of the matter, the High Court dismissed the Arbitration Petition by an order dated 26/07/2019 with liberty granted to the Appellant to file objections as per Section 34 and 37 of the Act.

Question of Law:

- Whether the Order dated 26/07/2019 by the High Court warranted interference?

Judgement and Analysis:

The Apex Court referring to the legal principles upheld in *Datar Switchgears Ltd Vs. Tata Finance Ltd. Anr.*[5] and in *Punj Lloyd Ltd. Vs. Petronet MHB Ltd*[6] reiterated that "*once an application has been filed under Section 11(6) of the Act for appointment of an Arbitrator before the High Court, the Respondents forfeited their right to appoint an Arbitrator and High Court alone holds the Jurisdiction to appoint an Arbitrator in exercise of power under Section 11(6) of the Act.*"

However, the Hon'ble Court took into consideration the peculiar facts and circumstances of the matter caused due to the inaction of the Appellants to carry forward the Arbitration Petition (ARBP No.61of 2009) and held that *"the High Court was not inclined to exercise its Jurisdiction under Section 34 or 37 of the Act."* The Hon'ble Court further noted that the Appellants had slept over the matter leading to circumstances which justified the impugned order passed by the High Court and accordingly, the Supreme Court dismissed the Appeal.

The aforementioned Judgement is an interesting interpretation of the scope of powers under Section 11(6) of the Act, which suggests that an application for appointment of an arbitrator may be dismissed, for inaction of the Applicant.

WHETHER THE COURTS HAVE THE POWER TO INTERFERE WITH AN AWARD PASSED BY THE ARBITRAL

[5] *Datar Switchgears Ltd., v. Tata Finance Ltd. Anr* 2000(8) SCC 151.

[6] *Punj Lloyd Ltd. Vs. Petronet MHB Ltd*, 2006(2) SCC 638.

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TRIBUNAL - MMTC Ltd. v M/S VEDANTA LTD.

By Declyn Gomes

The issue that plagued the Apex Court of India was whether the Court can interfere with an award that has been passed by the Arbitral Tribunal. The case created the ability for the Supreme Court of India to revisit the position of law that had been enumerated in the landmark case of *Associate Builders v Delhi Development Authority*[7] as well as *ONGC Ltd. v Saw Pipes*[8] among others. Innumerable judicial pronouncements have established the position of law that in case of a challenge against an award passed by an Arbitral Tribunal, there is no scope for the Court to delve into the merits of the matter or even appreciate any sort of evidence. The role of the Courts are simpliciter. Only if the issue falls within its power can the Court set aside the award.

Factual Matrix

Vedanta Ltd. (Respondent before the Supreme Court) had invoked the arbitration clause in an agreement entered into with MMTC Ltd. (Appellant) claiming payment for goods sold by the Respondent to one Hindustan Transmission Products Ltd through the Appellant. By the majority award dated 27/06/2001, the Arbitral Tribunal allowed the claims of the Respondent and directed the Appellant to pay the same along with interest. The Appellant challenged this Award under Section 34 of the Arbitration and Conciliation Act before a Learned Single Judge of the Bombay High Court on the ground that the disputes before the Arbitral Tribunal were not arbitrable as the same were not covered by the arbitration clause contained in the Agreement. The Learned Single Judge after considering the entire evidence and material on record dismissed the challenge. The said order passed by the Learned Single Judge was challenged by the

[7] *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49

[8] *ONGC Ltd. v. Saw Pipes Ltd*. (2003) 5 SCC 705.

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Appellant before a Division Bench of the Bombay High Court only on one ground namely that the disputes before the Arbitral Tribunal were not arbitrable. The Division Bench refused to interfere with the order passed by the Learned Single Judge and dismissed the appeal filed by the Appellant. The Appellant accordingly preferred a Civil Appeal in the Supreme Court, against the order of the Division Bench.

Point of Law

- Whether Courts have the power to interfere on merits with an award passed by The Arbitral Tribunal?

Judgement and Analysis

The crystallized point of law is that Courts cannot interfere on merits, with an award passed by the Arbitral Tribunal. It is also a well settled position that if any Court were to set aside an Arbitral award, they are to proceed with extreme caution as well as restrict themselves to the conditions enumerated under *Section 34 of the Arbitration and Conciliation Act.*

It was reiterated that the Court did not have power to delve into the facts of the issue or to even re-appreciate the evidence or pleadings that were placed before the Arbitral Tribunal.

After the implementation of the 2015 amendment to the Arbitration and Conciliation Act it has become set in stone that an arbitral award shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence. With the 2015 Amendment, the scope of interference by Courts with an arbitral award has been kept to a bare minimum. In the absence of such judicial restraint, the expediency and finality offered by arbitration proceedings as a measure for alternative dispute resolution, would be rendered ineffective.

Organizing Committee:

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Mr. Prashant Popat

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

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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 Member for Bulletin:

Mr. Prashant Popat

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