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ARBITRATION LAW

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I INTRODUCTION

THE ARBITRATION law in India has been witnessing a sea change since the first major amendment brought in 2015 to the Arbitration and Conciliation Act, 1996. There are constant efforts to modernize the arbitration law meeting the international best practices. The Arbitration Amendment Acts of 2015 and 2019, along with the reformatory series of judgments delivered by the Supreme Court of India from the case of BALCO till date as discussed below in the survey year 2022, have provided a robust facelift to the India's global image as the welcoming and neutral destination for arbitration and ease of doing business. A close peek into the judgments of the Supreme Court of India, delivered during the survey year, help us check the changing contours of the Indian judiciary *vis-à-vis* their expedited reliefs in arbitration petitions, lesser judicial interference and greater resolve for upholding party autonomy.

II APPOINTMENT OF ARBITRATOR

One of the earliest cases in the survey year, was the matter *between Intercontinental Hotels Group (India) Pvt. Ltd.* v. *Waterline Hotels Pvt. Ltd.,*[1] concerning the dispute on the issue of the appointment of a sole arbitrator. On examining the brief facts and decipher the apex court's decision making in the arbitration application. The petitioners filed a petition under Sections 11(6) and 11(12)(a) of the Arbitration and Conciliation Act, 1996, seeking the appointment of a sole arbitrator. The dispute arose from a Hotel Management Agreement (HMA) executed between the petitioners and the respondent for the purpose of renovating infrastructure. Subsequently, disagreements arose between the parties, and the respondent unilaterally terminated the HMA *via* email. The petitioners contested this termination and invoked the arbitration clause contained in the HMA.

The respondent, however, refused to appoint an arbitrator, contending that the notice of arbitration served by the petitioners was defective and incurable. This denial led to the filing of the present petition before the Supreme Court. The

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1 (2022) 7 SCC 662.

petitioners argued that the respondent was obligated, under Clause 22.1 of the HMA, to ensure that the agreement complied with the legal requirements of accordance with Section 2(6) of the Indian Stamp Act, 1899 the stamping of the HMA would be governed by the Karnataka Stamp Act, 1957. They further contended that procedural objections, such as issues related to insufficient stamping, are to be resolved during the arbitration proceedings and do not warrant rejection of the arbitration petition at the pre-appointment stage. Accordingly, the following two leading issues came up for consideration before the Supreme Court:

i. Whether the issue of insufficient stamping raised by the respondent can be treated as "deadwood," rendering the arbitration agreement unworkable, or whether it constitutes a procedural objection that warrants adjudication at a later stage?

ii. Whether the respondent is entitled to challenge the validity of the arbitration agreement or the substantive contract in light of the warranty provided under Clause 22.1 of the Hotel Management Agreement (HMA)?

The court allowed the petition and referred the matter to arbitration in terms of Clause 18.2 of the HMA. It reiterated that courts must respect party autonomy and refrain from pre-empting issues reserved for the arbitrator's determination. The apex court delivered a well-reasoned judgment addressing the key legal issues in the case, with the following significant observations:

i. Arbitration agreement's validity- The court examined Clause 22.1 of the HMA, which obligated the respondent to ensure the agreement's legal validity in India. It held that the enforceability of the arbitration agreement and the petitioner's reliance on the respondent's warranty were matters requiring adjudication by the arbitrator. These issues could not be conclusively resolved at the pre-appointment stage.

ii. Stamping issue not 'deadwood'- The court rejected the argument that the issue of insufficient or incorrect stamping rendered the arbitration agreement unworkable. It clarified that the stamping issue, in this case, could be finally determined during arbitration proceedings. The court emphasized that it was not a case of complete non-stamping, which might have justified intervention at this stage.

iii. Principle of party autonomy- Referring to the precedent set in *Vidya Drolia* v. *Durga Trading Corporation* (2021) 2 SCC 1, the court reaffirmed the principle of party autonomy and emphasized that judicial intervention at the pre-appointment stage under Section 11 should be limited to a prima facie examination of the existence of an arbitration agreement. It held that in cases of doubt, the matter should be referred to arbitration unless the issues clearly indicate the existence of "deadwood."

iv. Appointment of Arbitrator- The court appointed A.V. Chandrashekara J., a former Judge of the High Court of Karnataka, as the sole arbitrator to adjudicate all disputes, including the validity of the arbitration agreement and the substantive contract.

In the survey year, the division bench of the Supreme Court once again dealt with another petition with regard to the role of the court in appointment of an arbitrator. However, this time the matter was with respect to the preliminary enquiry which the high court may conduct to ascertain whether the dispute falls under the arbitrable category before deciding the petition for appointment of an arbitrator or dismissing it. In the case of *Emaar India Ltd.* v. *Tarun Aggarwal Projects LLP.*[2], the appeal was preferred against the impugned judgment and order of the High Court of Delhi , whereby the high court in exercise of powers under Section 11(6) of the Arbitration and Conciliation Act, 1996 had appointed arbitrators to resolve the dispute between the parties. The high court's judgment was challenged on various grounds including one of the grounds that the dispute falls under Clause 36 of the Addendum Agreement between the parties and not under Clause 37 which incorporates arbitration clause. It is ironical to note as it appears that the high court noted that:[3]

> the Clause 36 of the Addendum Agreement stipulates that in the event of any dispute with regard to Clauses 3, 6 and 9, other party shall have a right to get the agreement specifically enforced through appropriate court of law…..

And despite this clarity, the high court had appointed the arbitrators in terms of Clause 37 of the Addendum Agreement by observing that conjoint reading of Clauses 36 and 37 makes it clear that a party does have a right to seek enforcement of agreement before the Court of law but it does not bar settlement of disputes through Arbitration and Conciliation Act, 1996. Accordingly, the apex court had to consider a fundamental question whether in the facts and circumstances of the case, the high court is justified in appointing the arbitrators in an application under Section 11(5) and (6) of the Arbitration Act without holding any preliminary inquiry or inquiry on whether the dispute is arbitrable or not? Relying upon the precedents in *Vidya Drolia* v. *Durga Trading Corporation*[4]; and *Indian Oil Corporation Limited* v *NCC Limited,*[5] the Supreme Court observed that "High Court was at least required to hold a primary inquiry/review and prima facie come to conclusion on whether the dispute falls under Clause 36 or not and whether the dispute is arbitrable or not."

Further the apex court, quashed and set aside the judgment of the high court and remitted the matter back to the high court to decide the application under section 11(5) and (6) of the Arbitration Act afresh and to pass an appropriate order after holding a preliminary inquiry/review on whether the dispute is arbitrable or not and/or whether the dispute falls within Clause 36 of the Addendum Agreement or not.

2 (2023) 13 SCC 661: AIR 2022 SC 4678.

3 *Id*., para 2.2.

4 (2021) 2 SCC 1.

5 (2023) 2 SCC 539.

Appointment of an arbitrator, termination of the mandate of an arbitrator and substitution of an arbitrator are routine disputes which perennially affect the arbitration proceedings even before a proper kick start of the arbitral proceedings. One similar dispute landed up in the Supreme Court in the year of survey in the case of *Swadesh Kumar Agarwal* v. *Dinesh Kumar Agarwal*.[6]

In the present case, the sole arbitrator was appointed by the parties themselves by mutual consent and in the absence of any written contract containing the arbitration agreement. Hence it led to multiple issues arising *vis-à-vis* appointment of arbitrator by the court and others, such as the following questions came up for consideration by the Supreme Court:[7]

i. Whether the High Court in exercise of powers under section 11(6) of the Act, 1996, can terminate the mandate of the sole arbitrator?

ii. Whether in the absence of any written contract containing the arbitration agreement, the application under section 11(6) of the Act, 1996 would be maintainable?

iii. Is there any difference and distinction between subsection (5) of section 11 and sub-section (6) of section 11 of the Act, 1996?

iv. Whether the application under sub-section (6) of section 11 shall be maintainable in a case where the parties themselves appointed a sole arbitrator with mutual consent?

v. Whether in the facts and circumstances of the case the High Court was justified in terminating the mandate of the sole arbitrator on the ground that there was undue delay on the part of the sole arbitrator in concluding the arbitration proceedings which would lead to the termination of his mandate, in an application under section 11(6) of the Act, 1996 ?

vi. Whether in the facts and circumstances of the case, the learned Trial Court was justified in dismissing the application submitted by the appellant, submitted to reject the application under section 14(2) of the Act, 1996 in exercise of powers under Order VII Rule 11 of CPC?"

Considering the stated fact of a lack of any written arbitration agreement and mutual consent of the parties for referring the dispute to the sole arbitrator, it was decided by the apex court that the application under section 11(6) of the Act, 1996 in absence of any written agreement containing arbitration agreement was not maintainable at all. The court further observed that:[8]

> Once the dispute is referred to arbitration and the sole arbitrator is appointed by the parties by mutual consent and the arbitrator/ arbitrators is/are so appointed, the arbitration agreement cannot be invoked for the second time….

6 (2022) 10 SCC 235.

7 *Id.,* para 6.

8 *Ibid.*

The apex court clarified that in such a matter, the parties will have to invoke the jurisdiction of the court under Sec. 14 (2) of the Arbitration and Conciliation Act, 1996. This position was further affirmed by the Supreme Court's decision in the case of *Antrix Corporation Limited* v. *Devas Multimedia Private Ltd*.[9], wherein it was observed and held as under:[10]

> The matter is not as complex as it seems and in our view, once the arbitration agreement had been invoked by Devas and a nominee arbitrator had also been appointed by it, the arbitration agreement could not have been invoked for a second time by the petitioner, which was fully aware of the appointment made by the respondent. It would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. In our view, while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the 1996 Act, the Chief Justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement.
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> Sub-section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of sub-section (6) may be invoked by any of the parties. Where in terms of the agreement, the arbitration clause has already been invoked by one of the parties thereto under the ICC Rules, the provisions of sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act.

Based on the legal position reiterated by the apex court, the impugned judgment and order passed by the high court was termed as unsustainable and the same was quashed and set aside.

III ISSUES RELATING TO ARBITRATION CLAUSE

One of the most fundamental issues relating to validity of an arbitration clause came up for hearing before the division bench of the Supreme Court in the case of *Babanrao Rajaram Pund* v. *Samarth Builders* and *Developers*.[11]The

9 (2014) 11 SCC 560.

10 *Id*.,para 31.

11 (2022) 9 SCC 691.

arbitration clause in this apparently lacked the expression and certain essential characteristics of arbitration like "final and binding", and it led to the disputing of the arbitration clause which may be read herein under:[12]

> All the disputes or differences arising between the parties hereto as to the interpretation of this Agreement or any covenants or conditions thereof or as to the rights, duties, or liabilities of any part hereunder or as to any act, matter, or thing arising out of or relating to or under this Agreement (even though the Agreement may have been terminated), the same shall be referred to arbitration of a Sole Arbitrator mutually appointed, failing which, two Arbitrators, one to be appointed by each party to dispute or difference and these two Arbitrators will appoint a third Arbitrator and the Arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any re-enactment thereof.

In the impugned judgment of the high court, the contentions of the respondents were accepted to conclude that clause 18 indeed lacks certain essential ingredients of a valid arbitration agreement, as it does not mandate that the decision of the arbitrator will be final and binding on the parties. Consequently, the high court dismissed the application as not maintainable.

The Supreme Court observed that section 7 of the Arbitration and Conciliation Act, 1996 does not mandate any particular form for the arbitration clause. It is notable that this proposition stands settled by number of precedents of the Supreme Court. In order to reiterate the position, the Apex Court cited its decision of *Rukmanibai Gupta* v. *Collector, Jabalpur,*[13]which held that:[14]

> …….Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement. A passage from RUSSELL ON ARBITRATION, 19th Edn., p. 59, may be referred to with advantage: If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration.

The issue of minimal judicial interference in the arbitration matters and in the mandate of the arbitrator has been a constant bone of contention in the Indian judicial system. A related matter once again was heard by the division bench of the Supreme Court how the arbitrability should be left to the arbitrator, unless on the

12 *Id*., para 5.

13 (1980) 4 SCC 556.

14 *Id*.,para 6.

face it is found that the dispute is not arbitrable. In this matter between *VGP Marine Kingdom Pvt Ltd* v. *Kay Ellen Arnold,*[15] the appellants approached the high court under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an arbitrator so that the arbitral tribunal can be constituted in terms of clause 17.1.2 of the Share Subscription and Shareholders Agreement entered into between the appellants and the respondent at Chennai on April 27, 2016. However, the high court has refused to appoint an arbitrator, *inter-alia*, on the ground that at the time when the application was filed there were already arbitral proceedings pending between the parties and the award was passed and also on the ground that the proceedings were pending before the NCLT at the instance of the respondent on the allegation of mismanagement and oppression which was filed by the respondent as minority shareholder.Disposing off the petition and appointing a retired high court judge of High Court of Madras as an arbitrator, the Supreme Court observed:[16]

> ….High Court has erred in dismissing the application under Section 11(6) of the Act, 1996 and has erred in refusing to appoint an arbitrator with respect to the dispute between the parties with respect to the Share Subscription and Shareholders Agreement dated 27.04.2016…… The issue with respect to the arbitrability of the dispute is left to be decided by the learned Arbitrator.

Validity of an agreement clause as an arbitration clause was once again in question before the division bench of the Supreme Court in the survey year in the case of *Mahanadi Coalfields Ltd.* v. *IVRCL AMR Joint Venture*,[17]

Let us first of all, review the agreement clause under dispute:

15. Settlement of Disputes/Arbitration:

15.1 It is incumbent upon the contractor to avoid litigation and disputes during the course of execution. However, if such disputes take place between the contractor and the department, effort shall be made first to settle the disputes at the company level. The contractor should make request in writing to the Engineer-in-Charge for settlement of such disputes/claims within 30 (thirty) days of arising of the case of dispute/claim failing which no disputes/claims of the contractor shall be entertained by the company.

15.2 If differences still persist, the settlement of the dispute with Govt. Agencies shall be dealt with as per the Guidelines issued by the Ministry of Finance, Govt. of India in this regard. In case of parties other than Govt. Agencies, the redressal of the disputes may be sought in the Court of Law.

The Supreme Court, has undergone this drill several times of determining whether a particular agreement clause constitutes to be an arbitration clause. The court cited one such case, where an agreement clause was similar to the clause 15

15 (2023) 1 SCC 597.

16 *Id.*, para 6.

17 2022 SCC OnLine SC 960

cited above and what did the division bench of the apex court noted then. Such that in *IB Valley Transport, Vijay Laxmi (P) Ltd*. v. *Mahanadi Coalfields Ltd.,*[18] consisting of J Chelameswar and A. K. Sikri, JJ., the clause was interpreted as an alternative remedy at the company level to be exhausted before taking recourse to other suitable legal remedies. The court further observed:[19]

> 10. From the aforesaid narration of facts, it becomes clear that Clause 12 of the general terms and conditions provides for a mechanism of dispute resolution before resorting to the legal remedies. This clause specifically states that it is incumbent upon the contractor to avoid litigation and disputes during the course of execution. If any dispute takes place between the contractor and the department, effort shall be made first to settle the disputes at the company level. Further, this clause states that the contractors should make request in writing to the Engineer Incharge for settlement of such dispute/claim within 30 days of arising of cause of dispute/claim.

Accordingly, the Supreme Court quashed and set aside the judgment of the High Court and said that "there being no arbitration agreement between the appellants and the respondent, no reference to arbitration could have been made."

IV PARTY AUTONOMY AND SEAT OF ARBITRATION

While the party autonomy remain the cornerstone of arbitration agreements, in the judgment of *April 22, 2022 in the dispute between Oil and Natural Gas Corporation Limited (ONGC)* v. *Discovery Enterprises Private Limited (DEPL),*[20] the Supreme Court dealt with the critical issue of under what circumstances and by which doctrine non-signatory to the arbitration agreement can become party to the arbitration proceedings. In this matter, the Oil and Natural Gas Corporation Limited instituted an appeal against an interim award dated October 27, 2010 of the arbitral tribunal holding that the second respondent – Jindal Drilling and Industries Limited was not a party to the arbitration agreement and must be deleted from the array of parties. The interim award was challenged in an appeal before the High Court of Bombay, which was dismissed by the impugned judgment of the high court. Determining the subject matter of non-signatory being party to the arbitration, it was observed as part of the judgment that a non-signatory may be bound by the arbitration agreement where:

(i) There exists a group of companies; and

(ii) Parties have engaged in conduct or made statements indicating an intention to bind a non-signatory.

Further, in determining whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the Supreme Court noted that the law considers the following factors:

18 (2014) 10 SCC 630.

19 *Id.,* para 12.

20 (2022) 8 SCC 42.

(i) The mutual intent of the parties;

(ii) The relationship of a non-signatory to a party which is a signatory to the agreement;

(iii) The commonality of the subject matter;

(iv) The composite nature of the transaction; and

(v) The performance of the contract.

The apex court also relied upon the judgements of the its own courts in appreciating the concept of group of companies doctrine. The Court referred to the judgment in the case of *Chloro Controls India (P) Ltd*. v. *Severn Trent Water Purification Inc*.,[21] observed that "in substance, the doctrine postulates that an arbitration agreement which has been entered into by a company within a group of companies, can bind its non-signatory affiliates or sister concerns if the circumstances demonstrate a mutual intention of the parties to bind both the signatory and affiliated, non-signatory parties". Elaborating on the concept, the apex court held:[22]

> 71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [Russell on Arbitration (23rd Edn.)]
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> 72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

Hence the court held that based on the application of the interim award of the first arbitral tribunal stands vitiated because of:

(i) The failure of the arbitral tribunal to decide upon the application for discovery and inspection filed by ONGC;

21 (2013) 1 SCC 641.

22 *Id*., para 66.

(ii) The failure of the arbitral tribunal to determine the legal foundation for the application of the group of companies doctrine; and

(iii) The decision of the arbitral tribunal that it would decide upon the applications filed by ONGC only after the plea of jurisdiction was disposed of.

The debate of juridical seat of arbitration versus venue of arbitration is an old and continuing debate in the international arbitration cases, despite settled legal principles internationally. A similar debate was heard by the division bench of the Supreme Court in the case of *BBR (India) Private Limited* v. *S.P. Singla Constructions.*[23] The Supreme Court's jurisdiction wad invoked to decide whether conducting the arbitration proceedings at Delhi, owing to the appointment of a new arbitrator (Justice (Retd) T.S. Doabia), would shift the 'jurisdictional seat of arbitration' from Panchkula in Haryana, the place fixed by the first arbitrator (Justice (Retd.) N.C. Jain) for the arbitration proceedings? In arbitration matters, arbitration clauses have a crucial role to play, especially in cases where a one more doubts are casted on the validity or interpretation of the arbitration clause. Therefore, the dispute resolution and arbitration clause between the parties in this matter is produced below:[24]

> Save where the decision of the contractor is final and binding on the subcontract any dispute difference arising between the contractor and sub-contractor relating to any matter. In first instance shall be attempted to be resolved by the arbitration of the sole arbitrator to be appointed by the managing director of S.P. Singla Constructions Pvt. Ltd.
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> This letter of intent is being issued to you in two original you are requested return one original duty signed in token of your acceptance, which shall constitute a valid agreement for the work till such time a formal agreement is signed between you and us.

A bare perusal of this clause indicates that the words like place or venue of arbitration are not specifically provided in this clause. A question arises then how the seat of was fixed at Panchkula in Haryana. As stated in the facts, it appears that the contract and letter of intent were executed at Panchkula in Haryana. The corporate office of the respondent is also located at Panchkula. However, the registered office of the appellant is located in Bengaluru, Karnataka. Later when the dispute arose between the parties, the matter was referred to arbitration, and Justice (Retd.) N.C. Jain, was appointed as the sole arbitrator. In the first sitting held on August 5, 2014, the arbitral tribunal held that the venue of the proceedings would be H.No. 292, Sector-6, Panchkula, Haryana. Neither party had objected to the place of arbitration proceedings as fixed by the arbitral tribunal. Hence, Panchkula in Haryana was fixed as the neutral place for arbitration. After appointed

23 (2023) 1 SCC 693.

24 *Id.*,para 3.

of the second arbitrator, the arbitration proceedings were conducted in New Delhi and the arbitral tribal concluding its proceedings signed and pronounced the award at Delhi on January 29, 2016, where under the respondent was awarded a sum of Rs.3,35,86,577/- with interest at the rate of 15% per annum. Resultantly, the two proceedings were initiated. The respondent filed an application for interim orders under Section 9 of the Arbitration and Conciliation Act, 1996 before the Additional District Judge, Panchkula, on May 7, 2016. The appellant filed a petition under Section 34 of the Act before the High Court of Delhi on April 28, 2016. Thus the conflict with regard to the 'juridical seat of arbitration' came up before the Supreme Court.

The apex court recalled plethora of judgments delivered by various benches of the Supreme Court clarifying this matter. The five-judges bench judgment in the case of *Bhartiya Aluminium Company* v. *Kaiser Aluminium Technical Services Inc,*[25] was referred in the court had examined the distinction between 'jurisdictional seat' and 'venue' in the context of international arbitration, to hold that the expression 'seat of arbitration' is the centre of gravity in arbitration. However, this does not mean that all arbitration proceedings must take place at 'the seat'. The arbitrators at times hold meetings at more convenient locations.

The Supreme Court further observed that 'the seat' once fixed by the arbitral tribunal under Section 20(2) of the Arbitration and Conciliation Act, 1996, should remain static and fixed, whereas the 'venue' of arbitration can change and move from 'the seat' to a new location. Venue is not constant and stationary and can move and change in terms of sub-section (3) to Section 20 of the Arbitration and Conciliation Act, 1996. Change of venue does not result in change or relocation of the 'seat of arbitration'. More so, the court clarified that:[26]

> the appointment of a new arbitrator who holds the arbitration proceedings at a different location would not change the jurisdictional 'seat' already fixed by the earlier or first arbitrator. The place of arbitration in such an event should be treated as a venue where arbitration proceedings are held.

Accordingly, the Supreme Court dismissed the appeal, finally observing that "the courts having jurisdiction over Panchkula in Haryana, have exclusive jurisdiction. The courts in Delhi would not get jurisdiction as the jurisdictional 'seat of arbitration' is Panchkula and not Delhi."

V SPEEDY DISPOSAL AND COURT'S ROLE

Arbitration is understood to be by default a speedy means of dispute resolution, especially *vis-à-vis* regular court proceedings for dispute resolution. However, when the arbitration petitions remain pending in the high courts between one year to over four years, the situation becomes alarming. This is precisely the problem which the Supreme Court of India encountered in the case of *Shree Vishnu*

25 (2012) 9 SCC 552.
26 *Id*., para 29.

Constructions v. *The Engineer in Chief Military Engineering Service*.[27] In this matter, the Registrar General of the High Court for the State of Telangana at Hyderabad had submitted a report along with the statement of arbitration applications pending before the high court. From the statement it appeared that even the petition had been pending since 2006 till 2022. It also emerged from the statement that many applications under Section 11(6) of the Arbitration Act were pending since more than one year. The apex court noted the alarming rate of pendency in disposal of arbitration applications in the high court, so much so, even in the present case, the application had been pending since 2016. To address the situation, the Supreme Court thus directed that:

> All endeavors shall be made by the courts to decide and dispose of the applications for appointment of arbitrator within a period of six months. Even otherwise under the Commercial Courts Act, the commercial disputes are required to be disposed of within a period of one year. Even under the Arbitration (Amendment) Act, 2015, the arbitrator is required to dispose of the arbitral proceedings within a period of one year. Therefore, if the applications under Section 11(6) of the Arbitration Act are not decided at the earliest and within reasonable time, more particularly within one year from the date of filing, the object and purpose of the Arbitration Act shall be frustrated.

The apex court further noted that it could be possible that other high courts may also be facing similar problem, hence it was directed to the registry to call the statement/particulars with respect to the pending applications under Section 11(6) of the Arbitration Act from all the High Courts before any further directions are passed.

In the survey year, in the case of *UHL Power Company Ltd.* v. *State of Himachal Pradesh,*[28] concerning the premature termination of an Implementation Agreement (IA) between UHL Power Company Ltd. (UHL) and the State of Himachal Pradesh concerning a hydroelectric project, the appeals arose from the High Court of Himachal Pradesh decision, which partially modified the arbitral award favouring UHL. The dispute originated from the State's termination of the IA before the prescribed time. UHL invoked arbitration under the Arbitration and Conciliation Act, 1996, leading to an arbitral award of 26.08 crores, inclusive of compound interest, in its favour. This award was challenged by the State, resulting in the high court's partial reduction of the awarded amount. Mainly three issues were raised in the case:

i. Whether the arbitrator had the jurisdiction to award compound interest?
ii. Whether the 1992 Memorandum of Understanding (MoU) merged into the 1997 IA?

27 (2023) 8 SCC 329
28 (2022) 4 SCC 116.

iii. Whether the State acted lawfully in terminating the IA before the stipulated period?

The apex court settled the three leading issues as aforesaid:

Compound interest: The high court relied on the judgment in *State of Haryana* v. *S.L. Arora*[29] to deny compound interest, but the Supreme Court highlighted that this precedent was overruled by *Hyder Consulting* v. *State of Orissa.*[30] Upholding the arbitrator's decision, the Supreme Court clarified that compound interest could be granted if justified within the terms of the agreement.

Merger of agreements: The apex court affirmed that the MoU formed part of the IA based on explicit references within the IA. Clause 1 of the IA, which declared the MoU "lapsed," was harmonized with other provisions to confirm its incorporation. The arbitrator's interpretation was deemed plausible and within jurisdiction.

Premature termination: The Supreme Court upheld the arbitrator's finding that the State prematurely terminated the IA, contravening conditions related to delays caused by statutory clearances. The State's reliance on a distorted interpretation of Clause 4 of the IA was rejected as impermissible.

Finally, the Supreme Court reinstated the arbitral award, including compound interest, and held that the high court had overstepped its jurisdiction under Sections 34 and 37 of the Arbitration and Conciliation Act by interfering with the arbitrator's findings. The Apex Court further observed that by interfering with the arbitrator's findings, the High Court had ventured beyond its permissible scope of review, which is limited to rectifying awards that are perverse or in violation of public policy. Consequently, the State's appeal was entirely dismissed, while UHL's appeal was partly allowed.

Dispute over the mandate of arbitrators is not in the world of arbitration. It may be read as a dispute with regard to the dispute resolving body itself, technically called arbitral tribunal, irrespective of the number of arbitrators, sole or three or five, and so forth. In the year of survey, a classic dispute arose between *Oil and Natural Gas Corporation Ltd.* v. *Afcons Gunanusa JV,*[31] with regard to the fees of three arbitrators all retired judges of the Supreme Court and High Courts of India. The parties to the case and arbitration, Oil and Natural Gas Corporation Limited, and Afcons Gunanusa JV, together invoked arbitration clause as part of their Lump Sum Turnkey Contract for the construction of an ICP-R Platform. Three arbitrators were appointed, namely Mukul Mudgal J., Gyan Sudha Mishra J, and GN Ray J. It is interesting to see how the issue of the fees of arbitrators reached Supreme Court. The arbitral tribunal held a preliminary meeting on November 25, 2015 at which the members of the tribunal indicated their view that the fee schedule prescribed in the contract seemed unrealistic. While Afcons was agreeable to a

29 (2010) 3 SCC 690.
30 (2015) 2 SCC 189.
31 (2024) 4 SCC 481.

revision in the fee, ONGC indicated that it may not be agreeable. Later on subsequent arbitral proceedings, the dispute concerning arbitrators fees was discussed. Eventually, the tribunal held that the fee was set on the basis of the amount being paid in arbitrations of such nature. However, it agreed to reduce the fee of each arbitrator to Rs 1 lakh per sitting. It noted that the reading fee was kept open, and would be decided at a later stage. Consequently, by its letter dated August 21 2020, ONGC informed the arbitral tribunal that the revised fee was not approved by its 'higher' management. Thereafter, ONGC filed a petition under Section 14 read with Section 15 of the Arbitration and Conciliation Act, 1996 before the High Court of Bombay for the termination of the mandate of the arbitral tribunal and the substitution of a fresh set of arbitrators. By its order dated 7 October 2021, the petition was dismissed by the High Court of Bombay on the ground of a lack of jurisdiction since the arbitration was an international commercial arbitration within the meaning of Section 2(f) of the Arbitration and Conciliation Act, 1996. Therefore, the matter landed before the three judges bench of the Supreme Court to consider the petition. The apex court conducted survey of international best practices and approaches followed in determining fees of arbitrators, especially in international commercial arbitrations. One of the concluding observations of the Supreme Court in para 67 of the judgment, reflected below, reassures that the arbitration regime is although independent of the judicial interference, however, shall abide by certain legal rules and principles of reasonableness for being truly akin to the courts system of dispute resolution:[32]

> ……arbitrator(s) do not possess an absolute or unilateral power to determine their own fees. Parties are involved in determining the fees of the arbitrator(s) in some form. It could be by: (i) determining the fees at the threshold in the arbitration agreement; or (ii) negotiating with the arbitrators when the dispute arises regarding the fees that are payable; or (iii) by challenging the fees determined by the tribunal before a court.

To dispose off the petition, the Supreme Court, noted that:[33]

> it is evident that there was no consensus between the parties and the arbitrators regarding the fee that is to be paid to the members of the arbitral tribunal. Allowing the continuance of the arbitral tribunal would mean foisting a fee upon the parties and the arbitral tribunal to which they are not agreeable.

Accordingly, the Supreme Court issued directions for the constitution of a new arbitral tribunal in accordance with the arbitration agreement. Further, on the main contention on the fees of the arbitrators, the Supreme Court made following clear observations:[34]

32 *Id*., para 67.
33 *Id*., para 159.
34 *Id*., para 158.

> Arbitrators do not have the power to unilaterally issue binding and enforceable orders determining their own fees. A unilateral determination of fees violates the principles of party autonomy and the doctrine of the prohibition of in rem suam decisions, i.e., the arbitrators cannot be a judge of their own private claim against the parties regarding their remuneration. However, the arbitral tribunal has the discretion to apportion the costs (including arbitrators' fee and expenses) between the parties in terms of Section 31(8) and Section 31A of the Arbitration Act and also demand a deposit (advance on costs) in accordance with Section 38 of the Arbitration Act. If while fixing costs or deposits, the arbitral tribunal makes any finding relating to arbitrators' fees (in the absence of an agreement between the parties and arbitrators), it cannot be enforced in favour of the arbitrators. The arbitral tribunal can only exercise a lien over the delivery of arbitral award if the payment to it remains outstanding under Section 39(1). The party can approach the court to review the fees demanded by the arbitrators if it believes the fees are unreasonable under Section 39(2);
>
> This ceiling of INR 30,00,000 in the entry at Serial No 6 of the Fourth Schedule is applicable to each individual arbitrator, and not the arbitral tribunal as a whole, where it consists of three or more arbitrators. Of course, a sole arbitrator shall be paid 25 per cent over and above this amount in accordance with the Note to the Fourth Schedule.

This judgement and the threadbare analysis over the fees of arbitrators is expected to guide the future parties, cases and arbitrators, until we see new threads being opened again before at least three judges or larger bench of the Supreme Court.

While arbitration is perceived as a method of speedy disposal of commercial disputes, it is ironical that in most arbitration cases much time is spent in the courts from validation of arbitration clauses to appointment of arbitrators to interim relief applications to lastly stay or execution of arbitral awards. Be that as it may, the quest for expedient arbitration proceedings continues both inside the courtrooms and before the arbitral tribunals. Another such issue was heard by the division bench of the Supreme Court, in the case of *Sepco Electric Power Construction Corporation* v. *Power Mech Projects Limited*.[35]

In this case, post arbitration culminated in an award dated October 17, 2017, on December 3, 2017 the appellant filed an application under section 34 of the Arbitration and Conciliation Act, 1996, challenging the arbitral award dated October 17 2017, in the Commercial Division of the High Court of Delhi. On the same day, an appellant also filed an interim application under section 36 (2) of the Arbitration

35 (2021) 10 SCC 792.

and Conciliation Act, 1996 seeking stay of an arbitral award. Later the respondent also filed an application for the interim relief under section 9 of the Arbitration and Conciliation Act. Eventually, a material issue that came up before the Supreme Court, besides deciding on the multiple applications filed before the High Court of Delhi was that which application should be rightfully heard and disposed of first. The Supreme Court clearly observed that:

> There is no hard and fast rule that an application made earlier in point of time must be heard before an application made later in point oftime. Both the applications under Section 9 filed by the Respondent andthe application for stay under Section 36(2) filed by the Appellant relate to the same impugned award.

The Supreme Court further noted that there appears to be no ground for interference in the orders passed by the High Court of Delhi. It instead, requested the high court to dispose of the application for setting aside of an arbitral award as expeditiously as possible as, preferably within three months from the date of communication of this judgment of the Supreme Court.

VI CONCLUSION

Arbitration law has increasingly become highly expensive, witnessed judicial delays, and there are enough open wounds in the name of interpretation of arbitration provisions. Despite that, it would not be exaggeration to say that India has shown tremendous resistance to the judicial interference in the arbitration matters, and been on a spree to upgrade the law. The leading judgments on arbitration law delivered during the survey year, reflect the above assertions. The arbitration law still has many grey areas for settling the dust. This can be best understood referring to the propositions of Frederick Schauer that sometimes law provides good answer, sometimes, bad answer and sometimes no answer. Likewise, arbitration law is still precarious and evolving with each passing year testing the judicial grit for promoting party autonomy vested arbitration clauses and arbitral proceedings in India. This sums up the survey year's legal arbitration stories travelled through the galleries of the Indian judiciary, and is now presented for academic consumption and scrutiny.