

SAMVAAD

THE OFFICIAL NEWSLETTER OF CCADR FOR
ARBITRATION LAW UPDATES

ABOUT CCADR

The Chanakya Centre for Alternative Dispute Resolution (CCADR) was established at Chanakya National Law University, Patna, in the year 2021, with the objective to promote academic research on themes pertaining to the resolution of disputes. Alternative Dispute Resolution is a new and emerging interdisciplinary field that is concerned with, inter-alia, the following themes: (a) the study of the causative structural factors and the subjective motives of the actors giving rise to disputes; (b) the study of the formal and informal institutions dedicated to the resolution of disputes; and (c) the study of the laws and regulations to produce fair outcomes of disputes.



Court cannot award interest upon interest as per the scheme of the Arbitration Act 1940, and Section 3 Interests Act 1978, but can only award an interest upon the principal amount: Supreme Court of India [*D. Khosla & Company v. Union of India*]

The Supreme Court of India addressed the issue of interest awarded under an arbitration award dated September 17, 1997, related to a contract from 1984-1985. The arbitrator granted two types of interest: 12% simple interest per annum on the awarded amount from the completion of work until the award and 15% simple interest per annum from the date of the award until payment.

The petitioner contended that the 15% interest should apply not only to the principal amount but also to the previously awarded 12% interest, effectively seeking interest on interest. The Principal Senior Civil Judge and later the High Court rejected this claim, stating that the arbitrator had only awarded simple interest without any provision for compounding. The Supreme Court, led by Pankaj Mithal J., upheld the lower courts' decisions. The Court emphasized that the terms of the award did not permit the inclusion of prior interest in the principal for calculating subsequent interest. It cited several legal provisions, including Section 29 of the Arbitration Act, which allows interest on the principal sum but not on interest accrued, and Section 34 of the Code of Civil Procedure, which similarly restricts interest to the principal amount.

The Court concluded that, in the absence of any provision in the relevant statutes or award or the contract, permitting the arbitrator or the court to award interest upon interest, the same could not be granted. Therefore, the Special Leave Petition was dismissed, affirming that the awarded interest was strictly on the principal amount, maintaining the integrity of the original award.

The power of the Arbitrator to award pre-reference and pendente lite interest is not restricted when the agreement is silent on whether interest can be awarded or does not contain a specific term that prohibits the same: Supreme Court of India [*Pam Developments Pvt. Ltd. v. State of West Bengal & Anr.*]

The facts of the case were that the Appellant was granted a Work Order by the Respondent for a project to be completed within 18 months, which ultimately got delayed by five months. The Appellant raised a bill for Rs. 77,85,290 owing to alleged delays on the part of the Respondent. The Respondent denied any liability and the matter was referred to Arbitration. Vide arbitral award dated 30.01.2018, the Respondents were held liable for an amount of Rs.1,37,25,252, with interest. Aggrieved by the said award, the Respondent moved to the District Court which set aside certain claims but upheld the interest awarded. In appeal before the Calcutta HC, the HC set aside certain claims in the favour of Respondent and modified the interest amount holding that as per the Contract, no interest is payable for the pre-reference period.

The Supreme Court observed that the power of the Arbitrator to grant pre-reference interest, pendente lite interest, and post-award interest under Section 31(7) of the Act is fairly well-settled. The Court noted that the power of the Arbitrator to award pre-reference and pendente lite interest is not restricted when the agreement is silent on whether interest can be awarded or does not contain a specific term that prohibits the same. It was held that the HC had no reason to interfere with the Arbitral Award with respect to grant of pre-reference interest since the Contract between parties does not prohibit the same. Accordingly, it was held that the appellant would be entitled to claim pre-reference interest.

The Court acquires jurisdiction immediately under Section 11(6) of the Arbitration and Conciliation Act, 1996 (“A&C Act”) on the default, of either party, in adhering to the pre-arbitral or arbitral procedure envisaged in the contract: Delhi High Court [*M/s BK Sons Infrastructure Pvt. Ltd. v. Managing Director, National Highways and Infrastructure Development Corporation (“NHIDC”)*]

The dispute arose in the context of an EPC Contract (the “Contract”) executed by the Parties. Article 26 of the Contract envisaged a 3-step procedure for dispute resolution, beginning with resolution by Authority Engineer (“AE”)/Independent Conciliator, then a meeting with the Chairman of the Respondent, who would convene a joint meeting between the party and the respondent and if the same proves futile, through resolution by Conciliation Committee of Independent Experts.

The facts are that the Petitioner’s claim was rejected by the AE pursuant to which the Petitioner called upon the MD of the Respondent to appoint a Conciliator, to which there was no response despite multiple requests. The Petitioner then called the Chairman of the Respondent to convene a mutual meeting between the parties but the Respondent’s claims were again rejected. Subsequently, the Petitioner issued notice to the Respondent seeking reference of disputes to arbitration and moved to the Delhi HC under Section 11(6) of the Act. The Respondent contended that the petition is not maintainable as the petitioner did not exhaust the mandatory pre-arbitral protocol of approaching the Committee of Conciliators before seeking recourse to arbitration.

The Court held that the jurisdiction of the Court under Section 11(6) of the 1996 Act is galvanized when, under the procedure agreed upon between the parties for appointment of the Arbitral Tribunal, one or the other party fails. The Court observed that the Respondent’s failure to appoint a Conciliator as required by Clause 26.2, despite three reminders by the Petitioner, breached the pre-arbitral protocol, and this entitled the Petitioner to invoke Arbitration under Section 11(6)(a) of the Act. That being so, the petitioner was justified in approaching this Court for appointment of the Arbitrator.

Unless there is Patent Illegality in Arbitral Tribunal’s Appreciation of Evidence, the Court of Appeal’s Interference is unwarranted: Delhi High Court [*Union of India v. Parishudh Machines (P) Ltd.*]

The respondent was a successful bidder for a contract for the delivery of a locomotive to the appellant, which was duly delivered. A dispute arose between the respondent and the appellant when the latter refused to grant a subsequent extension to the delivery date and issued a letter of termination of the contract, thereby invoking an arbitration clause.

Before the Arbitral Tribunal, the respondent produced a document revealing the reason for cancellation as a non-requirement of the machine by the appellant. The appellant however contended that the reason for the cancellation of the contract was the untimely delivery of the machine.

The Arbitral Tribunal drew adverse inference since the appellant failed to produce a relevant document even after being asked for the same and decided in favor of the respondent while condoning the delay of the respondent in producing the document while emphasizing the importance of the document in the adjudication of the dispute.

The Appellant filed an appeal against the judgment dated 31st August 2020 passed by the learned Commercial Court which dismissed the petition filed by the appellant under Section 34 Act challenging the Award dated 22nd April 2019.

The Commercial Court dismissed the appeal filed by the appellant against the arbitral award in favor of the Respondents for several reasons:

The court found that the arbitral award was comprehensive and well-reasoned, addressing all relevant facts and issues, without any glaring procedural defects or manifest, indicating that the arbitral tribunal had thoroughly examined the evidence presented.

The Court also recognized that the arbitrator, appointed by the appellant, was an expert in the field and emphasized that findings made by an expert should generally not be interfered with unless they are unreasonable.

The court dismissed the appellant's claims of bias against the arbitrator, noting that the arbitrator was a nominee of the appellant. There was nothing to support the allegation of bias and merely the fact that the Award went against the appellant would not sustain the allegation of bias.

The High Court ruled that there was no patent illegality on the face of the award, affirming that the court cannot act as an appellate body to re-evaluate the evidence or the merits of the arbitration. The view taken by the arbitral tribunal was deemed plausible, thus providing no grounds for interference.

The High Court held that courts have limited grounds to interfere with arbitral awards under Section 34 of the Arbitration and Conciliation Act, emphasizing the finality of arbitration as a dispute resolution mechanism.

If Arbitration agreements coexist with Notice requirement within 3 years, under Section 21 of the Arbitration and Conciliation Act (“A&C Act”), a matter can be referred to Arbitration: Delhi High Court [*Yuvraj Singh Bundhel v. Etoile Pvt. Ltd.*]

The dispute arose in an Agreement to Sell dated 5th February 2021 executed between the petitioners and the respondents. The petitioner sought recovery of a certain amount they lent the respondents. In pursuant to the same, the petitioner sent a notice to the respondent on 27th April 2024. After waiting for the reply to the first notice, the petitioners moved the present petition under Section 11(6) of the (“A&C” Act, 1996) seeking reference of the disputes to arbitration. This was done as they could not reach a consensus on 25th May 2024.

The court observed that Respondent 2 cannot be excused from arbitration as there exists an arbitration clause between him and the petitioners, under clause 38 of the agreement, which is the dispute resolution clause. The petitioner can directly seek resolution of disputes under clause 38.2 without proceeding under clause 38.1, as clause 38.2 starts with a non-obstante clause, giving it overriding effect over clause 38.1 while rejecting Respondent 1 contention disputing the application of clause 38.2 over non-exhausted clause 38.1.

The court referred to the recent case of *SBI General Insurance Co. Ltd. v. Krish Spinning* wherein the Supreme Court of India held that a Section 11(6) Court is essentially to concern itself only with the existence of an arbitration agreement between the parties and filing of Section 11(6) petition within three years of the Section 21 notice. The Delhi High Court observed that the necessary ingredients of Section 11(6) of the said act exist in the present case. Accordingly, the case was referred to a competent arbitrator appointed by the court under the aegis of the Delhi International Arbitration Centre (“DIAC”).

Arbitral Award passed by the Sole Arbitrator for failing to appreciate contractual terms subsisting between parties, i.e. payment of interest pendent lite, set aside: Delhi High Court [*Pulin Comtrade Ltd. v. Handicrafts and Handlooms Exports Corporation of India Ltd.*]

The present petition arose from the impugned Arbitral Award dated 20.09.2023 (“Award”). The petitioner, Pulin Comtrade Limited, even though being a successful party in the arbitration, sought to set aside the award in the capacity of the interest issue passed by the sole arbitrator, which failed to deal with or consider clause 8.4 of the agreement in dispute.

The High Court of Delhi observed that the petition is filed within 90 days as prescribed under section 34(3) of the 1996 Act from the date of the disposal of the application filed under section 33 of the 1996 Act. So the petition is within the limitation. The court also observed that the learned Arbitrator failed to appreciate the contractual terms subsisting between the parties while rejecting interest under Issue III. Therefore, the said finding is perverse, as the learned Arbitrator has given no reasons as to why Clause 8.4 is not applicable or not to be adhered to.

As observed in *Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum (2022) 4 SCC 463*, an Arbitral Tribunal, being a creature of Contract, is bound to act in terms of the Contract under which it is constituted.

Hence, the court, allowing the petition, upheld the petitioner’s objection, setting aside the arbitral award’s finding on the disputed interest issue.

Application, allowing the arbitral proceedings to continue, stating that the time limit prescribed under 29A is applicable to arbitrations invoked post-amendment, disposed: Delhi High Court [*M/s Chinar Steel Industries v. Ircon International Ltd.*]

Arbitration and Conciliation Act, 1996, seeking an extension of the mandate of the Arbitral Tribunal concerning a dispute arising from a construction agreement in relation to a rail-link project in Jammu & Kashmir, dated September 15, 2008.

The petitioner, Chinar Steel Industries, invoked the arbitration clause on April 14, 2009, in the High Court of Jammu and Kashmir, but due to jurisdictional challenges, it led to a prolonged legal battle. Lastly, the Arbitral Tribunal was constituted on September 20, 2022, after the petitioner approached the Delhi High Court.

The respondent, Ircon International Limited, did not oppose the continuation of the arbitral proceedings but contended that Section 29A would not apply since the arbitration proceedings had commenced before the 2015 amendment, through which the section was inserted. The court noted that the commencement of proceedings, as per Section 21, occurred prior to the amendment and thus was not subject to the time limits imposed by Section 29A.

The court referred to its previous judgments, affirming that the commencement date is crucial for determining the applicability of Section 29A. It ruled that despite the constitution of the tribunal post-amendment, the distinction was irrelevant as no fresh “commencement” of arbitration within the meaning of section 21 had taken place after the earlier proceedings.

The court, therefore, disposed of the petition, confirming that the provisions of Section 29A did not apply, allowing the arbitral proceedings to continue without objection from the respondent.

The court cannot enter into a reappreciation of evidence under Section 34, unless there exists a patent illegality appearing on the face of the award: Calcutta High Court [*Damodar Valley Corporation v. BLA Projects Pvt. Ltd.*]

The High Court of Calcutta, in the present case, has upheld an arbitral award that went against the petitioner, Damodar Valley Corporation (“DVC”). The case concerns pertained to a challenge to an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996, dated August 14, 2021, favoring the respondent BLA Projects, allowing four of its seven claims while dismissing two counterclaims from the petitioner.

The petitioner argued that the award contradicted the contractual terms of the contract and hence the same was liable to be terminated due to respondent’s alleged corrupt and fraudulent practices in execution of the contract. Further, multiple clauses that permitted termination in such cases permitting termination on account of the claimant indulging in corrupt and fraudulent practices were adduced, claiming that the arbitrator misinterpreted them by solely focusing on one clause while ignoring others that allowed for termination, albeit with notice. The petitioner additionally contented insufficiency of evidence advanced by the respondent before the court.

The respondents argued that the evidence of the alleged quality issues was not conclusive. They stated that the claims for unpaid bills and loss of profits were justified, as the work performed had been certified and the claims were supported by adequate evidence .

The respondent argued upon the limited scope of Section 34 of the Act, contending that the merits of a case can only be looked into when either the award is in conflict with the public policy of India, or there exists a patent illegality striking at the root of the matter. Additionally, with respect to the alleged corrupt/fraudulent practice, it was argued that the petitioner referred to not a specific phenomenon but a series of isolated disjointed events.

The court while analyzing whether the arbitrator had acted with “*patent illegality*” in determining the termination to be unlawful, noted that while the petitioner cited multiple clauses for termination, only Clause 24.2.1 allowed for immediate termination without notice, while others required a notice period. Upon interpreting the said clause, the court held that the expressions “*corrupt*” and “*fraudulent*” pertained solely to the execution of contract, and not performance of the contract. Therefore, the termination was not supported by the contract’s contractual provisions, and was unlawful. Consequently, the court found deemed that the arbitrator’s interpretation of the evidence adduced and the contract was plausible and thus should not be interfered with.

The High Court further emphasized upon the limited scope for judicial review in arbitration matters while upholding the arbitral award, and concluding that the challenge did not satisfy the grounds for setting aside the award under Section 34, as the award was neither in conflict with public policy nor it suffers did it suffer from patent illegality.



SAMVAAD

AUGUST, 2024

CONTRIBUTORS

Rishika Sharma
Shambhavi
Ruthwika Reddy
Yash Singh
Shubham Sharma
Shrey Bhatnagar
Bhola Shankar
Ayush Bijalwan
Suryansh Beohar
Shivam Madhur
Ankita Kumari
Priyanshu Lucky
Tanya
Siddhi Rupa
Arpita Chaudhary
Amrit Raj Barnwal
Raunak Uday

CONTACT DETAILS



RISHIKA SHARMA (CONVENOR)

+91 6388608840

PRIYANSHI JAIN (EVENT CONVENOR)

+91 6261744918

YASH SINGH (CO-CONVENOR)

+91 9470435520

AYUSH BIJALWAN (EVENT CO-CONVENOR)

+91 8433188578