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ARBITRATION LAW

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I INTRODUCTION

IN THE survey year 2023, the plethora of arbitration issues, disputes, interpretations of law came up before the Supreme Court of India and high courts across the country, for consideration. Arbitration law has been constantly evolving since 1996 when the Arbitration and Conciliation Act, 1996 (AC Act) was enacted, courtesy Indian courts. The leading issues that dominated the arbitration litigation space in the Indian courts in the survey year 2023, include the following:

(i) timely completion of arbitration process and delivery of arbitral award
(ii) public policy in setting aside of an arbitral award
(iii) limitation on authority of arbitrator
(iv) pre-referral jurisdiction of courts in arbitration matters
(v) judicial intervention in arbitration proceedings
(vi) non signatory to an arbitration agreement
(vii) notice in invoking arbitration
(viii) patent illegality in challenging arbitral award
(ix) appointment of an arbitrator
(x) courts have no power to modify arbitral award
(xi) revision of fees by an arbitral tribunal
(xii) applicability of group of companies doctrine in arbitration

While the arbitration issues of domestic and international debate may have remained somewhat common over the years, in the survey year 2023, the Supreme Court of India's arbitration judgments reinforced India's stance to emerge as an arbitration friendly jurisdiction. Let us take a quick peek into the journey of the arbitration litigation in 2023:

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II TIME LIMIT TO ARBITRATE & RESOLVE WITHIN THE LIMITED AUTHORITY

One of the foundational philosophies of arbitration has been time effective dispute resolution outside the regular court system. However, over the years, arbitration matters have been seen to be taking few years for disposal, and if the arbitral award gets challenged in the courts, that time adds to the misery. In the survey year of 2023, this issue once again surfaced in the case *TATA Sons Pvt Ltd* v. *Siva Industries and Holdings Ltd,*[1] wherein a two-judge Supreme Court bench, comprising CJI D.Y. Chandrachud and P.S. Narasimha J., held that "In terms of the amended provisions of Section 29A, arbitral tribunals in international commercial arbitrations are only expected to make an endeavor to complete the proceedings within twelve months from the date of competition of pleadings and are not bound to abide by the time limit prescribed for domestic arbitrations."

Further, the Supreme Court clarified that, "In a domestic arbitration, Section 29A(1) stipulates a mandatory period of twelve months for the arbitrator to render the arbitral award. In contrast, the substantive part of Section 29A(1) clarifies that the period of twelve months would not be mandatory for an international commercial arbitration. Hence, post 2019 amendment, the time limit of twelve months as prescribed in Section 29A is applicable to only domestic arbitrations and the twelve-month period is only directory in nature for an international commercial arbitration."

The survey year also witnessed a discussion on the limitations on the authority of an arbitrator, when a three judges bench in the case of *Union of India* v. *Bharat Enterprise*[2] held that,

> The Arbitrator comes on the scene as a result of the agreement between the parties. Not unnaturally, the fundamental and primary foundation for the Arbitrator to settle the dispute is the contract between the parties. An Arbitrator is a creature, in other words, of the parties and the contract. It is elementary that as Arbitrator he cannot stray outside the contours of the contract. He is bound to act within its confines. A disregard of the specific provisions of the contract would incur the wrath of the Award being imperiled. This position cannot be in the region of dispute.

Should the cases me mechanically or clerically referred for arbitration or there should be a preliminary inquiry done in terms of the necessity, was one of the questions deliberated by the Supreme Court in the survey year of 2023. The division bench of the apex court overturned the decision of the High Court of Delhi in the case of *NTPC Ltd.* v. *SPML Infra Ltd.*[3], which had referred the parties to arbitration under Section 11(6) of the A and C Act, despite the existence of a settlement agreement explicitly stating that no subsisting issues pending between them. The

1 (2023) 5 SCC 421 (2 Judges Bench).

2 2023 SCC OnLine SC 369.

3 (2023) 9 SCC 385.

court held that the high court ought to have conducted a *prima facie* assessment to identify and dismiss *ex-facie* meritless and dishonest claims rather than mechanically referring the matter to arbitration. These are the kinds of cases where the high court should exercise the restricted and limited review to check and protect parties from being forced to arbitrate.

In its analysis, the Supreme Court emphasized the necessity of applying the principles laid down in *Vidya Drolia* v. *Durga Trading Corporation* (2021) 2 SCC 1 to assess whether a final settlement had been reached, thereby precluding arbitration. The Supreme Court has ruled that while exercising jurisdiction under Section 11(6) of the A and C Act, the court is not expected to act mechanically, and that the limited scrutiny of the court at the pre-reference stage, through the "eye of the needle", is necessary and compelling.

Further, on the 'eye of needle' phrase, the Court explained that,

> the pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the referral court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

These critical questions concerning early phases of arbitration continue to remain vexedissues, however, the courts in India have consistently resolved the conflicting legal opinions to support the wide acceptance of arbitration process, limiting the judicial interference. This has been a continued welcome step even in the survey year of 2023.

III AWARD MODIFICATION AND LIMITATION OF AUTHORITY

Autonomy of arbitral tribunal to modify or correct the award versus the court's power to intervene after the declaration of the arbitral award to modify it, continued to haunt the judicial corridors even in the survey year 2023. Nonetheless, courts have dealt with this subject matter in various matters given its increasing petitions and necessity of threadbare analysis as to where the power of the courts would rest in such cases. Let us take a sneak peek into such judgments. In one of such cases, the division bench of the Supreme Court in *Indian Oil Corpn. Ltd.* v. *Sathyanarayana Service Station*[4] relying on the precedent set in Project Director, National Highways No. 45 E and 220, National Highways Authority of *India* v. *M. Hakeem* (2021) 9 SCC 1, held that once an arbitral award is set aside, the court does not have the authority to modify the award or grant further relief. It must leave the parties to work out their remedies in a given case even where it justifiably interferes with the award. The court has set aside the judgment of the high court and the arbitral award was restored.

4 2023 SCC OnLine SC 597.

Likewise the issue of limitation *vis-à-vis* section 34 of the Arbitration and Concilitaion Act of 1996 came up before the Apex Court in the case of *USS Alliance* v. *State of Uttar Pradesh*[5], wherein the two-judge bench, held that the court, while citing *Ved Prakash Mithal and Sons* v. *Union of India*, interpreted Section 34(3) in conjunction with Section 33 of the A and C Act, 1996, and determined that the limitation period commences from the disposal of an application under section 33 of the Act. The court further held that "In our opinion, looking at the purpose and object behind section 34 (3) of the Act, which is to enable the parties to study, examine and understand the award, thereupon, if the party chooses and is advised, draft and file objections within the time specified, the starting point for the limitation in case of Suo-moto correction of the award, would be the date on which the correction was made and the corrected award is received by the party. *Once the arbitral award has been amended or corrected, it is the corrected award which has to be challenged and not the original award.* The original award stands modified, and the corrected award must be challenged by filing objections."

The power to modify the arbitral award partially has been talked about given the arising necessity when the arbitral award is disputes for various legal reasons in the courts. In the survey year, another division bench of the Supreme Court in the case of *Larsen Air Conditioning and Refrigeration Company* v. *Union of India*[6] held that the court has no power to modify an arbitration award, can only set aside partially, or wholly, an award on a finding that the conditions spelt out under section 34 have been established.

The limited and extremely circumscribed jurisdiction of the court under section 34 of the Act, permits the court to interfere with an award, sans the grounds of patent illegality, *i.e.*, that "illegality must go to the root of the matter and cannot be of a trivial nature"; and that the tribunal "must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground." The other ground would be denial of natural justice. In appeal, section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under section 34.

In yet one more case of *Gujarat Composite Ltd.* v. *A Infrastructure Ltd.*[7], in the survey year the division bench of the Supreme Court observed that the reliefs sought extended beyond the purview of the arbitration clause in the agreement between the parties, as the dispute encompassed multiple transactions involving various contracting parties and distinct agreements, the majority of which lacked an arbitration clause. In this matter the Supreme Court affirmed the High Court of Gujarat's decision to reject an application under Section 8 of the A and C Act, in a commercial civil suit.The court further emphasized that the reliefs claimed in the

5 (2023) 5 SCC 421 .
6 (2023) 15 SCC 472 .
7 (2023) 7 SCC 193.

suit pertained to subsequent purchasers of the suit property, who were not signatories to the arbitration agreement. Given these circumstances, it concluded that there was no ambiguity regarding the absence of an arbitration agreement governing the dispute in question. Consequently, the rejection of the application under Section 8 was upheld. Upon analysing the nature of the transactions, the reliefs sought, and the corresponding cause of action, as examined by the high court, the Supreme Court determined that the appellant's reliance on the amendment to Section 8 and subsequent judicial interpretations did not support their position. It reasoned that no legal correlation existed between the original license agreement dated April 7, 2005 and the tripartite agreements involving the Bank, dated July 6, 2006 and Jan. 23, 2008, that would extend the applicability of the arbitration clause to the latter. Furthermore, considering the involvement of subsequent purchasers and allegations of fraud, the dispute was deemed non-arbitrable. The court finally held that,

> There being no doubt about non-existence of arbitration agreement in relation to the entire subject-matter of the suit, and when the substantive reliefs claimed in the suits fall outside the arbitration clause in the original licence agreement, the view taken by the High Court does not appear to be suffering from any infirmity or against any principle laid down by this Court.

Thus, this case and the matter fell beyond the authority of an arbitrator to arbitrate.

IV CHALLENGING AWARDS/HEARINGS IN ARBITRATION

In the survey yet setting a positive trend the Supreme Court gave a clarion call to the high courts that arbitral awards are not susceptible of judicial interference, except in rare cases where for the justifiable reasons, petitions challenging the arbitral award may sustain under section 34 of the A and C Act. In order to save it from becoming a routine that arbitral awards may get challenged in the high courts and the Supreme Court akin to the orders, judgments of the district courts or the high courts, the apex court took a serious view on this matter and demonstrated a matured judicial stands by declining to interfere. So much so, in the survey year of 2023, while hearing a petition in *Konkan Railway Corporation Limited* v. *Chenab Bridge Project Undertaking*[8], the three judges bench of the Supreme Court observed that arbitration awards cannot be set aside merely on the basis of the possibility of an alternative interpretation of facts or the contract. The jurisdiction under Section 34 of the A and C Act is exercised only to see if the arbitral tribunal's view is perverse or manifestly arbitrary, The court held that the scope of jurisdiction under section 34 and section 37 of the Act is not akin to normal appellate jurisdiction. It is well-settled that courts ought not to interfere with the arbitral award in a casual and cavalier manner. The mere possibility of an alternative view on facts or interpretation of the contract does not entitle courts to reverse the findings of the

8 (2023) 9 SCC 85.

arbitral tribunal. Further, court cited another case *Dyna Technologies Private Limited* v. *Crompton Greaves Limited,*

> There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law.

If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."

Moreover, *umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists.* The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Act. This is where the Division Bench of the high court committed an error, in re-interpreting a contractual clause while exercising jurisdiction under section 37 of the Act.

In an interesting turn of events in the broad deliberation on challenge to the arbitral awards, the apex court had an opportunity to set a context between minority and majority opinion of the arbitral award, for the purpose of challenging. In the case of *Hindustan Construction Co. Ltd.* v. *NHAI*[9], the division bench held that a dissenting opinion cannot be treated as an award if the majority award is set aside. It might provide useful clues in case there is a procedural issue which becomes critical during the challenge hearings. The court observed that, *"When a majority award is challenged by the aggrieved party, the focus of the court and the aggrieved party is to point out the errors or illegalities in the majority award. The minority award (or dissenting opinion, as the learned authors point out) only embodies the views of the arbitrator disagreeing with the majority. There is no occasion for anyone- such as the party aggrieved by the majority award, or, more crucially, the party who succeeds in the majority award, to challenge the soundness, plausibility, illegality or perversity in the approach or conclusions in the dissenting opinion. That dissenting opinion would not receive the level*

9 2023 SCC OnLine SC 1063.

and standard of scrutiny which the majority award (which is under challenge) is subjected to."

V PUBLIC POLICY AND SETTING-ASIDE DEBATES IN ARBITRATION

All matters which are admitted by the Supreme Court for setting aside of an arbitral award do not necessarily succeed, as the courts have begun to increasingly differentiate between various contours that clarify parameters for patent illegality under the arbitration law. Addressing a similar concern, the apex court in the matter of *Batliboi Environmental Engineers Ltd.* v. *Hindustan Petroleum Corpn. Ltd.*[10], held that while setting aside an arbitral award for being in violation of Section 28(3) of the Arbitration and Conciliation Act, 1996, it must be considered that the arbitrator is empowered to interpret the terms of the contract reasonably. The mere interpretation of a contract by an arbitrator cannot be a ground for setting aside an award, as the construction of contractual terms is ultimately for the arbitrator to decide.

Regarding the scope of judicial interference in arbitral awards, the Supreme Court referred to *ONGC Limited* v. *Saw Pipes Limited*, (2003) 5 SCC 705, and reaffirmed that an award may be set aside under section 34 on the grounds of public policy, which include: (i) contravention of the fundamental policy of Indian law; (ii) infringement of the interests of India; (iii) violation of justice or morality; or (iv) patent illegality. The court further relied on *Associate Builders* v. *Delhi Development Authority*, (2015) 3 SCC 49, emphasizing that the public policy test does not permit the Court to act as an appellate authority and correct errors of fact. The court held that the *"Arbitral tribunal is the ultimate master of quality and quantity of evidence. An award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Every arbitrator need not necessarily be a person trained in law as a Judge. At times, decisions are taken acting on equity and such decisions can be just and fair should not be overturned under Section 34 of the A&C Act on the ground that the arbitrator's approach was arbitrary or capricious."*

The court clarified the scope of patent illegality, which consists of three subcategories:

i. Contravention of substantive law: The illegality must go to the root of the matter and cannot be trivial. Reference was made to Section 28(1)(a) of the Act, which mandates that disputes submitted to arbitration under Part I must be adjudicated in accordance with the substantive law in force.

ii. Failure to provide reasoning: If the arbitrator does not provide reasons for the award, in contravention of Section 31(3) of the Act, it may be set aside.

10 (2024) 2 SCC 375.

iii. Contravention of Section 28(3): The arbitral tribunal is obligated to decide disputes in accordance with the contract's terms and consider trade practices relevant to the transaction. However, an award can only be set aside under this provision if the arbitrator's interpretation is so unreasonable that no fair-minded person would reach the same conclusion.

The court noted that, *"This last sub-head [Section 28(3)] should be understood with a caveat that the arbitrator has the right to construe and interpret the terms of the contract in a reasonable manner. Such interpretation should not be a ground to set aside the award, as the construction of the terms of the contract is finally for the arbitrator to decide. The award can_be only set aside under this sub-head if the arbitrator construes the award in a way that no fair-minded or reasonable person would do."*

A clash point between applicability of arbitration in consumer dispute related matter came up for hearing before the Supreme Court in the case of *M. Hemalatha Devi* v. *B. Udayasri*[11], wherein the court crafted a judicial reasoning and held that, "the Consumer Protection Act is a welfare legislation aimed at safeguarding consumer interests. Consumer disputes are assigned to public fora as a matter of public policy, making them inherently non-arbitrable. Such disputes should remain within public fora unless both parties expressly opt for arbitration."

In this case, The appellants have challenged two orders of the High Court of Telangana. The first order was passed in 2022, dismissing their application for the appointment of an arbitrator under Section 11 of the A and C Act, on the ground that the dispute was pending before a judicial authority- the District Consumer Disputes Redressal Forum. Subsequently, the appellants sought arbitration, but the District Consumer Forum rejected the request, holding that the complainant had invoked a public law remedy under the Consumer Protection Act, 2019, rendering the dispute non-arbitrable. The validity of these orders must be examined in light of Section 11(6-A) and Section 8 of the A and C Act.

Issues before the court-:

(i) Whether the existence of an arbitration clause in the agreement would exclude the jurisdiction of the Consumer Courts? and

(ii) Whether the dispute between the parties is arbitrable, and once a party has availed the remedy before a public forum under a special beneficial legislation, can it be compelled to go for arbitration?

While answering the above issues, the court has referred the *National Seeds Corpn. Ltd.* v. *M. Madhusudhan Reddy*, (2012) 2 SCC 506 as *"The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Protection Act.* If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file a complaint under

11 (2024) 4 SCC 255.

the Consumer Protection Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the A and C Act. *Moreover, the plain language of Section 3 of the Consumer Protection Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force."*

Regarding the exclusion of disputes from arbitration, the court further observed that: "The exclusion of a dispute from arbitration may be express or implied, depending again upon the nature of the dispute, and a party to a dispute cannot be compelled to resort to arbitration merely for the reason that it has been provided in the contract, to which it is a signatory. *The arbitrability of a dispute has to be examined when one of the parties seeks redressal under a welfare legislation, in spite of being a signatory to an arbitration agreement."* "The Consumer Protection Act" is definitely a piece of welfare legislation with the primary purpose of protecting the interest of a consumer. Consumer disputes are assigned by the legislature to public fora, as a measure of public policy. *Therefore, by necessary implication such disputes will fall in the category of non-arbitrable disputes, and these disputes should be kept away from a private fora such as "arbitration", unless both the parties willingly opt for arbitration over the remedy before public fora.*

Another issue raised by the appellants was that, having initiated arbitration under Section 11, the consumer should have complied with the agreed arbitration framework rather than seeking recourse before the consumer forum. The court answered as, *"The question, however, is of election, or of choice, and not of which party had approached the court first. More importantly it would be the nature of the dispute, which would determine the forum for its redressal."* The law gives this choice to the consumer to either avail a remedy under the Consumer Protection Act, by filing a complaint before the judicial authority, or go for arbitration. This option is not available to the builder, as they are not "consumers", under the 2019 Act.

The court finally held that, "the 1986 Act was enacted to provide better protection of the interest of consumers and for providing a redressal mechanism, which is cheaper, easier, expeditious and effective. For this purpose, various quasi-judicial forums were set up at district, State and national level with a wider range of powers vested in these Judicial Authorities. These judicial authorities were vested with the powers to give relief of a specific nature and to award compensation to the consumer wherever it was felt necessary to impose penalty for non-compliance of their orders, and the judicial authorities were vested with such powers. Now compare this with the power of the arbitrator. An arbitrator does not have the power to impose a penalty. This is also one of the essential differences between the two forums. *It was finally held that the provisions given under the 1986 Act were in addition to, and not in derogation to, any other provisions or any other law for the time being in force."*

There are several intricate facets to challenging the arbitral award to prove grounds of public policy. One such issue relates to supporting evidence being produced in the court. Addressing a related concern and legal proposition, the Supreme Court in the case of *Alpine Housing Development Corpn. (P) Ltd*. v. *Ashok S. Dhariwal,*[12] handled a question, "Whether an applicant could be permitted to adduce evidence in support of the ground of public policy in an application filed under Section 34 of the Arbitration and Conciliation Act, 1996?" The court held that for arbitration proceedings that commenced and concluded prior to the amendment of Section 34(2)(a) by Act 33 of 2019, the pre-amended provision would be applicable.

Another issue for consideration was, "Whether, in an application filed under the pre-amended Section 34(2)(a), where the requirement is that the applicant must "furnish proof," the applicant could be allowed to adduce evidence by way of affidavit or other means.While explaining the scope and ambit of Section 34(2)(a) pre-amendment, the court citing three judgements, and held that, "the scope and ambit of section 34(2)(a) pre-amendment would be that applications under sections 34 of the Act are summary proceedings; an award can be set aside only on the grounds set out in section 34(2)(a) and section 34(2)(b); speedy resolution of the arbitral disputes has been the reason for enactment of 1996 Act and continues to be a reason for adding amendments to the said Act to strengthen the aforesaid object; therefore in the proceedings under section 34 of the Arbitration Act, the issues are not required to be framed, otherwise if the issues are to be framed and oral evidence is taken in a summary proceedings, the said object will be defeated; an application for setting aside the arbitral award will not ordinarily require anything beyond the record that was before the arbitrator, however, if there are matters not containing such records and the relevant determination to the issues arising under section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both the parties' the cross-examination of the persons swearing in to the affidavits should not be allowed unless absolutely necessary as the truth will emerge on the reading of the affidavits filed by both the parties. Therefore, in an exceptional case being made out and if it is brought to the court on the matters not containing the record of the arbitrator that certain things are relevant to the determination of the issues arising under section 34(2)(a), then the party who has assailed the award on the grounds set out in section 34(2)(a) can be permitted to file affidavit in the form of evidence. However, the same shall be allowed unless absolutely necessary."

In light of the foregoing reasons, the Supreme Court found no error in the high court's decision to permit the respondents to submit affidavits or additional evidence in proceedings under Section 34 of the Act.

Public policy consideration was again raised before the Supreme Court in the survey year in *Super Diamond Tools* v. *K. Mohan Rao*[13]. The respondent in

12 2023 SCC OnLine SC 55.

13 (2023) 14 SCC 407

this case approached the Division Bench, High Court of Madras, which, in its impugned order *K. Mohan Rao v. Super Diamond Tools*, 2008 SCC OnLine Mad 706, held that the arbitral award was unsustainable as it was contrary to public policy. The Division Bench opined that the arbitrator's method of retrospectively accounting for a period of 21 years was untenable. Furthermore, considering that the respondent in this, filed its claim beyond three years from the date of knowledge of the alleged fraud, the apex court found that the impugned order, to the extent that it sets aside the award on appeal, is not in error of law.

Courts and judges always encourage and are on a look out for a speaking order which has a well-founded legal reasoning that may inspire people's faith in the judgment and reflect a true spirit of justice being delivered. Addressing similar subject matter in the survey year, although in the context of an arbitral award, the Apex Court's division bench in the case of *Indian Railway Construction Co. Ltd.* v. *National Buildings Construction Corpn. Ltd.*[14], had set aside the high court's order, which had annulled an arbitral award. The court observed that the high court had exceeded its jurisdiction under Section 34 of the Act by overturning a well-reasoned award issued by the Arbitral Tribunal. Furthermore, with regard to Section 31(7)(a) of the Act, the Supreme Court, relying on the precedent established in *Raveechee and Company* v. *Union of India*, held that unless explicitly prohibited by the contract, an arbitrator or arbitral tribunal retains the discretion to award *pendente lite* interest.

The survey year witnessed multiple cases, wherein the Supreme Court displayed its support for respecting a well-reasoned arbitral awards and cautioned for touching upon the merits and interfering which may water-down the philosophy and tenets of arbitral process. This was further emphasized by the apex court's division bench in the case of *Reliance Infrastructure Ltd.* v. *State of Goa*[15], wherein the bench held that the arbitral award is not an ordinary adjudicatory order so as to be lightly interfered with by the courts under Sections 34 or 37 of the Act of 1996 as if dealing with an appeal or revision against a decision of any subordinate court. The expression "patent illegality" has been exposited by this Court in the cases referred hereinbefore. The significant aspect to be reiterated is that it is not a mere illegality which would call for interference, but it has to be "a patent illegality", which obviously signifies that it ought to be apparent on the face of the award and not the one which is culled out by way of a long drawn analysis of the pleadings and evidence.

Of course, when the terms and conditions of the agreement governing the parties are completely ignored, the matter would be different and an award carrying such a shortcoming shall be directly hit by Section 28(3) of the Act, which enjoins upon an Arbitral Tribunal to decide in accordance with the terms of contract while taking into account the usage of trade applicable to the transaction.

14 (2023) 7 SCC 390

15 (2024) 1 SCC 479.

As said by this court in Associate Builders, if an arbitrator construes the term of contract in a reasonable manner, the award cannot be set aside with reference to the deduction drawn from construction. The possibility of interference would arise only if the construction of the Arbitrator is such which could not be made by any fair minded and reasonable person. The narrow scope of "patent illegality" cannot be breached by mere use of different expressions which nevertheless refer only to "error" and not to "patent illegality."

The apex court has taken its stride further in declining to interfere in the arbitral process in order to preserve its sanctity and give a clear message that this court should not be approached as regular court of appeal in arbitration matters. This was enunciated by the division bench of the court in Narsi Creation (P) Ltd. v. State of U.P.[16], wherein after a detailed hearing, the court noted that the present Special Leave Petition (SLP) concerns issues already under adjudication before the Arbitral Tribunal, with no award passed yet. By invoking the provisions of the Arbitration and Conciliation Act, 1996, along with established judicial precedents, the Court reaffirmed the principle that judicial intervention in arbitral proceedings should be avoided, particularly in cases where the arbitral tribunal has yet to issue an award.

VI INVOKING ARBITRATION AND MANDATE OF AN ARBITRATOR

The survey year brought to light a pertinent question of law, what would happen to fate of the contracts and disputes emanating from them, which may get caught in between the principal Arbitration and Conciliation Act, 1996 and the amendments made to the law. The division bench of the Supreme Court had to dwell upon such critical questions and show way for a sound legal decision reducing multiple and further ligations on similar matter. From this angle, the case of Shree Vishnu Constructions v. Military Engg. Service[17], assumes greater importance, wherein the division bench of the Apex Court heard a petition whether in arbitration proceedings, wherein the notice invoking arbitration is issued prior to the Amendment Act, 2015, the law governing the arbitral proceedings would be the provisions of the old Act shall be applicable (pre-amendment 2015) or the new amended Act? The court while applying the law laid down by this Court in the cases of *Union of India v. Parmar Construction Company*, and Union of India V.. Pradeep Vinod Construction Company, and S.P. Singla Constructions Private Limited V.. State of Himachal Pradesh and Anr., to the facts of the case on hand as in the present case the notice invoking arbitration clause was issued on 26.12.2013, i.e., much prior to the Amendment Act, 2015 and the application under Section 11(6) of the Act has been preferred/filed on 27.04.2016, i.e., much after the amendment Act came into force, the law prevailing prior to the Amendment Act, 2015 shall be applicable and therefore the High Court has rightly entered into the question of accord and satisfaction and has rightly dismissed the application under section

16 2023 SCC OnLine SC 441 .
17 (2023) 8 SCC 329 .

11(6) of the Act applying the principal Act, namely, the Arbitration and Conciliation Act, 1996, prevailing prior to the Amendment Act, 2015. "*It is observed and held that in a case where the notice invoking arbitration is issued prior to the Amendment Act, 2015 and the application under Section 11 for appointment of an arbitrator is made post Amendment Act, 2015, the provisions of pre-Amendment Act, 2015 shall be applicable and not the Amendment Act, 2015.*"

The court also cited the *Board of Control for Cricket in India (BCCI)* v. *Kochi Cricket Private Limited*., has ruled that the 2015 Amendment Act, 2015 to be prospective in nature only so far as the proceedings under Sections 34 & 36 of the Act are concerned. Further, the application under Section 11(6) was not in issue before the court.

Appointment of an arbitrator sometimes possess initial and strong roadblock to the entire arbitral process, despite initial intentions of the parties to arbitrate. Unfortunately such matters do line up before the Supreme Court, which has to emerge as a beacon of hope and giving a catalyst push to the arbitration by appointing arbitrators, as applicable and warranted by the case. Similar matter was considered by the Apex Court in the survey year, and in the case of *Lombardi Engg. Ltd.* v. *Uttarakhand Jal Vidyut Nigam Ltd*.[18], the court heard an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, filed by Lombardi Engineering Ltd., a Swiss company, seeking the appointment of an arbitrator in a dispute with the State of Uttarakhand. The petition arose from disputes under a contract dated 25.10.2019 between the petitioner and Uttarakhand Vidyut Nigam Limited.

The court has framed the following issues-:

i. Whether the dictum as laid down in ICOMM Tele Limited (supra) can be made applicable to the case in hand more particularly when Clause 55 of the General Conditions of Contract provides for a pre-deposit of 7% of the total claim for the purpose of invoking the arbitration clause?

ii. Whether there is any direct conflict between the decisions of this Court in *S.K. Jain v. State of Haryana and Another reported in (2009) 4 SCC 357* and *ICOMM Tele Limited v. Punjab State Water Supply and Sewerage Board and Another (2019) 4 SCC 401*?

iii. Whether this Court while deciding a petition filed under Section 11(6) of the Act 1996 for appointment of a sole arbitrator can hold that the condition of pre-deposit stipulated in the arbitration clause as provided in the Contract is violative of the Article 14 of the Constitution of India being manifestly arbitrary?

iv. Whether the arbitration Clause No. 55 of the Contract empowering the Principal Secretary/Secretary (Irrigation), State of Uttarakhand to appoint an arbitrator of his choice is in conflict with the decision of this Court in

18 (2024) 4 SCC 341.

the case of Perkins Eastman Architects DPC and Another v. HSCC (India) Limited (2020) 20 SCC 760?

The court answered the answers to the issue raised above; the principles of law discernible from the aforesaid observations made by this Court in ICOMM Tele Limited are as under:

(a) That the pre-deposit condition in an arbitration clause is violative of Article 14 of the Constitution of India being arbitrary. (b) Unless it is first found or prima facie established that the litigation that has been embarked upon is frivolous, the exemplary costs or punitive damages cannot follow. (c) Deterring a party to an arbitration from invoking the Alternative Dispute Resolution Process by pre-deposit of certain percentage would discourage arbitration. This would run contrary to the object of de-clogging the court system and would render the arbitral process ineffective and expensive.

Further, the court held that there is no conflict between S.K. Jain case and ICOMM Tele Limited case, as the relevant arbitration clauses that fell for the consideration of the Supreme Court in both the cases stood completely on a different footing. Also, the points of law on which S.K.Jain case was distinguished and explained in the ICOMM Tele Limited case.

On Issue no.3, the court answered that, *the Arbitration Agreement, has to comply with the requirements of the following and cannot fall foul of: (i) Section 7 of the Arbitration and Conciliation Act; (ii) any other provisions of the Arbitration and Conciliation Act, 1996 & Central/State Law; (iii) Constitution of India, 1950.*

The concept of "party autonomy" as pressed into service by the respondent cannot be stretched to an extent where it violates the fundamental rights under the Constitution. *For an arbitration clause to be legally binding it has to be in consonance with the "operation of law" which includes the Grundnorm i.e. the Constitution. It is the rule of law which is supreme and forms parts of the basic structure.* The argument canvassed on behalf of the respondent that the petitioner having consented to the pre-deposit clause at the time of execution of the agreement, cannot turn around and tell the court in a Section 11(6) petition that the same is arbitrary and falling foul of Article 14 of the Constitution is without any merit. Moreover, the court held that, 'it is a settled position of law that there can be no consent against the law and there can be no waiver of fundamental rights.'

On Issue no.4, the Court held that that, this issue is covered by the judgment in Perkins Eastman Architects DPC and another v. HSCC (India) Ltd (2020) 20 SCC 760 which held that persons interested in the outcome of the arbitration must not have the power to appoint arbitrators. "If circumstances exist giving rise to justifiable doubts as to the independence and impartiality of the person nominated or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for

reasons to be recorded ignore the designated arbitrator and appoint someone else."

Finally, the court concluded that, we have reached to the conclusion that we should ignore the two conditions contained in Clause 55 of the GCC, one relating to 7% deposit of the total amount claimed and the second one relating to the stipulation empowering the Principal Secretary (Irrigation) Government of Uttarakhand to appoint a sole arbitrator and proceed to appoint an independent arbitrator.

The survey year herein brought to light Supreme Court's greater support for arbitration matters by liberally interpreting the arbitration law and clarifying amended provisions post 2015 amendment, concerning appointment of arbitrators, their mandate and referring matters to arbitral forum. In *Magic Eye Developers (P) Ltd*. v. *Green Edge Infrastructure (P) Ltd*.[19], the Apex Court addressed similar question and held that, *"post amendment in 2015, the jurisdiction of the Court under Section 11(6) of the Arbitration Act is confined to examining whether an arbitration agreement exists between the parties – "nothing more, nothing less".* Under Section 11(6A) of the Arbitration Act, referral court is duty bound to consider the dispute/issue with respect to the existence of an Arbitration Agreement.

Under Section 11(6) of the Arbitration Act, the pre-referral jurisdiction of the court is limited to two key inquiries, (i) existence and validity of arbitration agreement; and (ii) non-arbitrability of dispute. *The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. The said matter requires a thorough examination by the referral court. The Secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.*

Both are different and distinct. So far as the first issue with respect to the existence and the validity of an arbitration agreement is concerned, as the same goes to the root of the matter, the same has to be conclusively decided by the referral court at the referral stage itself. With respect to non-arbitrability of the dispute, the court at pre-referral stage may prima facie examine the arbitrability of claims. The review at the reference stage is done to sideline the cases where litigation must stop at the first stage. When the issue of 'existence and validity of an arbitration agreement' is raised at pre-referral stage, then the Court is duty bound to conclusively decide the issue and should not leave the said issue to be determined by the arbitral tribunal. The reason is that the issue with respect to the existence and validity of an arbitration agreement goes to the root of the matter. If the issue regarding 'existence and validity of an arbitration agreement' it is left to the Arbitral Tribunal, then it will be contrary to Section 11(6A) of the Arbitration Act. This is to protect the parties from being forced to arbitrate in absence of a valid arbitration agreement.

19 (2023) 8 SCC 50 .

For further clarification on the duty of the referral court in arbitration matters, the Court, while citing N.N. Global Mercantile Pvt. Ltd., reaffirmed that, in the absence of a valid arbitration agreement, no reference to arbitration can be made. It further emphasized that the insertion of Section 11(6A) in the A and C Act, was intended to confine the court's role under Section 11 to the verification of the existence of such an agreement. Accordingly, if the referral court fails to conclusively determine the existence and validity of an arbitration agreement and instead refers the matter to the arbitral tribunal, such an approach would contravene Section 11(6A). Therefore, it is imperative for the referral court to adjudicate this issue at the threshold stage to prevent parties from being compelled into arbitration in the absence of a legally valid agreement.

The Supreme Court resolved another matter concerning appointment of an arbitrator in the survey year and cleared another obstacle preventing an arbitral tribunal to come into existence and initiate the proceedings for further hearings on merit. The division bench of the *Apex Court in B & T AG* v. *Union of India*[20], held that the 'cause of action' for the appointment of an arbitrator arises from the 'breaking point' in the relationship between the parties. The court framed the issue, whether time-barred claims or claims which are barred by limitation, can be said to be live claims, which can be referred to arbitration?While citing the case of *Geo Miller and Company Private Limited* v. *Chairman, Rajasthan Vidyut Utpadan Nigam Limited, (2020) 14 SCC 643*, the court held that, "*on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act.*"

However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. *The Court upon careful consideration of such history must find out what was the "breaking point" at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This "breaking point" would then be treated as the date on which the cause of action arises, for the purpose of limitation.*Moreover, in a commercial dispute, while mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. It does not lie to the applicant to plead that it waited for an unreasonably long period to refer the dispute to arbitration merely on account of the respondent's failure to settle their claim and because they were writing representations and reminders to the respondent in the meanwhile."

Further, the court concludes that,

> *negotiations may continue even for a period of ten years or twenty years after the cause of action had arisen. Mere negotiations will*

20 (2024) 5 SCC 358 .

> *not postpone the "cause of action" for the purpose of limitation. The Legislature has prescribed a limit of three years for the enforcement of a claim and this statutory time period cannot be defeated on the ground that the parties were negotiating. The Arbitration Act does not prescribe any time period for filing an application under Section 11(6) for appointment of Arbitrator. Thus, the limitation of three years provided under Article 137 of the Limitation Act, 1963 would apply to such proceedings. The time limit of three years would commence from the period when the right to apply accrues.*

The Bench ruled that the 'breaking point' for the cause of action arose when the bank guarantee was encashed in 2016, marking the conclusion of the matter. Relying on the letter dated 24.02.2016, the Court noted that disputes had arisen in 2014, and the Petitioner could not claim an extension of the limitation period based on negotiations continuing until 2019.

The survey year also enriched the arbitration jurisprudence further when the Apex Court had to threadbare analyse and clarify whether the subject matters visa-vis the application of Article 299 of the Constitution can be sent for arbitrations. The three judges bench of the Apex Court heard this petition in *Glock Asia-Pacific Ltd.* v. *Union of India*[21] and held that, "having considered the purpose and object of Article 299, we are of the clear opinion that a contract entered into in the name of the President of India, cannot and will not create an immunity against the application of any statutory prescription imposing conditions on parties to an agreement, when the Government chooses to enter into a contract. We are unable to trace any immunity arising out of Article 299, to support the contention that for contracts expressed to be made by the President of India, the ineligibility of appointment as an arbitrator as contemplated under Section 12(5) of the Act, read with Schedule VII, will be inapplicable." Further, the court holds that the application under Section 11(6) of the A and C Act, is allowed. Justice Indu Malhotra, former judge of this Court, is appointed as the Sole Arbitrator to adjudicate disputes arising from the Conditions of Tender between the parties, subject to mandatory disclosures under amended Section 12 of the Act.

Arbitrations are said to be increasingly costly as against the general notion that they were conceptualized to be cost effective than the court room ligations. When and how fees can be altered, or increased came up for deliberation before the Supreme Court in *Chennai Metro Rail Ltd.* v. *Transtonnelstroy Afcons* (JV)[22] and the court held that, the unilateral revisionof fee by an arbitral tribunal, though not permissible, will not terminate its mandate on the ground of ineligibility as per Section 12 of the Arbitration and Conciliation Act 1996.

The court also relied upon case of *Oil and Natural Gas Corporation Ltd.* v. *Afcons Gunanusa JV 2022 (10) SCR 660* and observed that, 'the arbitrators

21 (2023) 8 SCC 226 .

22 (2024) 6 SCC 211.

should revise the fee only in consultation with the parties and should not do it unilaterally and breach of the rule laid down in *ONGC* will not render the arbitrator ineligible.' The court held that, this court is conscious of the fact that, '*ONGC (supra) is the authority for the proposition that the issue of fixation of fee, is contractual, and wherever there is no prior arrangement or court order, the tribunal has to fix it at the threshold.'* The arrangement is by way of a tripartite agreement, which means that regardless of what mode of payment (ad-valorem or sitting fee, or different rates, depending upon the number of hearings, or the issue of fee increase being contemplated allowing the tribunal to revise its fee at a later stage), any revision or revisiting of the fee condition, should be based on consultation, and agreement of both contesting parties, and the tribunal.

VII NON-STAMPING & NON-SIGNATORY DEBATE

"But I didn't sign an arbitration agreement" is a famous article authored by an American arbitrator which minutely analyses issues and doctrines concerning third parties in the arbitration matters. Similar aspects came up for detailed scrutiny before the Supreme Court during the survey year in the case of *Cox and Kings Ltd.* v *SAP India Pvt. Ltd.*[23] This being one of the lengthiest cases of the survey year and quite complicated, needs a very thorough examination. In this matter, on December 14, 2010, Cox and Kings Ltd. (C&K), a travel company, entered into a software licensing agreement with SAP India Pvt. Ltd., a company specializing in the development and sale of software solutions for various business functions, including marketing, finance, and human resources. In October 2015, as C&K was in the process of developing its own e-commerce platform, SAP India approached them with a proposal to implement a new software solution. Consequently, the two companies entered into three separate agreements for the use of SAP's 'Hybris Solution' software. SAP India assured C&K that the new software was already 90% compatible with their existing systems and that the remaining 10% could be customized within a period of 10 months.

Among these agreements, the General Terms and Conditions Agreement (GTC) contained an arbitration clause, wherein both parties consented to resolving any future disputes through arbitration. They further agreed to be governed by the provisions of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) and designated Mumbai as the seat of arbitration. However, the implementation of the Hybris software encountered significant challenges. Seeking assistance, C&K reached out to SAP SE, the parent company based in Germany. SAP SE subsequently assembled a team of global experts and effectively assumed control of the project. Despite multiple extensions, the implementation remained unsuccessful. Consequently, in November 2016, C&K terminated the contract and sought a refund of 45 crores to recover its payments to SAP. In response, SAP India issued a notice initiating arbitration proceedings, contending that C&K had wrongfully terminated the contract and claiming 17 crores in compensation.

23 (2024) 4 SCC 1.

In November 2019, the arbitration proceedings were halted by the National Company Law Tribunal due to ongoing insolvency proceedings against C&K. Despite the financial difficulties, C&K issued a fresh arbitration notice, this

including SAP SE as a party, even though SAP SE was not a signatory to any of the agreements. As SAP did not appoint an arbitrator, C&K approached the Supreme Court under Section 11 of the Arbitration Act, seeking the Court's intervention in appointing one. C&K contended that SAP SE should be bound by the arbitration agreement despite not being a signatory, arguing that SAP SE had assumed full responsibility for the project and had implicitly consented to be bound by the agreement. Additionally, C&K emphasized that SAP India was a wholly owned subsidiary of SAP SE. This argument was based on the 'Group of Companies Doctrine,' which allows a non-signatory entity to be included in arbitration proceedings under certain circumstances.

Reference to the Supreme Court-: On December 6, 2023, a five-judge Constitution Bench comprising Chief Justice D.Y. Chandrachud, Justice Hrishikesh Roy, Justice J.B. Pardiwala, Justice P.S. Narasimha, and Justice Manoj Misra, delivered a landmark judgment affirming the applicability of the Group of Companies Doctrine (GOCD) in arbitration. The Court held that entities not originally party to an arbitration agreement could nonetheless be bound by arbitration proceedings under this doctrine.

The case originated from *Cox and Kings Ltd.* v. *SAP India Pvt. Ltd.*, where a three-judge bench led by former Chief Justice N.V. Ramana, along with Justices A.S. Bopanna and Surya Kant, referred the question of the applicability of GOCD under the Arbitration and Conciliation Act, 1996, to a larger five-judge bench on May 6, 2022. In the earlier case of *Chloro Controls v. Severn Trent Water Purification Inc.*, a three-judge bench of the Supreme Court had invoked the GOCD, interpreting the phrase "through or under" in Sections 8 and 45 of the Arbitration Act to bind non-signatories to arbitration agreements. However, Chief Justice Ramana criticized the approach taken in case of *Chloro Controls India (P) Ltd.* particularly its reliance on the phrase "claiming through or under" in Section 45 of the Arbitration Act to justify the adoption of the Group of Companies Doctrine. He further emphasized that economic concepts such as a 'tight group structure' or 'single economic unit' alone could not be used to bind a non-signatory to an arbitration agreement in the absence of express consent. Additionally, Justice Surya Kant observed that the inconsistent application of the doctrine in Indian jurisprudence necessitated clarification by a larger bench.

Subsequently, in March and April 2023, a bench led by Chief Justice Chandrachud conducted a five days hearing in this case. In its unanimous 152-page judgment, the Constitution Bench reaffirmed the validity of the GOCD and broadened the scope of non-signatories who may be subjected to arbitration.

Issues Framed-: The Supreme Court has framed two issues for determination in this case as follows-: (i) Whether the Arbitration Act allows joinder of a non-signatory as a party to an arbitration agreement? (ii) Whether Section 7 of the

Arbitration Act allows for determination of an intention to arbitrate on the basis of the conduct of the parties?

In line with the established jurisprudence on the Group of Companies Doctrine (GOCD), the Bench held that mere affiliation to a corporate group is insufficient to compel a non-signatory to be bound by an arbitration agreement. Instead, the tribunal must ascertain whether the conduct of both the signatory and non-signatory parties demonstrates a shared intention to include the non-signatory within the scope of arbitration.To determine the existence of such common intent or implied consent, courts or tribunals must evaluate the following factors: (i) The relationship between and among the legal entities within the corporate group structure, (ii) The extent of involvement of the parties in the fulfillment of contractual obligations. (iii)The commonality of the subject matter. (iv) The composite nature of the transactions. (v) The overall performance of the contract.The Bench further clarified that the burden of proof rests upon the party seeking to include the non-signatory within the arbitration proceedings. The Courts and tribunals are required to undertake a comprehensive assessment of whether the conduct of the non-signatory indicates a level of involvement that precludes them from being regarded as a mere third party to the dispute.

On the issue raised the 4 judges (CJI Dr Dhananjaya Y Chandrachud, Justices Hrishikesh Roy, J B Pardiwala, Manoj Misra) of Supreme Court finally concluded in reference to the issues raised as-:

(i) The definition of "parties" under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory parties; (ii) Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement; (iii) The requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties; (iv) Under the Arbitration Act, the concept of a "party" is distinct and different from the concept of "persons claiming through or under" a party to the arbitration agreement; (v) The underlying basis for the application of the group of companies doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatory party to the arbitration agreement; (vi) The principle of alter ego or piercing the corporate veil cannot be the basis for the application of the group of companies doctrine; (vii) The group of companies doctrine has an independent existence as a principle of law which stems from a harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act; (viii) To apply the group of companies doctrine, the courts or tribunals, as the case may be, have to consider all the cumulative factors laid down in Discovery Enterprises (supra). Resultantly, the principle of single economic unit cannot be the sole basis for invoking the group of companies doctrine; (ix) The persons "claiming through or under" can only assert a right in a derivative capacity; (x) The approach of this Court in Chloro Controls (supra) to the extent that it traced the group of companies doctrine to the phrase "claiming through or

under" is erroneous and against the well-established principles of contract law and corporate law; (xi) The group of companies doctrine should be retained in the Indian arbitration jurisprudence considering its utility in determining the intention of the parties in the context of complex transactions involving multiple parties and multiple agreements; (xii) At the referral stage, the referral court should leave it for the arbitral tribunal to decide whether the non-signatory is bound by the arbitration agreement; and (xiii) In the course of this judgment, any authoritative determination given by this Court pertaining to the group of companies doctrine should not be interpreted to exclude the application of other doctrines and principles for binding non-signatories to the arbitration agreement.

Justice Pamidighantam Sri Narasimha concurred with the reasoning and conclusions of the four other judges but provided additional reasoning to supplement the judgment. Further, he concluded as-:

(i) An agreement to refer disputes to arbitration must be in a written form, as against an oral agreement, but need not be signed by the parties. Under Section 7(4)(b), a court or arbitral tribunal will determine whether a non-signatory is a party to an arbitration agreement by interpreting the express language employed by the parties in the record of agreement, coupled with surrounding circumstances of the formation, performance, and discharge of the contract. While interpreting and constructing the contract, courts or tribunals may adopt well-established principles, which aid and assist proper adjudication and determination. The Group of Companies doctrine is one such principle.

(ii) The Group of Companies doctrine is also premised on ascertaining the intention of the non-signatory to be party to an arbitration agreement. The doctrine requires the intention to be gathered from additional factors such as direct relationship with the signatory parties, commonality of subject-matter, composite nature of the transaction, and performance of the contract.

(iv) Since the purpose of inquiry by a court or arbitral tribunal under Section 7(4)(b) and the Group of Companies doctrine is the same, the doctrine can be subsumed within Section 7(4)(b) to enable a court or arbitral tribunal to determine the true intention and consent of the non-signatory parties to refer the matter to arbitration. The doctrine is subsumed within the statutory regime of Section 7(4)(b) for the purpose of certainty and systematic development of law.

(iv) The expression "claiming through or under" in Sections 8 and 45 is intended to provide a derivative right; and it does not enable a non-signatory to become a party to the arbitration agreement. The decision in Chloro Controls (supra) tracing the Group of Companies doctrine through the phrase "claiming through or under" in Sections 8 and 45 is erroneous. The expression 'party' in Section 2(1)(h) and Section 7 is distinct from "persons claiming through or under them."

Whether the unstamped arbitration agreement may sustain the arbitral process, opened judicial corridors for legal surgery on this matter and in the case

of In Re Interplay Between Arbitration Agreements Under The Arbitration And Conciliation Act, 1996, And The Indian Stamp Act, 1899[24], the seven-judge bench of the Supreme Courtdelivered its judgment on December 13, 2023. The bench held that while an unstamped arbitration agreement is inadmissible under the provisions of the Indian Stamp Act, 1899, it is not void ab initio. This judgment overturned the decision of the five-judge bench in NN Global Mercantile v. Indo Unique Flame (2023) and *SMS Tea Estates* v. *Chandmari Tea Co. Pvt. Ltd.* (2011). In NN Global, the five-judge bench, by a 3:2 majority, had held that an unstamped arbitration agreement was void and unenforceable.

The case stemmed from a curative petition challenging the Supreme Court's 2020 ruling in *Bhaskar Raju and Brother* v. *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram,* where the Court held that an arbitration clause within an insufficiently stamped agreement could not be enforced. The dispute originated from a petition filed under Section 11(6) of the Arbitration Act before the Karnataka High Court, where one party contended that the lease deed was insufficiently stamped under the Karnataka Stamp Act, 1957, and therefore inadmissible. Nevertheless, the High Court appointed an arbitrator, a decision subsequently reviewed by the Supreme Court.

The Supreme Court, in appeal, set aside the judgment and order of the High Court, relying on the precedent established in *SMS Tea Estates Pvt. Ltd*. v. *Chandmari Tea Co. Pvt. Ltd*. The Court observed that the lease deeds containing the arbitration clause were neither registered nor adequately stamped, rendering them unenforceable. In April 2023, a Constitution Bench, by a 3:2 majority, reaffirmed that arbitration agreements contained in unstamped contracts are unenforceable. Subsequently, on July 18, 2023, a five-judge bench issued notice in the curative petition, raising questions about the correctness of the ruling in *N.N. Global Mercantile Pvt. Ltd.* v. *Indo Unique Flame Ltd.* In *NN Global*, the Court, by a 3:2 majority, ruled that an unstamped instrument does not constitute an enforceable contract under Section 2(h) of the Contract Act.

It was further held that an instrument subject to stamp duty, containing an arbitration clause, cannot be considered a legally enforceable contract under Section 2(h) of the Contract Act if it remains unstamped. Such an instrument is also unenforceable under Section 2(g) of the Contract Act. Under Section 7 of the Arbitration and Conciliation Act, 1996, an arbitration agreement is subject to stamp duty, and if it remains unstamped or insufficiently stamped, it cannot be acted upon under Section 35 of the Stamp Act unless duly impounded and the requisite duty paid. Sections 33 and 35 of the Stamp Act render the arbitration agreement in such an instrument non-existent in law until the instrument is validated under the Stamp Act. Furthermore, at the Section 11 stage of the Arbitration Act, the Court is required to examine the instrument, and if it is found to be unstamped or insufficiently stamped, it must be impounded at that stage itself.

24 (2024) 6 SCC 1. This judgement overruled, the decision in the case of N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd., (2023) 7 SCC 1

Reference to the Larger Bench of Supreme Court-:Recognizing the broader implications and consequences of the majority decision in *N.N. Global Mercantile Private Limited v. Indo Unique Flame Limited* the five-judge bench, while hearing the curative petition in *M/S Bhaskar Raju and Brothers* v. *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram,* determined that the matter warranted reconsideration. Consequently, the issue was referred to a larger seven-judge bench on September 26, 2023, leading to the present ruling.

The Supreme Court has delivered a comprehensive 155-page judgment, consisting of two separate opinions. The primary judgment, authored by Chief Justice Dr. Dhananjaya Y. Chandrachud on behalf of six judges (Justices Sanjay Kishan Kaul, B.R. Gavai, Surya Kant, J.B. Pardiwala, and Manoj Misra), is accompanied by a concurring opinion written by Justice Sanjiv Khanna.

The court finally concluded that-:

i. Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered void or void ab initio or unenforceable;

ii. Non-stamping or inadequate stamping is a curable defect;

iii. An objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The concerned court must examine whether the arbitration agreement prima facie exists;

iv. Any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal; and

v. The decision in NN Global 2 (supra) and SMS Tea Estates are overruled. Paragraphs 22 and 29 of Garware Wall Ropes are overruled to that extent.

Arbitrability of dispute can be a complex subject matter which may attract the attention of the courts when cases get stuck and the Supreme Court gives a push to the arbitral process. One of the last cases discussed of the survey year relates to this aspect. In the case of Sushma *Shivkumar Daga* v. *Madhurkumar Ramkrishnaji Bajaj*[25], the division bench of the Apex Court held that, *the cancellation of a deed is an action in personam, not in rem, and hence arbitrable.* The key issue before the court is, 'whether the Trial Court and the High Court correctly referred the matter to arbitration, or if the dispute is of a nature that cannot be arbitrated.' This depends on whether the Conveyance Deed dated contained an arbitration clause and, if so, whether the dispute is arbitrable under the law. *The court held that, the first prerequisite for an application under Section 8, of an arbitration agreement being there in the 2007 and 2008 Tripartite agreements cannot be denied, as all the other Development Agreements find their source in the aforesaid two Tripartite Agreements.* Further, the court held that the role of a 'Court' is now, in any case, extremely limited in arbitration matters. *Nevertheless, the case before the Civil Court does not fall in any of the categories,*

25 2023 SCC OnLine SC 1683.

visualised in either Booz Allen or Vidya Drolia referred above. In Vidya Drolia case, this Court has held that the Court will only decline reference under Section 8 or under Section 11 of the Act in rare cases where the Court is certain that either the arbitration agreement is non-existent, or the dispute is itself "manifestly non-arbitrable". This was reiterated in NTPC Ltd. v. SPML Infra Ltd. (2023) 9 SCC 385.

The second issue was whether the dispute constituted an action in rem, thereby rendering arbitration inapplicable. To address this, the Court referred to Deccan Paper Mills v. Regency Mahavir Properties, (2021) 4 SCC 786, wherein it was held that a suit for cancellation of a deed or declaration of rights arising from it constitutes an action in personam, not in rem. Regarding the third issue on fraud allegations, the Court held that the appellants' objection to the Section 8 application lacked substance, as it was merely an unsubstantiated claim. *The Court has consistently held that only serious fraud can oust an Arbitrator's jurisdiction. In Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710, the Court outlined two conditions for refusing arbitration: (i) the fraud must permeate the entire contract, including the arbitration agreement, rendering it void, or (ii) it must have public implications beyond the party's internal affairs.* Here, the allegations strictly between the parties do not meet the threshold to bar arbitration.

VIII CONCLUSION

In the brief assessment, it can be said that the judgement delivered on arbitration litigation in the survey year 2023 are expected to positively influence the arbitration sector in India. It may boost the confidence of the investors, business houses within India, in general trade community and also the lawyers and arbitrators that the Indian courts are progressive in their approach towards appreciating the autonomy aspect of arbitration and that court's should intervene only in rare cases involving critical questions of law, not per se the working of the arbitral tribunals. Arbitration has always been a front runner as of the principal methods of out of court settlement across all major common law jurisdictions. The survey year 2023, reinforces this thought through the judgments of the Indian courts, that India is committed to be at par with international standards in disposing of arbitration cases expeditiously and facilitating globally competent legal model for both domestic and international commercial arbitration to be settled on the Indian soil under the Indian jurisdiction. The survey year 2024, may witness the fruits of the decisions of the survey year 2023, which may be discussed and examined after a scrutiny of the arbitration litigation in the year 2024. Over all, the survey year 2023 must be once again remembered as a growth year in the arbitration landscape by virtue of landmark judgment which have enriched the judicial discourse on the subject.