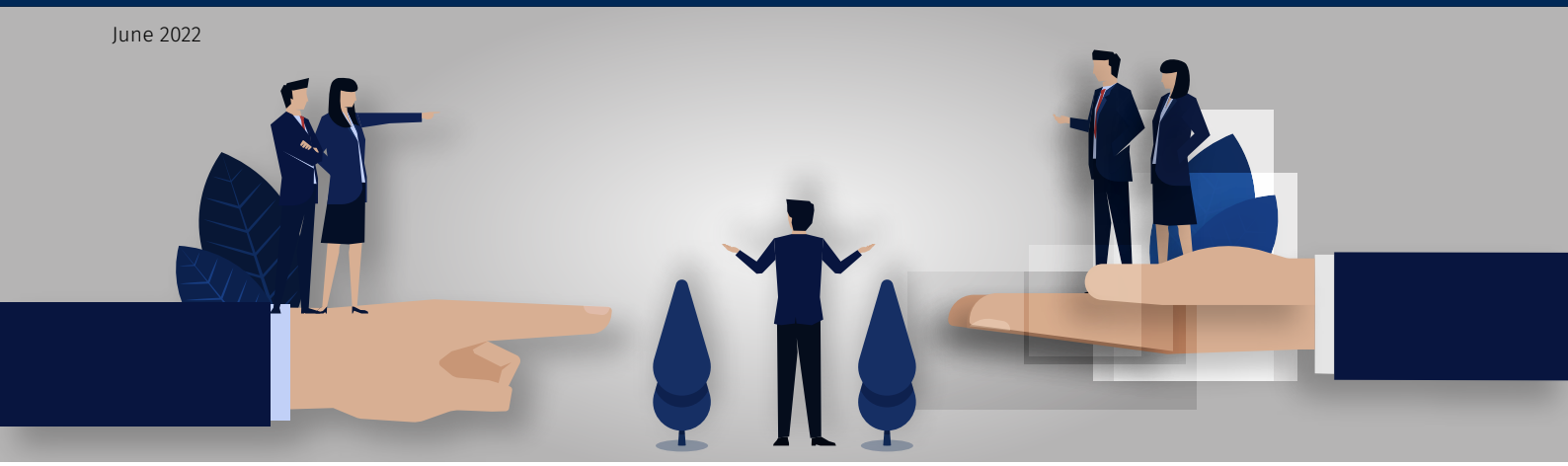
Arbitration Newsletter

Shardul Amarchand Mangaldas

June 2022



Arbitration Newsletter – June 2022

It gives us immense pleasure to circulate the twenty-first edition of the Arbitration Newsletter of Shardul Amarchand Mangaldas & Co.

In this edition, we have analysed the impact of recent arbitration related judgments of the Supreme Court of India and Indian High Courts.

We are pleased to share that the '2022 Edition of Benchmark Litigation Asia-Pacific' ranked Shardul Amarchand Mangaldas & Co as a 'Tier 1' firm for international arbitration. **Pallavi Shroff (Managing Partner and National Practice Head Dispute Resolution)** and **Tejas Karia (Partner – Head Arbitration**) have been ranked as 'Litigation Stars'. **Aashish Gupta (Partner)** and **Binsy Susan (Partner)** have been ranked as 'Future Stars'.

The 'Legal Era Leading Lawyers Rankings 2022' ranked **Pallavi Shroff (Managing Partner and National Practice Head Dispute Resolution)** as a 'Leading Lawyer Legend' and **Tejas Karia (Partner – Head Arbitration**) as a 'Leading Lawyer Champion'.

Shardul Amarchand Mangaldas & Co was recognised as one of the winners for Arbitration & ADR at the Indian Business Law Journal's Indian Law Firm Awards 2022.

The 'Forbes India Legal Powerlist 2021' recognised **Pallavi Shroff (Managing Partner and National Practice Head Dispute Resolution)** among the 'Top 50 Managing Partners'. **Tejas Karia (Partner – Head Arbitration)** and **Ila Kapoor (Partner)** were recognised among the 'Top 100 Lawyers'.

Tejas Karia (Partner – Head Arbitration) featured in the 'ALB Asia Super 50 Disputes Lawyers 2022'. He was also recognised as a 'Thought Leader' for the year 2022 by 'Who's Who Legal'.

We hope you enjoy reading this edition and find it useful to your practice.

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Arbitration Case Law Updates

High Court of Bombay clarifies that a writ petition under Articles 226 or 227 of the Constitution against an order passed by an arbitral tribunal is not maintainable[1]

Brief Facts

Tagus Engineering Private Limited and IDFC First Bank Limited (together the "**Petitioners**") had filed applications under Section 16 of the Arbitration and Conciliation Act, 1996 ("**Act**") challenging the jurisdiction of the arbitral tribunal in an arbitration against L&T Finance Ltd and Bell Invest India Limited (together the "**Respondents**"). The tribunal rejected both applications. Accordingly, the Petitioners filed writ petitions under Article 226 of the Constitution of India ("**Constitution**") before the High Court of Bombay ("**Court**") seeking writs of mandamus against the Respondents.

Issue

Whether a writ petition is maintainable against an order passed by an arbitral tribunal?

Judgment

At the outset, the Court's attention was drawn to the fact that both Petitioners were seeking writs of mandamus against private financial entities, which cannot be considered as 'States' under Article 12 of the Constitution. Accordingly, the Division Bench held that it is wholly impermissible for it to exercise its jurisdiction under Article 226 of the Constitution, including on questions of the jurisdictional competence of an arbitral tribunal, except "*perhaps*" where the arbitral tribunal is itself a statutory tribunal, i.e., one created by statute.

Further, the Division Bench relied on the Supreme Court's decisions in ***Deep Industries Ltd. v. ONGC Ltd. and Anr.***[2] and ***Bhaven Construction v. Executive Engineering Sardar Sarovar Narmada Nigam Ltd. and Anr.***[3] on the issue of the extent of permissible judicial interference in orders passed by an arbitral tribunal under Articles 226 or 227 of the Constitution. The Court emphasised the following principles:

- A party that is aggrieved by an order passed by an arbitral tribunal can only challenge the order under Section 34 of the Act, subject to an appeal being available under Section 37 of the Act. This is the scheme of the Act, which is in line with the principle of minimal judicial interference enshrined in Section 5 of the Act.
- An arbitral tribunal is a creature of a contract between parties and therefore, it is incorrect to say that any order passed by an arbitral tribunal is capable of being corrected under Articles 226 or 227 of the Constitution.
- It is settled law that when a statutory forum is created for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. Therefore, a court must be extremely circumspect in exercising its inherent power under Articles 226 and 227 – it "*needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear "bad faith" shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient*".

IDFC First Bank Limited argued that there are exceptional circumstances warranting the Court's interference. Specifically, it argued that the arbitration is contrary to the law laid down by the Supreme Court in ***Vidya Drolia & Ors. v. Durga Trading Corporation***,[4] which forbids recourse to arbitration where parties have remedies under the Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), Recovery of Debts Due to Banks and Financial Institutions, 1993 (RDDBFI Act) and other laws related to the Debt Recovery Tribunal.

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However, the Court did not find this to be an "*exceptional circumstance*" and held that such an argument overlooks the intent and purpose of the Act, which is to minimise judicial interference and provide a quick dispute resolution mechanism. Further, the Court reasoned that the Act contains an in-built mechanism to address jurisdictional challenges – namely an application under Section 16 and if required, a challenge against the tribunal's order under Section 34 of the Act once the award is passed. Therefore, if the Petitioners are aggrieved by the orders passed in their respective applications under Section 16 of the Act, their remedies lie elsewhere and not in writ petitions claiming 'exceptional circumstances'. The Court accordingly rejected both writ petitions.

Analysis

With this decision, the Court has reiterated the established principles of the Act being a complete code in itself and minimum judicial interference in the arbitration process. Hence, aggrieved parties cannot resort to the writ jurisdiction of High Courts to seek recourse against unfavourable orders issued by arbitral tribunals. The Court specifically held that it is impermissible for High Courts to exercise their discretionary power under Articles 226 and 227 of the Constitution on questions of the jurisdictional competence of an arbitral tribunal. The Court also clarified that non-arbitrability is not an exceptional circumstance warranting judicial interference under Articles 226 or 227 as the Act provides a mechanism to address such issues. However, the Court indicated that an exception may be made where the tribunal is created by a statute.

High Court of Gujarat observes that the non-obstante clause in Section 12(5) of the Act will supersede an agreement between parties to allow one party to appoint an arbitrator[5]

Brief Facts

On 17 January 2017, M/s M. N. Trapasia ("**Petitioner**") entered into a contract ("**Contract**") with Divisional Railway Manager (WA) ("**Respondent No. 1**") for the repair of railway lines and associated works in Vadodara pursuant to a tender. Disputes arose between the parties when Respondent No. 1 terminated the Contract in April 2018 on the ground that the Petitioner breached its contractual obligations. The Petitioner denied having breached the provisions of the Contract and demanded payments under the Contract. However, there was no response from Respondent No. 1.

The Petitioner thereafter issued a notice under Section 21 of the Act read with Clause 64 of the Contract and requested Respondent No. 2 (Respondent Nos. 1 and 2 are collectively referred to as "**Respondents**") to appoint an arbitrator to adjudicate the disputes between the parties. Since there was no response forthcoming from the Respondents, the Petitioner filed a petition under Section 11(6) of the Act ("**Section 11 Petition**") before the High Court of Gujarat ("**High Court**") seeking appointment of an arbitrator. On 18 March 2021, after filing the Section 11 petition, the Respondents appointed one of its officers as the arbitrator as per Clause 64(3)(b) of the General Conditions to Contract ("**GCC**"). The Respondents also sent a communication to the Petitioner seeking the latter's consent to waive the applicability of Section 12(5) of the Act to the present facts. The Petitioner, however, did not convey its consent for this purpose.

Before the High Court, the Petitioner contended that as per Section 12(5) of the Act,[6] there is an embargo on the Respondents to appoint one of its officers as an arbitrator unless there is a waiver expressly agreed in writing, which was not the case. The proviso to Section 12(5) of the Act states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. On the other hand, the Respondents contended that even in the absence of a waiver under Section 12(5) of the Act, their right to appoint an arbitrator under Clause 64(3)(b) of the GCC could not be forgone.

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Issue

Whether the Respondents could have appointed an officer as an arbitrator by virtue of Clause 64(3)(b) of the GCC in view of Section 12(5) of the Act?

Judgment

At the outset, the High Court noted that the Respondents invoked Clause 64(b)(3) of the GCC to appoint its officer as an arbitrator after the Petitioner filed the Section 11 Petition before the High Court. It was only then that the Respondents sought a waiver of the application of Section 12(5) of the Act from the Petitioner, which came to be refused.

On the scope of Section 12(5) of the Act, the High Court held that the expression "*notwithstanding any prior agreement to the contrary*" in Section 12(5) operates as a non-obstante clause. Placing reliance on decisions of the Supreme Court, the High Court observed that the object of incorporating a non-obstante clause in a statutory provision is to give an overriding effect to the provision that follows the non-obstante clause over any agreement and/or specific circumstance contemplated within the ambit of such non-obstante clause.

Contextualising the above non-obstante clause in the facts of the case, the High Court went on to hold that the object of Section 12(5) of the Act is very clear, i.e., to ensure that any person who falls within any of the categories specified in Schedule VII of the Act is precluded from acting as an arbitrator. It further stated that the only situation in which this non-obstante clause would not come into play is when the parties, subsequent to disputes subsisting between them, decide to waive the applicability of Section 12(5) in writing. In the present facts, the High Court did not find any evidence of such waiver having agreed to between the parties mutually. Since the Petitioner never consented to waiving the application of Section 12(5), the High Court held that there could not have bene any deemed waiver on the strength of the Respondents issuing a communication calling upon the Petitioner to waive the embargo under Section 12(5).

The High Court also observed that the independence and impartiality of an arbitrator constitutes the hallmark of arbitration proceedings. It was because of these considerations of neutrality of an arbitrator that the Act was amended in 2015 to provide for Section 12(5). The High Court rejected the decisions relied upon by the Respondents on the ground that they related to agreements entered into between parties before the insertion of the amended Section 12(5) of the Act and therefore, were held to be inapplicable.

Accordingly, the High Court allowed the Section 11 Petition and proceeded to appoint the arbitrator.

Analysis

In so far as preserving the intent and purpose of Section 12(5) of the Act (which is to preserve the independence and impartiality of arbitrators) is concerned, this judgment is most certainly a step forward in the right direction. The judgment correctly holds that the neutrality of an arbitrator upholds the sanctity of the arbitration process and therefore, there is an affirmative need to ensure that parties do not appoint arbitrators who fall within any of the categories specified in Schedule VII read with Section 12 of the Act.

High Court of Delhi clarifies scope of proviso to Section 38(1) of the Act[7]

Brief Facts

Jivanlal Joitaram Patel ("**Applicant**") filed a clarification application in an appeal, which was disposed of by the Division Bench of the High Court of Delhi ("**Court**") while appointing a sole arbitrator to adjudicate claims and counter-claims of the parties afresh. The Court further directed the arbitrator's fees to be fixed as per the Fourth Schedule of the Act. The application was filed seeking clarification regarding the fixation of arbitral fees.

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Vide the procedural order dated 27 January 2021, the arbitral tribunal fixed the arbitral fees by holding that the applicable arbitral fees have to be assessed separately for the claim and counter-claim. The arbitral tribunal noted the following: (i) the proviso to Section 38(1) of the Act carves out a specific exception for the arbitral tribunal to fix separate fees for claims and counter-claims; (ii) a counter-claim would most likely arise from an independent cause of action and can continue even if the main suit fails or is withdrawn; (iii) separate court fees is required to be paid on the amount of a counter-claim; (iv) adjudication of claims and counter-claims mostly requires additional evidence and arguments; (v) claims in a particular case may cross the ceiling under the Fourth Schedule to the Act and if counter-claims are filed thereafter and they are taken together with the claims, the arbitral tribunal would have to decide the counter-claims and the claims without any additional fees, which could not be the intention of the statute; (vi) a conjoint reading of Sections 38(1) and 31A of the Act leaves no doubt that arbitral fees and expenses can be fixed by the arbitral tribunal separately for claims and counter-claims; and (vii) even in terms of the Delhi International Arbitration Centre Rules and the Indian Council of Arbitration's Rules, claims and counter-claims are assessed separately for calculation of arbitral fees.

After making the above observations, the arbitral tribunal gave liberty to the parties to approach the Court for seeking clarification in the matter of fixation of arbitral fees.

Issue

Whether counter-claims are to be included in the expression "*sum in dispute*" appearing in the Fourth Schedule to the Act or the amounts thereof are to be separately considered in terms of the proviso to Section 38(1) of the Act?

Judgment

The Court held that the "*sum in dispute*" would include both, the claim and counter-claim amounts. In arriving at this conclusion, the Division Bench relied upon the decision in ***Delhi State Industrial Infrastructure Development Corporation Ltd. v. Bawana Infra Development Pvt. Ltd.***[8] where the Ld. Single Judge noted that the proviso to Section 38(1) of the Act can only apply when the arbitral tribunal fixes its own fees. The court in that case held that the said proviso cannot apply when the arbitral tribunal fixes its fees in terms of the Fourth Schedule to the Act.

The Ld. Single Judge in ***DSIIDC*** (*supra*) based its findings on the following:

- the 246th Law Commission Report gave the rationale behind fixing of a model schedule of fees, so that arbitration becomes a cost-effective solution for dispute resolution in the domestic context.
- the fee schedule set by DIAC is where "*sum in dispute*" is the cumulative value of claim and counter claim.
- if the legislature intended to have the arbitral tribunal exceed the ceiling limit by charging separate fees for claim and counter-claim amounts, it would have provided so in the Fourth Schedule.
- the argument that the adjudication of counter-claim would require extra effort by the arbitral tribunal and therefore, the tribunal should be entitled to charge a separate fee for the same is incorrect. The object of providing for counter-claim is to avoid multiplicity of proceedings and to avoid divergent findings. Keeping the object of the Arbitration and Conciliation (Amendment) Act, 2019 in view, the ceiling on the fees, as prescribed in the Fourth Schedule to the Act, cannot be allowed to be breached.

The Division Bench further held that the expression "*sum in dispute*" used in the Fourth Schedule to the Act has to be given its ordinary meaning. It also held that unlike a civil suit, where a counter claim could be in respect of a totally different transaction, in the context of arbitral proceedings, the counter claim has to necessarily be in relation to the arbitration

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agreement. Therefore, in the context of arbitration proceedings, it may not be correct to say that counter claim would be an "independent" cause of action.

Analysis

The Court's decision reiterates that where the arbitral tribunal's fees have been fixed by the court in terms of the Fourth Schedule to the Act, Sections 38(1), 31(8) and 31A of the Act would have no application. The term "*sum in dispute*" used in the Fourth Schedule to the Act has to be interpreted to include the aggregate value of the claims and counter-claims. This clarity was much awaited since it has now crystallised the scope of "*sum in dispute*" and reduced the possibility of conflicting meanings and methods of computation of the said term.

High Court of Calcutta rules on rights of an MSME award-holder seeking withdrawal of a part of the amount deposited by the award-debtor with the court[9]

Brief Facts

Optimal Power Synergy India Pvt. Ltd. ("**Optimal**" or "**Award-holder**"), a small manufacturing enterprise, had issued eight purchase orders to BHEL ("**Award-debtor**") for the supply of a solar power conditioning unit and other items for a diesel power plant. The payment terms in the purchase order stipulated 80–90% payment on supply and 100% taxes with 30–45 days of credit from receipt of the material at site. The balance of 10% was required to be paid on execution of basic supply of the materials. On non-payment of the stipulated amounts, Optimal referred the dispute under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 ("**MSME Act**"). BHEL failed to participate in the conciliation proceedings and the dispute was finally referred to arbitration.

In terms of the award dated 24 September 2019 ("**Impugned Award**"), the West Bengal State Micro Small Enterprises Facilitation Council directed BHEL to pay the principal sum of INR 61,08,654/- along with interest. Further, Optimal was directed to submit its claim for interest and BHEL was directed to pay the said sum within 30 days from the date of submission of the claim of interest. Accordingly, Optimal submitted its claim for an amount of INR 2,78,88,228/- inclusive of interest.

Thereafter, Optimal filed an execution application before the High Court of Calcutta ("**Court**") while BHEL filed applications for setting aside and stay of the Impugned Award. The stay application was disposed of by an order of the Court by which BHEL was directed to deposit 75% of the total awarded amount (principal and interest) and to deposit 50% of this amount with the Registrar (Original Side) of the Court. The remaining 50% was directed to be given by way of a bank guarantee from a reputed bank within a specific time frame.

Issues

Issue (i): Whether the Award-holder will be entitled to withdraw the amount deposited by the Award-debtor, if the application for setting aside the Award is filed?

Issue (ii): Whether the Award-holder can withdraw 75% of the principal amount without furnishing security?

Judgment

Issue (i): The Court observed that Section 36(3) of the Act provides the Court with the discretion to grant stay of an arbitral award subject to conditions that it may deem fit. However, in terms of Section 19 of the MSME Act, it is mandatory for an award-debtor to deposit 75% of the amount in terms of the award. Further, the *proviso* to Section 19 clarifies that a percentage of the amount deposited shall be paid to the supplier under such circumstances as the court may deem fit.

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While interpreting the text of Section 19, the Court emphasised the leverage given to the supplier under Section 19 of the MSME Act and held it to be in consonance with the overall scheme of the MSME Act, the object of which is to facilitate promotion, development and competitiveness of micro, small and medium enterprises ("**MSMEs**"). Accordingly, the Court upheld the right of the Award-holder to withdraw a portion of the amount deposited by the Award-debtor pending an application for setting aside the award.

In the present case, the Court allowed Optimal to withdraw 75% of the principal sum awarded by the Impugned Award, since the dispute in the application for setting aside the award was only in relation to the amount of interest, which was to be added to the principal sum under Section 16 of the MSME Act.

Issue (ii): The Court observed that Section 19 of the MSME Act contemplates exercise of discretion in considering the application for stay of an award with respect to: (a) the percentage of the deposited amount, which is to be paid to the supplier; as well as (b) the conditions to be imposed for such payment. The Court highlighted that the concluding part of the proviso, i.e., "*as it deems necessary to impose*" clarifies that the court is empowered to not only decide the nature of conditions that may be imposed on the supplier for withdrawing the money but also consider if such conditions are necessary in light of the facts of the case. Accordingly, the Court emphasised the importance of considering the particular facts of the case, which act as a guiding factor for exercise of discretion by courts under Section 19 of the MSME Act.

In the present case, the Court also took into account the Award-holder's ailing financial position. The Court noted that Optimal had just recovered from a financial crisis suffered on account of the pandemic and required urgent funds for meeting its operations costs and for survival of its workmen. Therefore, the Court allowed Optimal to withdraw 75% of the principal amount awarded in the arbitration without requiring any security.

Analysis

The Court has reiterated the rights of MSMEs protected by the MSME Act. The present decision of the Court has emphasised and reinforced the discretionary power of courts under Section 19 of the MSME Act to decide the quantum and terms on which the amount deposited by an award-debtor could be withdrawn by a supplier award-holder. The Court interpreted Section 19 in consonance with the object and scheme of the MSME Act, which is to ensure survival of MSMEs and prevent them from being crushed under the weight of financial pressures aggravated by initiation of proceedings for realisation of their dues from supply of materials to a buyer.

Supreme Court holds that parties' agreement on location of sitting of arbitral tribunal amounts to 'venue' and not 'seat' of arbitration[10]

Brief Facts

The Appellant and the Respondent entered into a Development Agreement dated 15 June 2015 ("**Agreement**") for development of a property situated at Muzaffarpur in Bihar outside the jurisdiction of High Court of Calcutta ("**Calcutta High Court**"). The Agreement was executed and registered in Muzaffarpur in Bihar, and contained an arbitration clause, which *inter alia* provided that "*the sitting of the said Arbitral Tribunal shall be at Kolkata*".

Differences arose in relation to the said Agreement, following which the Respondent, on 24 April 2019, terminated the Agreement, which termination was not accepted by the Appellant.

On 17 August 2019, the Respondent filed a petition under Section 9 of the Act for interim reliefs in the Court of the District Judge, Muzaffarpur (Bihar) ("**Bihar Court**"). Thereafter, the Respondent sent a notice invoking arbitration under the Agreement to the Appellant at its registered office

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at Patna in Bihar, outside the jurisdiction of the Calcutta High Court.

On 15 January 2021, the Respondent filed a petition under Section 11(6) of the Act in the Calcutta High Court ("**Petition**"). The Appellant questioned the territorial jurisdiction of the High Court, whereas the Respondent contended that the Calcutta High Court exercises jurisdiction over the place agreed upon as the seat of arbitration and would thus, have jurisdiction to entertain the Petition.

On 13 August 2021, the Calcutta High Court allowed the Petition and appointed a sole arbitrator, without adjudicating the issue of territorial jurisdiction ("**Final Order**"). *Vide* order dated 4 October 2021 ("**Review Order**"), the Calcutta High Court dismissed the Appellant's application for review of the Final Order. The Appellant challenged the Final Order and Review Order before the Supreme Court.

Issue

Whether the Calcutta High Court had the jurisdiction to entertain the Petition filed by the Respondent and appoint an arbitrator?

Judgment

The Supreme Court observed that the definition of 'Court' in Section 2(1)(e) of the Act would not be applicable in the case of a High Court exercising jurisdiction under Section 11(6) of the Act to appoint an arbitrator. At the same time, an application under Section 11(6) of the Act cannot be moved in any High Court in India, irrespective of its territorial jurisdiction. Section 11(6) has to be harmoniously read with Section 2(1)(e) of the Act and construed to mean a High Court that exercises superintendence/supervisory jurisdiction over a Court within the meaning of Section 2(1)(e) of the Act.

The Appellant had contended that basis Section 42 of the Act, an earlier application for interim relief having been moved at the Bihar Court, the Respondent could not have invoked the jurisdiction of the Calcutta High Court. The Court held that Section 42 cannot possibly have any application to an application under Section 11(6), which necessarily has to be made before a High Court, unless the earlier application was also made in a High Court. In the instant case, the earlier application under Section 9 was made in the Bihar Court and not in the High Court of Judicature at Patna. An application under Section 11(6) of the Act could not have been made in the Bihar Court. Therefore, Section 42 is not attracted.

Thereafter, to determine whether Kolkata was the seat or venue of arbitration, the Court relied on ***Union of India v. Hardy Exploration and Production (India) Inc***.,[11] wherein a three-judge bench of the Supreme Court held that the sittings at various places are relatable to venue. It cannot be equated with the seat of arbitration or place of arbitration, which has a different connotation. The Court also referred to ***Mankastu Impex Private Limited v. Airvisual Limited***[12] in this regard.

The Supreme Court held that the Calcutta High Court did not have jurisdiction to entertain the Petition filed by the Respondent since: (i) the Agreement was admittedly executed and registered in Bihar; (ii) the Agreement pertains to development of a property located in Muzaffarpur (Bihar); and (iii) the Appellant has its registered office in Patna, all outside jurisdiction of the Calcutta High Court. The Appellant had no establishment and did not carry on any business within the jurisdiction of the Calcutta High Court and no part of the cause of action had arisen within the jurisdiction of the Calcutta High Court.

Further, in this case, the parties did not agree to refer their disputes to the jurisdiction of the courts in Kolkata. The parties did not intend that Kolkata should be the seat of arbitration; Kolkata was only intended to be the venue for arbitration sittings. Accordingly, the Respondent

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himself approached the Bihar Court, and not a court in Kolkata for interim protection under Section 9 of the Act. The Respondent having himself invoked the jurisdiction of the Bihar Court is estopped from contending that the parties had agreed to confer exclusive jurisdiction on the Calcutta High Court to the exclusion of other courts. The Calcutta High Court inherently lacked jurisdiction to entertain the Petition and should have decided the Appellant's objection to the jurisdiction of the High Court to entertain the Petition, before appointing an arbitrator.

The Court accordingly set aside the Final Order, Review Order as well as the appointment of the arbitrator and appointed another arbitrator to decide the disputes.

Analysis

The Supreme Court has once again reiterated the difference between seat and venue of arbitration and has given effect to the intention of the parties by strictly construing the language of the arbitration agreement. The Court has also elucidated the interplay of Sections 2, 11 and 42 of the Act for determining jurisdiction of courts for appointment of an arbitrator to clarify that Section 42 will not be applicable to applications for appointment of arbitrator which have to be made before a High Court unless the previous application was made before a High Court.

High Court of Delhi clarifies the scope of challenging the mandate of an arbitrator under Section 14(1) of the Act[13]

Brief Facts

Sacheerome Advanced Technologies ("**Petitioner**") filed a petition under Section 14(2) of the Act before the High Court of Delhi ("**Court**") for terminating the mandate of the sole arbitrator. The Petitioner challenged the mandate on the following grounds: (i) the conduct of the arbitrator did not inspire confidence since the arbitrator's conduct with regard to the fixation of dates for cross-examination and the manner of conducting the same gave rise to apprehension of real likelihood of bias; (ii) the arbitrator was unjustified in changing the mode of cross-examination from physical to virtual; and (iii) there had been inordinate delays on the part of the arbitrator in conducting the arbitration proceedings.

Issues

Issue (i): In view of the fact that the Petitioner has challenged the mandate of the tribunal on grounds set out under Section 12(3) of the Act, whether the petition was maintainable?

Issue (ii): Whether the arbitral tribunal had caused delays in conducting the arbitration proceedings and not acted with due dispatch in conducting the said proceedings?

Judgment

Issue (i): The Court rejected all the grounds raised by the Petitioner and held the petition to not be maintainable. The Court held that it is a well settled position that: (i) a petition under Section 14(1) of the Act cannot be filed to challenge the appointment of an arbitrator on the grounds set out under Section 12(3) of the Act; (ii) a party seeking to challenge the mandate of an arbitrator on the aforesaid grounds is required to do so under Section 13 of the Act wherein the said challenge is required to be considered by the arbitral tribunal; (iii) in the event that the said challenge is not successful, the only recourse available to the party challenging the appointment is to await the arbitral award and take recourse to the provisions set out under Section 34 of the Act. In holding the aforesaid, the Court relied upon the decisions in ***Progressive Career Academy Pvt. Ltd. v. FIITJEE Ltd.***[14] and ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd***.[15] In view of the aforesaid, the Court held that given that the Petitioner had challenged the appointment before the arbitrator which was decided by the arbitrator, the only recourse now available to the Petitioner was to proceed with the arbitration proceedings and challenge the award under Section 34 of the Act thereafter.

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Issue (ii): As regards the contention that the arbitrator had conducted the proceedings with inordinate delays, the Court held that: (i) the arbitral tribunal was appointed on 9 August 2021 and a number of hearings had been held by the arbitral tribunal despite the circumstances on account of the outbreak of COVID-19; and (ii) the matter was at the stage of recording of evidence.

As regards the Petitioner's contention that the arbitrator was unjustified in changing the mode of cross-examination from physical to virtual, the Court held that the said contention was without any substance inasmuch as: (i) it was common that the number of COVID-19 cases had increased; and (ii) the Petitioner itself had objected to the change in the mode of hearing after two weeks since the counsel on record were down with COVID-19, which was sufficient to demonstrate that change in the mode of hearing was justified.

The Court further held that to determine if the tribunal had acted with due dispatch, the bearing of the mitigating circumstances resulting from COVID-19 is required to be considered. In view of the above, the arbitral tribunal had acted with due dispatch and there had been no delay on its part and the Court accordingly dismissed the petition with costs of INR 25,000.

Analysis

This decision reiterates the limited grounds on which an application under Section 14(1) of the Act can be preferred for termination of the mandate of an arbitrator. The Court has clarified that: (i) a recourse to Section 14(1) of the Act would not be available to challenge an arbitrator on the grounds specified in Section 12(3) of the Act; and (ii) in the event that an arbitrator is ineligible to be appointed as an arbitrator under Section 12(5) of the Act, a petition under Section 14 may be maintainable. This will ensure that a petition for termination of the mandate of an arbitrator is preferred only on limited grounds and also ensure minimal judicial interference in arbitration proceedings.

High Court of Calcutta clarifies that an arbitration agreement in a partnership deed continues to exist even after the death of a party thereto and the legal representatives of the deceased are bound by the arbitration agreement[16]

Brief Facts

A partnership deed was executed between Dr. Papiya Mukherjee ("**Applicant**") and Dr. Dhrubajyoti Banerjea in 1992 for running a pathological laboratory namely, Calcutta Clinical Laboratory. The said partnership deed contained an arbitration clause for resolution of disputes. Dr. Dhrubajyoti Banerjea passed away in 2015 leaving two surviving legal heirs (collectively "**Respondents**"), one of whom was his wife ("**Respondent No. 1**").

After the death of Dr. Dhrubajyoti Banerjea, Respondent No. 1 started committing various illegalities in relation to the business of the firm. Therefore, the Applicant filed a petition under Section 9 of the Act, wherein a restraint order was passed on 16 March 2016. An arbitrator was appointed in the dispute upon the request of the Respondents and the arbitration was commenced thereafter. However, subsequently, due to settlement talks between the parties, the arbitration did not proceed further.

Around December 2019, disputes again arose between the parties and the Applicant sent a notice of arbitration to the Respondents requesting them to appoint an arbitrator. The Respondents denied the Applicant's request stating that there was no valid arbitration agreement between the parties. In view of the said refusal, the Applicant filed an application under Section 11 of the Act for the appointment of an arbitrator by the High Court of Calcutta ("**Court**").

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Issues

Issue (i): Whether upon the death of a partner, an arbitration agreement continues to exist?

Issue (ii): If yes, are the legal representatives of the deceased bound by such an arbitration agreement?

Judgment

Issue (i): While placing reliance on Section 40 of the Act, and Sections 42 and 46 of the Partnership Act, 1932, the Court held that an arbitration agreement continues to exist even after the death of a partner and is enforceable by or against the legal representatives of the deceased. The Court also placed reliance on the Supreme Court's decision in ***Ravi Prakash Goel v. Chandra Prakash Goel***,[17] wherein the Apex Court considered Section 40 of the Act and held that "*an arbitration agreement is not discharged by the death of any party thereto and on such death it is enforceable by or against the legal representatives of the deceased* [...]".

Issue (ii): In the facts of the case, the Court observed that although the Respondents are not signatories to the arbitration agreement executed in the year 1992, but being the legal representatives of Dr. Dhrubajyoti Banerjea, who was one of the signatories to the agreement, they are bound by it to the extent provided in law. Further, the Court also noted the conduct of the Respondents to this effect, inasmuch as at an earlier stage, the Respondents themselves had invoked the subject arbitration clause in the capacity of the legal heirs of the deceased, Dr. Dhrubajyoti Banerjea, with a request to appoint a sole arbitrator.

Analysis

The decision of the Court affirms the position of law that an arbitration agreement will not cease to exist upon the death of one of the parties thereto and, in fact, the legal heirs of the party will be bound by such an arbitration agreement. It also takes into consideration the prior conduct of the Respondents wherein they themselves had invoked arbitration under the same clause, the validity of which they subsequently sought to challenge. The decision of the Court is also in line with that of the Supreme Court in ***Ravi Prakash Goel*** (*supra*) and other similar cases decided by various other High Courts.[18]

High Court of Delhi reiterates that in an action to recover an amount under an arbitral award payable in a foreign currency, the date for determining the applicable exchange rate is the date on which the decree becomes final and executable[19]

Brief Facts

MMTC Ltd. ("**Respondent/Judgment Debtor**") entered into a contract ("**Contract**") with M/s Karam Chand Thapar & Bros. (Coal Sales) Ltd. ("**Petitioner/Decree Holder**") (collectively "**Parties**") to engage the Petitioner as a stevedoring and handling contractor for handling imported coal received from foreign vessels and its transportation to a thermal power station of the National Thermal Power Corporation Limited located at Talcher, Odisha.

Disputes arose between the Parties under the Contract. These disputes were referred to arbitration by the Petitioner. The arbitral proceedings culminated in an arbitral award on 7 January 2017 ("**Award**"). Under the Award, the arbitral tribunal awarded the claims of the Petitioner in two currencies: Indian Rupees ("**INR**") and US Dollars ("**USD**"). The Respondent challenged the Award before a single judge of the High Court of Delhi ("**High Court**") under Section 34 of the Act, albeit unsuccessfully. This was followed by an appeal before a Division Bench of the High Court under Section 37 of the Act, which also failed. A special leave petition against this order came to be dismissed by the Supreme Court on 29 April 2019.

Pursuant to the above, the Respondent deposited an amount of approx. INR 69.7 million with the registry of the High Court on 7 May 2019. According to the Respondent, the above figure was

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arrived at by computing the amount awarded in USD to INR at the exchange rate of INR 73.996 per USD (exchange rate prevailing on 7 May 2019). Out of the approx. INR 69.7 million, an amount of approx. INR 57.1 million was released to the Petitioner. This comprised the amount awarded in INR along with interest till 7 May 2019 (date of deposit) and the amount equivalent to the monies awarded in USD converted at an exchange rate of INR 45.10 per USD (the exchange rate applicable as on 15 May 2010, which is when the Petitioner demanded the claim amount from the Respondent for the first time).

The Petitioner, however, was of the view that the applicable exchange rate for converting the amount awarded in USD ought to be the rate prevailing as on 29 April 2019 since this is the date when the Respondent's special leave petition was dismissed by the Supreme Court and therefore, the Award became final and executable as on that date. Accordingly, the Petitioner filed an enforcement petition before the High Court under Section 36 of the Act seeking enforcement of the balance amount awarded in the Award.

Issue

What is the relevant date for determining the applicable exchange rate required to be applied to satisfy an award to the extent of the amounts awarded in a foreign currency?

Judgment

Agreeing with the contention put forth by the Petitioner, the High Court held that a court is not required to go behind a decree in execution proceedings and that the enforcement ought to be done as per the terms of the decree. The High Court noted that the Contract between the Parties did not offer any clarity regarding conversion of a foreign currency component in INR, but the Award must be enforced on its own terms. The High Court then noted that the Award did not indicate the conversion rate for computing the Indian currency equivalent to the amounts awarded in USD.

In the backdrop of the above legal and factual conspectus, the High Court placed heavy reliance on the judgment of the Supreme Court in ***Forasol v. Oil and Natural Gas Commission***[20] wherein it was held that the date on which a decree becomes final and executable shall be the relevant date to determine the exchange rate applicable to convert amounts awarded in a foreign currency in INR. The High Court also observed that the above referred judgment has been followed in subsequent judgments of the Supreme Court, thereby rendering it an authority on this proposition of law.

The High Court also considered the Respondent's contention that the question relating to the applicable exchange rate was for the executing court to decide. Referring to the observations of the High Court in the Section 34 and Section 37 proceedings, namely that the applicable conversion rate would be the rate prevailing on the date of the decree, it was held that since the Respondent raised this question at earlier stages unsuccessfully, its attempts to re-agitate the same were not justified.

Accordingly, the High Court held that the exchange rate to be applied for computing the amounts due and payable under the Award and awarded in USD shall be 29 April 2019 (date on which the decree became final) and not 15 May 2010 (date on which the demand was made by the Petitioner for the first time as contended by the Respondent).

Since the exchange rate on 29 April 2019 was INR 70.1445 per USD (which is less than the exchange rate of INR 73.996 per USD prevailing on the date when the Respondent made the deposit), the Petitioner was held to be entitled to the remaining amount under the Award computed at INR 35.045 per USD (INR 70.1445 less INR 45.10) and the balance amount (computed at INR 73.996 per USD) was directed to be refunded to the Respondent.

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Analysis

This judgment reiterates a well settled proposition of law that the duty of an executing court is to execute a decree as it finds it and as per its own terms. It cannot go behind the decree or traverse beyond what is contemplated by the decree. In doing so, the High Court has given a twofold impetus: (i) recognised the need to enforce decrees as they stand so that decree holders are able to enjoy the fruits underlying the decree; and (ii) disincentivised judgment debtors to try and resist enforcement of arbitral awards by attacking the decree on meritless grounds.

By re-affirming that in an action to recover an amount under an arbitral award payable in a foreign currency, the date for determining the applicable exchange rate is the date on which the decree becomes final and executable, the High Court has also brought about clarity on this issue for prospective award holders in future arbitrations where claims are awarded in more than one currency.

High Court of Calcutta clarifies the scope of the protective nature of orders under Section 9 of the Act[21]

Brief Facts

M/s Satyen Construction ("**Petitioner**") was awarded a sum of INR 2,66,69,73/- on account of various claims against the State of West Bengal ("**Respondent**") along with costs and interest ("**Award**") in an arbitration relating to the construction of a Bridge at Mahishadal, Nandigram Road, West Bengal. The said Award was challenged by the Respondent under Section 34 of the Act before the High Court of Calcutta ("**Court**"). In furtherance of the direction of a coordinate bench pursuant to a stay application under Section 36(2) of the Act, the Respondent deposited the requisite security amount ("**Deposit**") with the Registrar of the Court.

In the present case, the Petitioner filed an application under Section 9 of the Act for withdrawal of the amount of Deposit ("**Application**"). The Respondent challenged the maintainability of the Application on the ground that the nature of an application under Section 9 is for preserving or securing the subject matter of the arbitration proceeding, and not payment of the awarded amount to a petitioner. The Petitioner argued that the ambit of Section 9 is wide enough to allow for an application to withdraw the amount deposited by the Respondent upon furnishing of security.

Issue

Whether an application under Section 9 of the Act is maintainable for withdrawal of security deposited pending the challenge to an arbitral award, upon furnishing of security?

Judgment

The Court noted that the objective of Section 9 of the Act is to provide for interim measures, which are protective in nature, to a party before, or during, or at any time after making an award. In this regard, the Court relied upon the judgment of ***Adhunik Steels Ltd. v. Orissa Manganese & Minerals (P) Ltd.***[22] while holding that the orders contemplated under Section 9 of the Act relate to *inter alia* preservation, interim custody or sale of goods, which are the subject matter of the arbitration agreement or securing the amount in dispute. The Court further held that the scope of Section 9 cannot be extended to enforce an award or grant fruits of an award by way of an interim measure. Therefore, withdrawal of the amount of Deposit cannot be permitted as a measure of protecting the award holder.

In view of the above, the Application was dismissed on account of being non-maintainable.

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Analysis

The decision has provided clarity on the scope of Section 9 of the Act by holding that the orders passed therein only extend to protective measures and cannot be used to enforce an arbitral award.

Supreme Court clarifies that an arbitral tribunal cannot order provisional deposit of rental amount under Section 17 of the Act when the question of liability to pay the amount is yet to be considered[23]

Brief Facts

Evergreen Land Mark Pvt. Ltd. ("**Appellant**") and John Tinson & Company & Anr. ("**Respondents**") had executed two separate lease deeds for two premises owned by the Respondents. The Appellant was running a restaurant and bar ("**Restro/Bar**") on the said premises. However, the lease deeds came to be terminated by the Respondent and subsequently, disputes arose with respect to the termination of the lease deeds, which were referred to arbitration.

Respondents filed two separate applications under Section 17 of the Act before the arbitral tribunal, seeking deposit of the rental amount due and payable for the period between March 2020 and December 2021. It was pleaded by the Appellant that owing to the COVID-19 pandemic, there was a lockdown leading to complete/partial closure of the Restro/Bar, thereby triggering the *force majeure* clauses in the lease deeds.

By way of an interim measure, the arbitral tribunal *vide* order dated 5 January 2022 directed the Appellant to deposit hundred percent of the rental amount due and payable for the period between March 2020 and December 2021 ("**Interim Order**").

The Appellant preferred an appeal against the Interim Order before the High Court of Delhi under Section 37(2)(b) of the Act, which came to be dismissed. Subsequently, the Appellant preferred an appeal before the Supreme Court. It was argued by the Appellant that the arbitral tribunal has specifically observed that it is not deciding anything on the import and effect of the *force majeure* clauses. Further, it was pointed out that there was no evidence to show possible frustration of the monetary award that may be passed by the arbitral tribunal. The Appellant further contended that the Interim Order also falls short of the threshold set for passing an interim order, which is akin to that of Order XXXVIII, Rule 5 of the Code of Civil Procedure, 1908 ("**CPC**"). In this regard, the decision of the Supreme Court in ***Raman Tech. & Process Engg. Co. v. Solanki Traders***[24] was relied upon. Additionally, while placing reliance on ***Adhunik Steels*** (*supra*) it was argued by the Appellant that even while passing an order under Section 9 of the Act, the court has to bear in mind and consider the principles set out under Order XXXIX of CPC.

It was the case of the Respondents that the principles of *force majeure* will cease to apply as the Appellant continued to remain in possession of the premises and hence, ought to pay the entire amount which is admittedly due.

Issue

What is the scope of powers of an arbitral tribunal to pass interim orders under Section 17 of the Act concerning seriously disputed issues, which are yet to be adjudicated by the tribunal?

Judgment

The Supreme Court, while discussing the scope of Section 17 of the Act, observed that no order by way of an interim measure could have been passed by the arbitral tribunal when there is a serious dispute with respect to the liability to pay rental amount in terms of the *force majeure* clause, which was yet to be adjudicated upon or considered by the arbitral tribunal. Thus, no such order for deposit by way of an interim measure under Section 17 of the Act could have been passed.

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However, it was clarified that the above interpretation holds ground only for the period of complete closure due to the lockdown. Therefore, the Appellant was directed to deposit the entire rental amount for the period when the Restro/Bar was allowed to run at fifty percent capacity.

Analysis

Firstly, the Court's observation that no order can be passed by the arbitral tribunal by way of an interim measure under Section 17 of the Act, when the liability to pay the rental amount is yet to be adjudicated upon by the arbitral tribunal, reiterates that the powers of an arbitral tribunal to grant interim measures is analogous to the powers of civil courts under Order XXXVIII, Rule 5 of CPC.

The High Court of Delhi had observed in ***Pearl Hospitality & Events Pvt. Ltd. v. OYO Hotels & Homes Pvt. Ltd.***[25] that the principles governing Order XXXVIII, Rule 5 would generally be applicable to prayers under Section 9(1)(ii)(b) or Section 17(1)(ii)(b) of the Act. Further, in ***Raman Tech*** (*supra*), the Supreme Court opined that the petitioner has to satisfy the court that the respondent is attempting to remove or dispose of its assets, with the intention of defeating the decree that may be passed, before passing an order to deposit the disputed amount as security.

Secondly, in ***State of Uttar Pradesh & Ors. v. Ram Sukshi Devi***[26] and ***Deoraj v. State of Maharashtra***,[27] the Supreme Court held that interim reliefs of the nature of final relief may not be granted at a preliminary stage.

Supreme Court applies the 'group of companies' doctrine to bind a non-signatory to an arbitration agreement[28]

Brief Facts

ONGC had entered into an agreement with Discovery Enterprise Pvt. Limited ("**DEPL**"), under which disputes arose between the parties. ONGC initiated arbitration against DEPL and Jindal Drilling and Industries Limited ("**JDIL**") on the premise that DEPL and JDIL are one single commercial entity and hence, JDIL is a necessary party. JDIL preferred an application under Section 16 of the Act, which was allowed by the tribunal by way of an interim award ("**Award**"). ONGC had preferred an application for production and discovery of documents before the tribunal, which could have shown close corporate and functional unity between both companies ("**Application**"), which was "*deferred until the issue of the jurisdiction is decided*" by the tribunal. The present appeal before the Supreme Court ("**Court**") arises from the order of the High Court of Bombay ("**High Court**"), which upheld the Award in the proceedings initiated by ONGC under Section 37 of the Act ("**Impugned Judgment**").

ONGC contended that JDIL has substantial business interest in DEPL and as per the business structure of both entities, it can be concluded that DEPL is an alter ego of JDIL. Further, JDIL is the ultimate beneficiary in the business with DEPL. An arbitration agreement signed by one company from a group of companies binds other non-signatory companies when the underlying contract is intended to benefit the non-signatory. It was also brought to the notice of the Court that the tribunal did not consider the Application, which could have shown a direct relationship between DEPL and JDIL before the Award was passed.

Per contra, DEPL submitted that JDIL is not a party to the arbitration agreement as required under Section 7 of the Act and therefore, cannot be held liable for the claims sought against DEPL. Reference was also drawn to Section 2(1)(h) of the Act to highlight that the key words in both provisions are "*party to an arbitration agreement*". JDIL and DEPL are two separate

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entities and there was no representation from JDIL to show that it was directly/indirectly party to the arbitration agreement.

Issue

Whether JDIL was bound by the arbitration agreement despite being a non-signatory to the agreement between ONGC and DEPL?

Judgment

The Court allowed the appeal filed by ONGC after analysing the "group of companies" doctrine. The Court also considered its decisions in: (i) ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors***;[29] (ii) ***Cheran Properties Ltd. v. Kasturi & Sons Ltd. & Ors.***;[30] and (iii) ***MTNL v. Canara Bank & Ors.***,[31] and laid down the following factors to determine whether a company within a group of companies, which is not a signatory to an arbitration agreement, would nonetheless be bound by it :

- Mutual intent of the parties;
- Relationship of the non-signatory to a party, which is a signatory to the agreement;
- Commonality of the subject matter;
- Composite nature of the transaction; and
- Performance of the contract.

The Court noted that although party autonomy is recorded under Section 7 of the Act, a non-signatory may be held to be bound under a consensual theory, founded on the principles of agency and assignment, or on a non-consensual basis such as estoppel or alter ego. These principles would have to be understood in the context of the present case where ONGC's attempt at the joinder of JDIL to the present proceedings was rejected without adjudication of the Application. Accordingly, the Court held that the Impugned Judgment has to be set aside since the tribunal had failed to adjudicate the Application and failed to allow evidence, which may have had a bearing on the issue. Therefore, JDIL's plea has to be considered afresh by the tribunal after appreciating all the evidence on record.

The Court also touched upon the standard of review that a court can exercise while considering an appeal under Section 37(2)(a) of the Act. It was submitted before the Court that an appeal under Section 37(2)(a) of the Act against an order of a tribunal accepting a plea under Section 16 that it has no jurisdiction, would not be constricted by the principles that apply to a challenge to an arbitral award under Section 34 of the Act.

The Court, while discussing the scope of Section 37 in the present case, observed that in exercise of appellate jurisdiction, the court must duly consider the grounds that have weighed with the tribunal in holding that it lacks jurisdiction. While doing so, the court must be mindful of the fact that the statute has entrusted the arbitral tribunal with the power to rule on its own jurisdiction in order to facilitate the efficacy of arbitration as a mechanism for the resolution of disputes.

Analysis

The present case has made it clear that in the event the factors laid down by the various legal precedents are satisfied in the facts of a given case, then a non-signatory is also bound by arbitration proceedings. The factors laid down in the present case have given a better clarity and outlook for determining the vital question of the applicability of an arbitration agreement to non-signatories.

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Supreme Court rethinks tenability of using the group of companies doctrine to bind non-signatories to an arbitration agreement[32]

Brief Facts

Respondent No. 2 ("**R2**") is the foreign parent company of Respondent No. 1 ("**R1**"). Applicant and R1 had entered into three agreements on the basis of which Applicant was utilising R1's customised software platform to run its e-commerce business.

With implementation of the agreements being delayed, R2 provided assurances to Applicant as to the timely fulfilment of R1's contractual obligations and was also involved in trying to resolve the disputes between R1 and Applicant. Finally, Applicant rejected R2's proposed solutions and terminated the agreements.

R1 commenced arbitration against Applicant for wrongful termination. Thereafter, insolvency proceedings were commenced against Applicant, causing the arbitration to be adjourned *sine die*. Applicant commenced a fresh arbitration against R2 and filed a petition under Section 11 of the Act before the Supreme Court ("**Court**") to appoint an arbitrator.

Issue

Whether the group of companies' doctrine can be relied on to bind a non-signatory (R2) to the arbitration agreement, and compel it to participate in the arbitration between Applicant and R1?

Judgment

The Court unanimously referred the questions as to the scope of the group of companies doctrine, its compatibility with foundational principles of corporate and arbitration law, and its consistency with Section 8 of the Act to the larger bench.

The majority opinion expressed considerable scepticism as to the validity of the group of companies doctrine, even going so far as to doubt whether it is based in sound law, rather than being a creature of convenience and economics. The majority also sought to examine whether the doctrine, as conceptualised in Indian jurisprudence, goes beyond the limits of Section 8, which allows non-signatories with derivative claims / obligations (from a signatory) to be bound by the arbitration agreement. Importantly, the majority also remarked that merely being a part of a group company would not be sufficient to bind a non-signatory to an arbitration involving its associate company, which is a signatory. The Court also noted that the doctrine has varied acceptance across different jurisdictions.

Taking a more favourable view of the doctrine, one Hon'ble Judge gave a separate opinion affirming the merits of the doctrine. The separate opinion sought to dispel the notion that the doctrine operates in contravention of the principle of separate legal identity. Instead, it held that the evolution of the doctrine has struck a balance between remaining consistent with party autonomy and economic realities of the day. Nonetheless, he also referred questions regarding the scope of the doctrine to a larger bench.

Analysis

From its initial recognition by Indian courts, the group of companies' doctrine has not been clearly defined, leading to divergent practice in its application by different courts. The reference to a larger bench is a welcome move, which will bring in much needed doctrinal clarity and predictability in cases where it is invoked. In the interim, this judgment provides ammunition to non-signatories who were being forced into arbitrations they never consented to, on account of indiscriminate application of the doctrine.

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High Court of Delhi holds that Section 65-B of the Indian Evidence Act, 1872 does not apply to arbitral proceedings[33]

Brief Facts:

On 1 April 2012, the parties entered into an agreement, whereby the Respondent agreed to provide transport services to the Petitioner ("**Agreement**"). The Petitioner owned twenty two school buses, which the Respondent agreed to operate and maintain. In addition, the Respondent also agreed to provide additional buses. The Agreement was for a term of eight years from 1 April 2012 to 31 March 2020, with the first five years as a lock-in period.

By a communication dated 7 June 2015, the Respondent requested the Petitioner to release outstanding payments in terms of the Agreement. The Petitioner responded by an email dated 5 August 2015 alleging deficiencies in the Respondent's services and informed him that the Petitioner would be compelled to take strict action if the said deficiencies were not rectified. Thereafter, by a communication dated 3 September 2015, the Petitioner terminated the Agreement.

Aggrieved by the termination of the Agreement, the Respondent invoked the arbitration clause in the Agreement. *Vide* order dated 4 April 2018, the High Court of Delhi ("**Court**") directed the Delhi International Arbitration Centre to appoint an arbitrator. Thereafter, the arbitral tribunal entered upon reference on 7 June 2018.

By the impugned award, the arbitral tribunal partially accepted the claims of the Respondent ("**Award**"). Aggrieved, the Petitioner filed a petition under Section 34 of the Act, challenging the Award.

Issues

Issue (i): Whether the arbitral tribunal was justified in rejecting certain communications as not admissible on the ground that the certificate under Section 65-B of the Indian Evidence Act, 1872 ("**Evidence Act**") was not furnished?

Issue (ii): Whether the Award was liable to be set aside?

Judgment

Issue (i): While adjudicating the challenge to the award of loss of profits, the Court observed that the arbitral tribunal found that the termination was illegal as it was not open for the Petitioner to terminate the Agreement during the lock-in period. However, upon perusing the relevant clauses of the Agreement, the Court found the contention that the Agreement could not be terminated during the lock-in period to be, *ex-facie*, erroneous.

The Court examined whether the decision of the arbitral tribunal that the Petitioner had failed to prove deficiency of service (an interconnected issue), was manifestly erroneous. The Petitioner had contended that the arbitral tribunal had erred in rejecting evidence on the ground that requirements under Section 65-B of the Evidence Act were not satisfied.

The Court observed that the arbitral tribunal had rejected several emails on the ground that the requirements under Section 65-B of the Evidence Act were not complied with. The Court noted that the principal of the Petitioner school had issued a certificate under Section 65-B of the Evidence Act in support of the said emails ("**Certificate**"). The Court found it material to note that there was no objection to the Certificate at the time when the same was produced and that it was also duly exhibited and marked.

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Thereafter, the Court referred to ***R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and Anr***.[34] wherein the Supreme Court had held that the requirement of Section 65-B of the Evidence Act relates to the mode and manner of leading evidence and if no objection as to the same is taken at the material time, it would not be open for a party to raise it at a later stage. The Court also referred to the Supreme Court's judgments in ***Sonu v. State of Haryana***[35] and ***Om Prakash v. CBI***[36] in this regard.

The Court noted that by virtue of Section 1 of the Evidence Act, the same does not apply to arbitration. The Court observed that although the principles of the Evidence Act are usually applied in arbitral proceedings, however, *sensu stricto*, the Evidence Act is not applicable. The Court found that even though Section 65-B of the Evidence Act was not applicable to arbitral proceedings, the arbitral tribunal had disregarded the entire evidence led by he Petitioner regarding deficiency of service solely on the ground that the Certificate (under Section 65-B) was defective.
The Court further noted that the receipt of several communications relied upon by the Petitioner was admitted. However, the said communications were rejected as not admissible on the ground that the Certificate was not furnished.

In these circumstances, the Court held that the decision of the arbitral tribunal to completely ignore the emails, was manifestly erroneous.

Issue (ii): The Court held that the finding of the arbitral tribunal that the termination of the Agreement was illegal, could not be sustained and set aside the award of damages for loss of profits.

The Court observed that the scope of examination under Section 34 of the Act does not entail re-appreciation and re-evaluation of evidence. Therefore, award of outstanding contractor's fee could not be interfered with.

Regarding the claim for extra cab charges, the Court held that the Award, to the extent it awards excess amount, was liable to set aside.

Insofar as the award of interest was concerned, the Court held that it was well-settled that the arbitral tribunal has wide discretion in awarding interest and the Court was unable to accept that the award of interest @ 18% p.a. was manifestly erroneous and warranted interference. The Court referred to the Supreme Court's decision in ***Punjab State Civil Supplies Corporation Limited (PUNSUP) and Anr. v. Ganpati Rice Mills***[37] in this regard.

Analysis

The Court has reiterated the well-settled position of law that the provisions of the Evidence Act (including Section 65-B) do not apply to arbitral proceedings, which is also clear from a reading of Section 19 of the Act. Further, the Court has delineated the scope of Section 34 of the Act by holding that in absence of any objections to the admissibility of electronic evidence, the arbitral tribunal's rejection of the same on the ground that Section 65-B of the Evidence Act had not been complied with, would be manifestly erroneous and open to judicial interference under Section 34 of the Act.

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Past Events

Young ITA Global Forum (22 February 2022)

The Young Institute for Transnational Arbitration (ITA) organised the first Young ITA Global Forum at which topical issues of procedural law and substantive law/policy in international arbitration were debated. **Juhi Gupta (Principal Associate)** was a panellist in the session on substantive law/policy issues.

Online Faculty Development Program (24 February 2022)

Marwadi University, Rajkot, in collaboration with the Gujarat National Law University, Gandhinagar, and AMP Government Law College, Rajkot, organised an online faculty development program on "*Changing Contours of Legal Education and Teaching Techniques*". **Tejas Karia (Partner – Head Arbitration)** conducted a session on "*Emerging Trends in Mediation and Alternative Dispute Resolution*".

Virtual book launch of the Law Practice and Procedure of Arbitration in India by AIADR and Thomson Reuters (25 February 2022)

The Asian Institute of Alternative Dispute Resolution (AIADR) and Thomson Reuters organised a virtual book launch for the commentary "*Law Practice and Procedure of Arbitration in India*" by Professor Sundra Rajoo. **Pratik Singhvi (Senior Associate)**, who drafted 21 chapters for the commentary, spoke on behalf of the editorial board at this event.

Young ITA Webinar (2 March 2022)

The Young ITA organised a webinar on "*BIT Arbitration in India: Developments, Trends and Predictions*". **Juhi Gupta (Principal Associate)** and **Niyati Gandhi (Principal Associate)** were panellists at this event.

Remote Oral Advocacy Programme (ROAP) (11 March 2022)

Delos Dispute Resolution conducted the 2022 edition of ROAP Asia, an advanced oral advocacy training programme. **Tejas Karia (Partner – Head Arbitration)** was a faculty member in the programme and conducted a session on procedural submissions.

NUJS Mediation Competition 2022 (11-13 March 2022)

The ADR Society of West Bengal National University of Juridical Sciences (NUJS) organised the 4th NUJS Mediation Competition, 2022. **Tejas Karia (Partner – Head Arbitration)** judged the Grand Final Round of the event. **Surabhi Lal (Senior Associate)** was an expert assessor at the event.

Course and Mentorship Program on Arbitration (13 March 2022, 16 and 24 April 2022)

Bettering Results conducted the 2nd edition of the Course and Mentorship Program on Arbitration. **Tejas Karia (Partner – Head Arbitration)** spoke on concepts, definition and principles involved in arbitration, evidence and drafting of arbitration agreement and other documents.

AIAC YPG Conference (17 March 2022)

The Young Practitioners' Group (YPG) of the Asian International Arbitration Centre organised a conference on "*Current State of International Trade and Arbitration: Has the Dust Settled?*". **Ila Kapoor (Partner)** was a panellist in the session on "*Appointment of Arbitrators in Multi-Party Arbitration: To Appoint or Not To Appoint?*".

6th CARTAL Conference on International Arbitration (1 April 2022)

The Centre for Advanced Research and Training in Arbitration Law (CARTAL) organised its 6th international arbitration conference on "*Leaps and Bounds: Arbitration Evolving*". **Ila Kapoor (Partner)** was a panellist in the session on "*Blockchain Technology and Arbitration*".

International Conference on Indian Arbitration Framework (9 April 2022)

The Nani Palkhivala Arbitration Centre organised its 13th Annual International Conference on the theme - "*The Evolving Arbitration Framework in India – Challenges and Opportunities*". **Tejas Karia (Partner – Head Arbitration)** spoke on the topic "*Perplexing Issues in Statutory Arbitrations*".

29th Willem C. Vis International Commercial Arbitration Moot (9-12 April 2022)

The oral rounds of the 29th Vis International Commercial Arbitration International Commercial Arbitration Moot were held virtually. **Rangon Choudhury (Associate)** acted as an arbitrator in the general rounds of arguments.

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International Conference on Mediation (10 April 2022)

The Faculty of Law, University of Delhi and Delhi School of Public Policy and Governance, Institution of Eminence, University of Delhi in association with the Mediation and Conciliation Project Committee, Supreme Court of India, organised the 3rd International Conference on Mediation. **Tejas Karia (Partner – Head Arbitration)** spoke at a panel discussion on "*Role of Mediation in Commercial and IPR Disputes*".

MCIA Conference on International Arbitration, Ahmedabad (23 April 2022)

The Mumbai Centre for International Arbitration (MCIA), Gujarat High Court Arbitration Centre and Gujarat High Court Advocates' Association organised a conference on "*International Commercial Arbitration: The Way Forward*". **Tejas Karia (Partner – Head Arbitration)** moderated a panel discussion on the topic "*Institutional Arbitration - The way the world arbitrates*".

Bennett University ADR Webinar (23 April 2022)

Bennett University organised a consultation meet on "*Efficiency of Alternative Dispute Resolution: With Special Focus on Mediation*". **Ila Kapoor (Partner)** was a panellist in the session on the "*Mediation Bill, 2021: A Leap Forward*".

Panel discussion on arbitration and enforcement (27 April 2022)

SKOCH Group organised the India Law Forum 2022. **Tejas Karia (Partner – Head Arbitration)** was a panellist in the discussion on "*Arbitration & enforcement*" and spoke on arbitration as an effective alternative to civil courts and the 2021 amendments to the Act.

GNLU Centre for ADR Training (30 April 2022)

Shruti Sabharwal (Partner) conducted a training session on "*Commencement and Conducting Arbitration Proceedings*" for the officers of the Indian Airforce (JAG Branch) that was organised by the Centre for Alternative Dispute Resolution at Gujarat National Law University (GNLU).

Chaffetz Lindsey-SAM Webinar (3 May 2022)

Chaffetz Lindsey LLP and Shardul Amarchand Mangaldas & Co organised a webinar on "*International enforcement against States and State Entities*". **Rishab Gupta (Partner)** was a panellist at this event.

CII Session on Institutional Arbitration (7 May 2022)

Tejas Karia (Partner – Head Arbitration) spoke on the "*Institutionalisation of Arbitration in India*" in a session organised by the Confederation of Indian Industries (CII).

GLC ADR Weekend (8 May 2022)

The ADR Cell of the Government Law College, Mumbai (GLC), in collaboration with Council for Fair Business Practices organised the ADR Weekend, a conference on contemporary issues in arbitration and mediation. **Tejas Karia (Partner – Head Arbitration)** conducted a session on the topic "*Techniques for Saving Time and Costs in International Arbitration*". **Bikram Chaudhury (Principal Associate)** was a panellist in the session on "*Framework of Construction Arbitration*".

NLUJA Special Lecture (13 May 2022)

National Law University and Judicial Academy, Assam, organised the NLUJA Lecture Series, 2022. **Tejas Karia (Partner – Head Arbitration)** conducted a special lecture on the topic "*Practical Aspects of Drafting Effective Arbitration Agreement and Tips for Arbitral Advocacy*".

MNLU Course on Online Mediation and Artificial Intelligence (14,15, 21 and 22 May 2022)

The Maharashtra National Law University, Mumbai (MNLU) organised a course on "*Online Mediation and Artificial Intelligence*" as part of an executive program for professionals. **Tejas Karia (Partner – Head Arbitration)** was a visiting faculty member in the program and conducted lectures on

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"*Mediating Online*" and "*Translating Offline Skills to Online*". In the lectures on "*Communication Skills in Online Mediation*", **Tejas Karia (Partner – Head Arbitration)** was joined by **Gauhar Mirza (Partner)**, **Avlokita Rajvi (Principal Associate)** and **Samarth Madan (Associate)** as co-speakers.

IDRC Arbitrate in India Conclave (28 May 2022)

The Indian Dispute Resolution Centre organised the "*Arbitrate in India Conclave*". **Tejas Karia (Partner – Head Arbitration)** spoke in a panel discussion at the event and shared insights on the need for institutionalisation of arbitration, use of technology, creation of a specialist arbitration bar and identifying Indian cities that can be a hub for international commercial arbitration.

Upcoming Events

MNLU Course on Online Mediation and Artificial Intelligence (June - August 2022)

MNLU is organising more sessions in the course on "*Online Mediation and Artificial Intelligence*" as part of an executive program for professionals. **Tejas Karia (Partner – Head Arbitration)** will a visiting faculty member in the program.

India Dispute Resolution Forum (6-7 June 2022)

ThoughtLeaders4 Disputes (TL4D) is organising the India Dispute Resolution Forum, an advanced forum discussing complex multi-jurisdictional arbitration and court cases involving Indian parties. **Ila Kapoor (Partner)** will be a panellist at this event.

SIAC Mumbai Conference 2022 (17 June 2022)

SIAC is organising a conference on "*Current Choices and Emerging Trends in International Arbitration*". **Tejas Karia (Partner – Head Arbitration)** will be a panellist at this event.

Publications

Ila Kapoor (Partner), **Vrinda Pareek (Associate)** and **Rangon Choudhury (Associate)**, have contributed the India Chapter to the Lex Mundi 'Global Gathering Evidence in Aid of Foreign Litigation' Guide. The chapter provides an overview of the various mechanisms available to foreign parties/courts to seek assistance with gathering of evidence in India, with a focus on how the 'Hague Evidence Convention' practically interacts with domestic laws in India. Click here

Swagata Ghosh (Senior Associate) and **Lakshana R (Associate)**, *It's an Emergency? Let's Arbitrate!* in NUJS Journal of Dispute Resolution (2022). Click here

Endnotes

1 Authored by Rishab Gupta, Partner, Juhi Gupta, Principal Associate and Madhav Kumar, Senior Associate; *Tagus Engineering Private Limited and Ors. v. Reserve Bank of India and L&T Finance Ltd.*, Writ Petition No. 3957/2021 and *IDFC First Bank Limited v. Bell Invest India Limited and Anr.*, Writ Petition No. 7348/2021, High Court of Bombay, judgment dated 21 February 2022.
Coram: G.S. Patel and Madhav J. Jamdar, JJ.

2 (2020) 15 SCC 706.

3 (2021) SCC OnLine SC 8.

4 (2021) 2 SCC 1.

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5 Authored by Ila Kapoor, Partner, Rangon Choudhury and Mrinali Komandur, Associates; *M/S M N Trapasia, Through Proprietor Manishbhai Nagjibhai Trapasiya v. Divisional Railway Manager (WA)*, R/Petition under Arbitration Act No. 109, High Court of Gujarat, judgment dated 28 February 2022.
Coram: Aravind Kumar, J.

6 Section 12(5) of the Act provides that: "*Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:*

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing".

7 Authored by Siddhartha Datta, Partner, Surabhi Binani, Senior Associate and Sejal Agarwal, Associate; *Jivanlal Joitaram Patel v. NHAI*, FAO (OS)(COMM) No. 70/2017, High Court of Delhi, 2022 SCC OnLine Del 703, judgment dated 8 March 2022.
Coram: Vipin Sanghi and Amit Bansal, JJ.

8 2018 SCC OnLine Del 9241.

9 Authored by Binsy Susan, Partner, Neha Sharma, Senior Associate and Palak Kaushal, Associate; *BHEL v. Optimal Power Synergy India Pvt. Ltd.*, I.A. No. GA 3/2021 in A.P. 175/2020 and *Optimal Power Synergy India Pvt. Ltd. v. BHEL*, I.A. No. GA 1/2020 in E.C. 156/2020, High Court of Calcutta, 2022 SCC OnLine Cal 521, judgment dated 23 March 2022.
Coram: Moushumi Bhattacharya, J.

10 Authored by Tejas Karia, Partner & Head-Arbitration, Avlokita Rajvi, Principal Associate and Samarth Madan, Associate; *M/s Ravi Ranjan Developers Pvt. Ltd. v. Aditya Kumar Chatterjee*, S.L.P. (C) Nos. 17397/17398 of 2021, Supreme Court of India, 2022 SCC OnLine SC 568, judgment dated 24 March 2022.
Coram: Indira Banerjee and A.S. Bopanna, JJ.

11 (2019) 13 SCC 472.

12 (2020) 5 SCC 399.

13 Authored by Aashish Gupta, Partner, Arjun Pall, Principal Associate and Satya Jha, Associate; *Sacheerome Advanced Technologies v. NEC Technologies Pvt. Ltd.*, O.M.P. (T) (COMM) No. 34/2022, High Court of Delhi, judgment dated 29 March 2022.
Coram: Vibhu Bakhru, J.

14 80 (2011) DLT 714.

15 (2018) 12 SCC 471.

16 Authored by Anirudh Das, Partner and Gunjan Soni, Associate; *Dr. Papiya Mukherjee v. Aruna Banerjea and Anr.*, A.P. No. 255/2021, High Court of Calcutta, 2022 SCC OnLine Cal 595, judgment dated 30 March 2022.
Coram: Prakash Shrivastava, J.

17 (2008) 13 SCC 667.

18 *Smt. Parwati Devi and Others v. M/s. Kesarwani & Company, Sahson, Allahabad*, 2011 SCC OnLine All 786 and *Jyoti Gupta v. Kewalsons and Ors.*, 2018 SCC OnLine Del 7942.

19 Authored by Shruti Sabharwal, Partner and Rangon Choudhury, Associate; *M/s Karam Chand Thapar & Bros. (Coal Sales) Ltd. v. MMTC Ltd.*, OMP (ENF.) (COMM.) No. 258/2018 & EA (OS) Nos. 1026/2019, 188/2020, 16240/2018 & 8918/2019, High Court of Delhi, 2022 SCC OnLine Del 949, judgment dated 4 April 2022.
Coram: Vibhu Bakhru, J.

20 (1984) Supp SCC 263.

21 Authored by Smarika Singh, Partner, Yashna Mehta, Senior Associate and Adya Jha, Associate; *M/s Satyen Construction v. State of West Bengal and Ors.*, A.P. No. 78/2021, High Court of Calcutta, 2022 SCC OnLine Cal 708, judgment dated 8 April 2022.
Coram: Ravi Krishan Kapur, J.

22 (2007) 7 SCC 125.

23 Authored by Gauhar Mirza, Partner, Varun Kalra, Associate and Ramayni Sood, Paralegal; *Evergreen Land Mark Pvt. Ltd. v. John Tinson & Company Pvt. Ltd. & Anr.*, Civil Appeal No. 2783/2022, Supreme Court of India, 2022 SCC OnLine SC 468, judgment dated 19 April 2022.
Coram: M.R. Shah and B.V. Nagarathna, JJ.

24 (2008) 2 SCC 302.

25 2020 SCC Online Del 2089.

26 (2005) 9 SCC 733.

27 (2004) 4 SCC 697.

28 Authored by Tejas Karia, Partner & Head - Arbitration, Grishma Ahuja, Principal Associate and Shalin Jani, Senior Associate; *Oil and Natural Gas Corporation Ltd. v. M/s Discovery Enterprises Pvt. Ltd. & Anr.*, Civil Appeal No. 2042/2022, Supreme Court of India, 2022 SCC OnLine Del 522, judgment dated 27 April 2022.
Coram: D.Y. Chandrachud, Surya Kant and Vikram Nath, JJ.

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30 (2018) 16 SCC 413.

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32 Authored by Shruti Sabharwal, Partner and Ujval Mohan, Associate; *Cox & Kings v. SAP India Private Limited*, Arb Pet. No. 38/2020, Supreme Court of India, 2022 SCC OnLine SC 570, judgment dated 6 May 2022.
Coram: N.V. Ramana, A.S. Bopanna and Surya Kant, JJ.

33 Authored by Tejas Karia, Partner & Head-Arbitration, Avlokita Rajvi, Principal Associate and Samarth Madan, Associate; *Millennium School v. Pawan Dawar*, O.M.P. (COMM) No. 590/2020, High Court of Delhi, SCC OnLine Del 1390, judgment dated 10 May 2022.
Coram: Vibhu Bakhru, J.

34 (2003) 8 SCC 752.

35 (2017) 8 SCC 570.

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37 SLP (C) No. 36655/2016, Supreme Court of India, order dated 20 October 2021.

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PRACTICE AREA EXPERTS

Pallavi Shroff
Managing Partner and
National Practice Head Dispute Resolution
+91 98100 99911
E: pallavi.shroff@AMSShardul.com

Tejas Karia
Partner and Head, Arbitration Practice sub-group
+91 98107 98570
E: tejas.karia@AMSShardul.com

Anirudh Das
Partner
+91 98100 98329
E: anirudh.das@AMSShardul.com

Rishab Gupta
Partner
+91 98217 80313
E: rishab.gupta@AMSShardul.com

Siddhartha Datta
Partner
+91 90070 68488
E: siddhartha.datta@AMSShardul.com

Ila Kapoor
Partner
+91 98717 92737
E: ila.kapoor@AMSShardul.com

Binsy Susan
Partner
+91 96500 80397
E: binsy.susan@AMSShardul.com

Aashish Gupta
Partner
+91 98189 19857
E: aashish.gupta@AMSShardul.com

Smarika Singh
Partner
+91 97170 98075
E: smarika.singh@AMSShardul.com

Gauhar Mirza
Partner
+91 70423 98844
E: gauhar.mirza@AMSShardul.com

Shruti Sabharwal
Partner
+91 98107 46183
E: shruti.sabharwal@AMSShardul.com