

MONTHLY ROUND-UP

JULY 2023

INDIAN ARBITRATION
LAW REVIEW



INTERIM RELIEF UNDER THE A&C ACT OBTAINED WITHOUT DISCLOSING MATERIAL EVIDENCE, CALCUTTA HIGH COURT IMPOSES COST OF INR 50,000 ON EACH PETITIONER

In the case of Omkar Tradecomm LLP v. Mayank Agarwal, High Court of Calcutta held that a party approaching the Court for relief must do so with clean hands and is under an obligation to disclose all material facts that have bearing on the adjudication of the issues in the case.

The Court held that the doors of justice would be closed for litigants approaching the Court with a case built on falsehood, fraudulent concealment or suppression of material facts. The Court imposed a cost of INR 50,000 on each of the petitioners.

THE EXISTENCE OF AN ARBITRATION AGREEMENT SHOULD NOT BE INTERFERED WITH UNLESS IT IS MANIFESTLY CLEAR THAT THERE WAS NO AGREEMENT

In the case of Jaldhi Overseas PTE Ltd v. Steer Overseas Pvt Ltd, the High Court of Calcutta held that the Courts, while exercising powers under Section 48 of the A&C Act, cannot re-appreciate the evidence or substitute its view with that of the arbitral tribunal. It reiterated that the scope of judicial interference at the stage of enforcement of foreign award is limited to the grounds mentioned under Section 48 and the court is only required to make a preliminary determination.

ARBITRATOR'S NAME IN THE "HALL OF FAME" ON WEBSITE, CREATED BY HIM AND HIS DENIAL OF MAXIMUM NUMBER OF CLAIMS IS A JUSTIFIABLE APPREHENSION TO HIS NEUTRALITY

In the case of Microsoft Corporation v. Zoai Founder, the High Court of Delhi ruled that the inclusion of the arbitrator's name in the "Hall of Fame" of a website created by him, based upon the fact that he had denied the maximum number of complaints under the "In Domain Name Dispute Resolution Policy" (hereinafter "INDRP"), gives rise to a justifiable apprehension as to his neutrality.

ORDER OF ARBITRAL TRIBUNAL REFUSING TO ENTERTAIN ADDITIONAL COUNTER-CLAIMS FILED WITHOUT AN APPLICATION UNDER SECTION 23 IS NOT AN ‘INTERIM AWARD’

In the case of *M/s Abhijeet Angul Sambhalpur Toll Road Limited v. NHAI*, the High Court of Delhi has held that an Order of the arbitral tribunal refusing to entertain additional counter-claims filed without making any application under Section 23 of the A&C Act is not an ‘interim award’, therefore, it cannot be challenged under Section 34 of the A&C Act. The Court came to the conclusion as such an Order neither conclusively settles any issue between the parties so to have the res judicata effect nor forecloses the right of the aggrieved party to refile the counter-claims by seeking “authority” or permission on an application under Section 23 of the A&C Act.

PLEA THAT CLAIMANT’S CLAIM CANNOT STAND IN THE ABSENCE OF A THIRD ENTITY, CAN BE RAISED BEFORE THE ARBITRAL TRIBUNAL

In the case of *Wave Geo-Services Pvt Ltd v. M/s Devi Engineering and Construction Pvt Ltd*, the High Court of Delhi ruled that the plea that the claimant’s claim cannot stand in the absence of a third entity in the arbitral proceedings, is an aspect touching upon the maintainability of the claim(s) sought to be raised before the Arbitral Tribunal. The Court stated that the said plea can be urged before a duly constituted Arbitration Tribunal and the same cannot preclude the claimant from seeking or invoking Arbitration in terms of the arbitration agreement executed between the parties.

“COUNTER-BALANCING” NOT ACHIEVED WHEN 2/3RD MEMBERS OF THE ARBITRAL TRIBUNAL TO BE APPOINTED BY ONE PARTY

The Court remarked that the “counter balancing”, as contemplated in *Perkins Eastman Architects DPC & Anr. v. HSCC Ltd*, cannot be said to be achieved in a situation where one of the parties has a right to choose one arbitrator from a panel whereas 2/3rd of the members of the arbitral tribunal are appointed by the other party.

COURT CANNOT APPOINT ARBITRATOR UNDER SECTION 11 OF THE A&C ACT WHEN THE DISPUTE IS COVERED UNDER MSMED ACT

In the case of TBEA Energy v. R K Engineering High Court of Gujarat has reiterated that the petition under Section 11 of the A&C Act for the appointment of the arbitrator by the Court would not be maintainable if the dispute is covered under the Micro, Small and Medium Enterprises Act, 2006 (hereinafter "MSMED Act") and the provisions of the act are invoked. The bench of Justice Biren Vaishnav followed a line of earlier precedents wherein the High Court has held that the provisions of MSMED Act prevail over the A&C Act and the resolution of dispute covered under the MSMED Act has to be in terms of Section 18 of the MSMED Act only.

NEW CLAIM FOR ENHANCEMENT OF COMPENSATION FROM NHAI BASED ON SUBSEQUENT CHANGE OF LAND USE IS BARRED BY LIMITATION

In the case of Sarvesh Rajput v. State of Madhya Pradesh, the High Court of Madhya Pradesh has held that the cause of action for referring the dispute to arbitration under Section 3G(5) of the National Highways Act, 1956 arises on the date of the determination of the amount of compensation by the competent authority under Section 3G(1) of the Act. The Court held that though there is no period of limitation provided for referring the dispute to arbitrator under the said Section, however, it is governed by the residuary clause as contained under Article 137 of the Limitation Act wherein a period of 3 years is provided.

ORDER OF THE EXECUTING COURT STAYING EXECUTION OF AWARD UNDER O 21, R 26 CPC IS WITHIN JURISDICTION

In the case of M/s Hindustan Construction Co. Ltd. v. North Eastern Electric Power Corporation Ltd., the Meghalaya High Court has ruled that there is no specific provision in the A&C Act as regard execution or stay of an arbitral award. Therefore, the Order passed by the Executing Court who stayed the execution of the award by resorting to Order XXI Rule 26 of the Code of Civil Procedure, 1908 (hereinafter "CPC"), was within its jurisdiction.

COURTS ARE EMPOWERED TO EXTEND ARBITRATOR'S MANDATE WITHOUT THE PARTIES' CONSENT

The Kerala High Court in a recent judgement held that, in accordance with Section 29A (4) of the A&C Act, an arbitrator's mandate may be extended even if the parties have not agreed to an extension. It acknowledged that domestic arbitration must be completed within the 12-month deadline imposed by Section 29A (1). On the request of either party, the Court may, however, extend the deadline if there exists sufficient cause under Section 29A of the A&C Act.

ONLY ISSUES RELATING TO A PATENT OR INHERENT LACK OF THE TRIBUNAL'S JURISDICTION ARE PERMISSIBLE FOR OBJECTIONS UNDER SECTION 36 OF THE A&C ACT

In the case of M/s ESL Steel Limited v. Ispat Carriers Pvt Ltd, The Jharkhand High Court has held that while only grounds specified in Section 34 of the A&C Act may be used to challenge an arbitral award, Section 47 of the CPC permits objections to be raised at the time the award is being enforced under Section 36 of the A&C Act if those objections relate to the tribunal's lack of jurisdiction to pass an award or when the award is non-est or otherwise invalid under the law. Such a defect in the award, however, must be evident from the record alone and not call for any factual determination.

COURTS SHOULD REFRAIN FROM INTERFERING IN ORDERS PASSED FOR INTERIM RELIEF IF IS BASED ON THOROUGH EXAMINATION AND IS WELL-REASONED

The High Court of Delhi has held that a reasoned order of the tribunal awarding interim relief based on a thorough examination of the case should not be interfered with by the Court under Section 37 of the A&C Act.

The Court reaffirmed that it should not interfere with such orders if the arbitral tribunal has granted interim relief to protect and preserve the subject matter of arbitration and balances the equities between the parties based on a prima facie case, the balance of convenience, and irreparable harm.

A PARTY'S RIGHT TO CHOOSE ARBITRATOR CANNOT BE REVIVED ONCE IT IS SURRENDERED TO THE COURT UNDER SECTION 11(6) OF THE A&C ACT

According to a recent decision by the Calcutta High Court, once a party waives its right to name an arbitrator under Section 11 of the A&C Act, that party cannot later "trace back its steps" to reinstate that right in order to replace the current panel of arbitrators with a new one when that arbitrator becomes de jure or de facto unable to perform their duties.

