

ACUITY **LAW**

DISPUTES
NEWSLETTER

January-March 2022

acuitylaw.co.in

ABOUT ACUITY LAW

Acuity Law was founded in November 2011. Acuity Law comprises of a team of young and energetic lawyers/ professionals led by Souvik Ganguly, Gautam Narayan, Deni Shah and Renjith Nair who have deep and diverse experiences in their chosen areas of practice. We advise Indian and multinational companies, funds, banks and financial institutions, founders of companies, management teams, international law firms, domestic and international investment banks, financial advisors and government agencies in various transactions in and outside India.

Acuity Law takes pride in rendering incisive legal advice taking into consideration commercial realities. Our areas of practice are divided into three departments. The Corporate practice is led by Souvik Ganguly, the Global Trade and Tax practice is led by Deni Shah and the Disputes practice is led by Gautam Narayan with assistance from Renjith Nair.

As part of the Corporate practice, Acuity Law advises on:

- Mergers and acquisitions;
- Distressed mergers and acquisitions;
- Insolvency Law;
- Private Equity and Venture Funding;
- Employment and labour laws;
- Commercial and trading arrangements; and
- Corporate Advisory

As part of the Global Trade and Tax practice, Acuity Law advises on:

- Cross-border tax planning and jurisdiction analysis
- Strategies for acquisitions, mergers, divestitures, diversification or consolidation of businesses
- Inbound and outbound investment structuring
- Endowment planning / wealth management strategies
- Global Trade & Customs laws, including foreign trade policy
- International supply chain optimization
- Goods & Services Tax and other Indirect taxes

As part of the Disputes practice, Acuity Law advises and represents clients on domestic and cross - border:

- Civil disputes;
- Criminal law matters; and
- Arbitration matters

Acuity Law actively follows legislative and policy developments in its chosen areas of practice and shares such developments with clients and friends on a regular basis.

If you want to know more about Acuity Law, please visit our website acuitylaw.co.in or write to us at al@acuitylaw.co.in.

The information contained in this document is not legal advice or legal opinion. The contents recorded in the said document are for informational purposes only and should not be used for commercial purposes. Acuity Law LLP disclaims all liability to any person for any loss or damage caused by errors or omissions, whether arising from negligence, accident or any other cause.

INTRODUCTION

This newsletter covers key updates about developments in civil and arbitration disputes for the quarter January – March 2022.

We have summarized the key judgments passed by the Supreme Court of India and various High Courts of India. Please see below the summary of the relevant regulatory developments.

ORDERS PASSED BY THE SUPREME COURT OF INDIA (SC)

1) AN AWARD CANNOT BE REMITTED TO THE ARBITRATOR IF NO FINDINGS ON THE CONTENTIOUS ISSUES ARE ADDRESSED IN THE AWARD

Matter: *I-Pay Clearing Services Pvt. Ltd. v. ICICI Bank Ltd.*

Order dated: 03 January 2022

Summary:

I-Pay Clearing Services Pvt. Ltd. ("**I-Pay**") and ICICI Bank Ltd. ("**ICICI**") entered into an agreement wherein I-Pay was to provide software technology, management, and operations for a 'Smart-Card' based loyalty program for Hindustan Petroleum Corporation Ltd. Owing to sudden termination of the agreement at the hands of ICICI, without stating reasons for the same, dispute arose between the parties and I-Pay invoked arbitration. The Arbitral Tribunal passed an award in favour of I-Pay on the ground that there was no accord and satisfaction between the parties. However, the Arbitral Tribunal failed to give adequate reasons in support of its finding. Being aggrieved by the award, ICICI filed an application before the Bombay HC to set-aside the award. While the hearing of this application was underway, I-Pay also filed an application seeking directions to adjourn the proceedings for a period of three months and for directions to the Arbitral Tribunal to reconsider the issues. I-Pay contended that the lack of reasons or gaps in the reasoning of an award is a 'curable defect' and in such a case, the Arbitral Tribunal can be directed to resume the proceedings to rectify such defects and fill such gaps. I-Pay's application was rejected by the HC, and this order was challenged before the SC.

The issue before the SC was whether, in the absence of any reasons accorded to the findings on a particular issue by the Arbitral Tribunal, the matter can be relegated to the Arbitral Tribunal? The SC noted that the provisions of Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") which allow for the relegation of the award for reconsideration before the same Arbitral Tribunal, can only be used to record reasons for findings previously made in the award or to fill in the gaps in the award's reasoning. The SC opined that the intention behind this remission is a 'curative alternative' to not set aside an award, and that only additional reasons could be attested to the findings already recorded in the award, whereas a finding already concluded cannot be changed or altered under the guise of provisions of remission.

The SC observed that certain relevant letters and evidence produced before the Arbitral Tribunal to prove 'accord and satisfaction' between the parties were not considered and this approach, in essence, amounts to patent illegality. The SC agreed with the view taken by the HC and that such aspects of patent illegality in the award require application of judicial mind and are to be considered by the court itself, and therefore the SC upheld the HC's order dismissing I-Pay's application.

2) COURT SHOULD NOT INTERFERE AT PRE-APPOINTMENT STAGE OF ARBITRATION FOR INSUFFICIENCY OF STAMP DUTY

Matter: *Intercontinental Hotels Group (India) Pvt. Ltd. & Anr. v. Waterline Hotels Pvt. Ltd.*

Order dated: 25 January 2022

Summary:

Waterline Hotels Pvt. Ltd. ("**Waterline**") had entered into an agreement with Intercontinental Hotels Group (India) Pvt. Ltd. and Intercontinental Hotels Group (Asia-Pacific) Pvt. Ltd. (collectively, "**Intercontinental**"). As disputes arose between Waterline and Intercontinental, Waterline invoked the arbitration clause in the agreement. Aggrieved by Waterline's refusal to appoint an arbitrator, Intercontinental filed a petition under the Arbitration Act before the SC, seeking appointment of an arbitrator. Waterline opposed the petition on the ground that the agreement which contains the arbitration agreement, was an unstamped document

that cannot be relied on or acted upon unless the unstamped document is impounded, and the applicable stamp duty/ penalty is assessed and paid.

The issue before the SC was whether insufficient stamping of an agreement rendered the arbitration agreement as unworkable. Pertinently, due to previous conflicting judgments of the SC, this issue has already been referred to a larger bench for clarification. The SC observed that courts have very limited jurisdiction with respect to appointment of an Arbitral Tribunal under the Arbitration Act, and such jurisdiction is limited to examining issues relating to existence of the arbitration agreement. Issues of arbitrability of a dispute or validity of the arbitration agreement are matters to be adjudicated upon by the Arbitral Tribunal. Further, the SC being cognizant of the time-sensitivity while dealing with arbitration issues and considering that all matters at a pre-appointment stage cannot be left hanging until the larger bench of the SC settles the issue, held that until the larger bench decides on the court's jurisdiction on appointment of Arbitral Tribunal on the basis of an unstamped or insufficiently stamp agreement, Indian courts should ensure that arbitrations are carried on unless the issue before the court patently indicates existence of deadwood.

Therefore, on the issue of enforceability of an arbitration clause contained in an unstamped or insufficiently stamped agreement, the SC held that a court hearing a petition for appointment of arbitrator under the Arbitration Act cannot determine the sufficiency of stamp duty payable on any agreement and the same is a question which is to be decided at a later stage by the Arbitral Tribunal.

3) HIGH COURTS SHOULD SHOW JUDICIAL RESTRAINT IN INTERFERING WITH TENDER PROCESS OF FOREIGN FUNDED PROJECTS

Matter: *National High Speed Rail Corporation Ltd v. Montecarlo Ltd & Anr.*

Order dated: 31 January 2022

Summary:

National High Speed Rail Corporation Ltd (“NHSRCL”) invited bids with regards to construction of Mumbai-Ahmedabad High Speed Rail (“Project”). The bid submitted by Montecarlo Limited (“Montecarlo”) was declared unsuccessful. Montecarlo sought reasons for rejection of its bid and received a communication from NHSRCL that its bid was ‘not substantially responsive’. Aggrieved by the communication received and the rejection of its bid, Montecarlo filed a writ petition before the Delhi HC. Delhi HC set aside the rejection of Montecarlo’s bid and directed NHSRCL to reconsider the bid.

Delhi HC’s order was challenged before the SC. The issue before the SC was whether the Delhi HC was justified in interfering with the tender process in the absence of any specific allegations of *mala fides* and/or favouritism against NHSRCL. SC noted that the Project is a national project which is fully foreign funded pursuant to a Memorandum of Understanding between the governments of Japan and India. A loan of Indian Rupees One Trillion was provided by the Japan International Cooperation Agency (“JICA”) for the Project. SC observed that the bids were evaluated by the Japan International Consultants Consortium (“JICC”) as per JICA’s International Guidelines, and a conscious decision was taken by JICC that Montecarlo’s bid was not significantly responsive as it suffered from material deviation from the terms and conditions of the bid document. This decision was also approved by JICA.

SC opined that JICA, JICC and the NHSRCL took a conscious decision that Montecarlo’s bid was non-responsive and not in conformity with the bid document. SC found that NHSRCL’s action of acting upon the recommendations of JICA and JICC and relying upon the Technical Bid Evaluation Report to reject Montecarlo’s bid was not unfair. SC further held that Montecarlo had no authority to deviate from the evaluation of its bid done on the basis of contractually agreed guidelines which were transparent, fair and non-arbitrary. Therefore, SC opined that the rejection of Montecarlo’s bid could not have been the subject matter of scrutiny by the Delhi HC and that the scope of judicial review in such foreign funded contracts/projects should be minimal and limited to the ground that the action of the authority suffers from *mala fide* / favouritism.

Accordingly, SC quashed the order of the Delhi HC while emphasising that HCs should exercise judicial restraint while entertaining writ petitions challenging a tender process, more specifically, in fully foreign funded contracts of national importance.

4) AN AWARD IS PATENTLY ILLEGAL IF THE ARBITRAL TRIBUNAL FAILS TO ACT IN TERMS OF THE CONTRACT

Matter: *Indian Oil Corporation v. Shree Ganesh Petroleum Rajgurunagar*

Order dated: 01 February 2022

Summary:

Indian Oil Corporation (“**Indian Oil**”) took a land on lease from Shree Ganesh Petroleum (“**Shree Ganesh**”) under a lease agreement to set up a retail outlet for sale of its petroleum products. The lease agreement was for a period of 29 years, after which the agreement contemplated renewal by mutual consent. Indian Oil then entered into a dealership agreement with Shree Ganesh, under which Shree Ganesh was appointed as the dealer of Indian Oil’s retail outlet. The dealership agreement was in force for a period of 15 years and was contemplated to continue thereafter for successive periods of one year each until either party terminated it with three months’ notice. In 2008, Indian Oil noticed irregularities in the functioning of the petrol outlet, and it terminated the dealership of Shree Ganesh and demanded that it vacate the premises. Shree Ganesh invoked arbitration under the dealership agreement.

In its statement of claim, as an alternative to seeking the setting aside of the termination of the dealership agreement, Shree Ganesh requested an amendment of the lease agreement to enhance the monthly rent of the premises to INR 35,000 (from INR 1,750), with a 20% increase after every three years. The Arbitral Tribunal increased the rent to INR 10,000 with a 10% increase after every three years. The District Court, hearing an appeal against the Arbitral Tribunal’s order, ruled that the Arbitral Tribunal was correct in enhancing the rent, on the grounds that the terms of an agreement, if wholly prejudicial or capable of causing grave injustice, could be examined not only by a court of justice but also an arbitrator. The District Court’s order which made certain alteration in the Arbitral Tribunal’s award was then challenged before the Bombay HC wherein it was held that there was no scope for the District Court to interfere with the award. The Bombay HC’s order was appealed before the SC.

SC noted that Shree Ganesh invoked the arbitration clause under the dealership agreement, which was distinct and separate from the lease agreement, and therefore the Arbitral Tribunal appointed under the dealership agreement had no authority and/or jurisdiction to adjudicate any dispute pertaining to the lease agreement. Therefore, the decision of the Arbitral Tribunal enhancing the lease rent is patently beyond the scope of the dealership agreement and is liable to be set aside. Further, the SC opined that an Arbitral Tribunal, or for that matter, the court cannot alter the terms and conditions of a valid contract executed between the parties with their eyes open, and an award which is passed ignoring the terms of a contract would not be in public interest.

5) CONSENT DECREE CANNOT BE MODIFIED UNLESS MISTAKE IS PATENT OR OBVIOUS

Matter: *Ajanta LLP v. Casio Keisanki Kabushiki Kaisha d/b/a Casio Computer Co. Ltd.*

Order date: 04 February 2022

Summary:

This case relates to scientific calculators manufactured by the parties. Casio Keisanki Kabushiki Kaisha (“**Casio**”) alleged that Ajanta LLP (“**Ajanta**”) had fraudulently imitated the registered design of its scientific calculator and was manufacturing and selling its ORPAT scientific calculator which bears Casio’s registered design. Casio filed a suit against Ajanta urging that Ajanta be restrained by a permanent injunction from manufacturing, importing, marketing, advertising, promoting, offering for sale, selling, exporting and/ or using its ORPAT scientific calculators.

Before the Delhi HC, Casio submitted that Ajanta had copied each and every original and novel element of the registered designs of Casio’s calculator model ‘CASIO FX-991ES PLUS’, and Ajanta is now selling an identical calculator model ‘ORPAT FX-991ES PLUS’ at a lower price. Delhi HC passed an interim order of stay, however, later, a settlement was arrived at between the parties and the HC decreed the suit in terms of the settlement agreement. Subsequently, an application was filed by Casio for rectification of the judgment, contending that the settlement agreement pertains only to trademark ‘FX-991ES PLUS/ ‘FX-991’ and there was an inadvertent typographical error of the trademark in the settlement agreement as ‘FX-991ES PLUS/ FX/ 991’. The HC however, dismissed the application, and an appeal was filed before the SC.

After considering the submissions, SC noted that the misunderstanding as projected between the parties relates to use of “FX” or “991” as separate marks in the settlement agreement. A final draft of the settlement agreement from Ajanta’s side was communicated to the advocate for Casio’s in which it was categorically stated that Ajanta undertakes not to adopt/ manufacture/ sell/ offer/ advertise/ promote/ use in any manner, any goods incorporating the design of Casio of ‘FX-991ES PLUS’ and/ or the trade mark ‘FX-991ES PLUS/ ‘FX/ ‘991’ and/ or its packaging or any other identically, deceptively and/ or confusingly similar packaging to that of Casio’s packaging. Finally, the settlement agreement was executed between the parties. The SC held that a consent decree cannot be modified/ altered unless the mistake is obvious, or consent is vitiated by fraud or misrepresentation. In

the present case, there were no allegations of either of fraud or misrepresentation on the part of Ajanta or Casio. The SC did not agree with Casio that there was a mistake committed while entering into a settlement agreement due to misunderstanding and upheld the order of the HC.

6) APPLICATION FOR THE APPOINTMENT OF AN ARBITRATOR CANNOT BE MOVED IN A HIGH COURT IRRESPECTIVE OF ITS TERRITORIAL JURISDICTION

Matter: *Ravi Ranjan Developers Pvt. Ltd. v. Aditya Kumar Chatterjee.*

Order dated: 24 March 2022

Summary:

Ravi Ranjan Developers Pvt. Ltd. (“**RR Developers**”) and Aditya Kumar Chatterjee (“**Chhaterjee**”) entered into a development agreement for development of a property situated in the state of Bihar. The said development agreement executed and registered in Bihar contained an arbitration clause that all disputes between the parties arising out of and relating to the development agreement would be referred to arbitration under the provisions of the Arbitration Act “*and the sitting of the said Arbitral Tribunal shall be at Kolkata.*” Differences and disputes arose in relation to the development agreement, giving rise to various proceedings between the parties and eventually Chhaterjee filed a petition in Calcutta HC for appointment of an arbitrator. This application was challenged by RR Developers questioning the territorial jurisdiction of the Calcutta HC as no part of the cause of action arose within the territorial jurisdiction of the Calcutta HC. On the other hand, Chhaterjee contended that though the development agreement was executed in Bihar and the property in question is also located outside the jurisdiction of the Calcutta HC, but as the parties have agreed to submit to the jurisdiction of Calcutta HC in the arbitration agreement contained in the said development agreement, Calcutta HC had jurisdiction to try and entertain the case.

The issue under consideration before the SC was whether the Calcutta HC at all had the jurisdiction to entertain the application filed by Chhaterjee and appoint an arbitrator. The SC observed that the development agreement was admittedly executed and registered outside the jurisdiction of the Calcutta HC, and it pertains to development of property in Bihar which is again outside the jurisdiction of the Calcutta HC. Further, neither of the parties carry out any business within the jurisdiction of the Calcutta HC. SC also rejected the contention of Chhaterjee that Calcutta HC had the territorial jurisdiction to appoint the arbitrator as the seat was Calcutta (Kolkata). The SC noted that Calcutta (Kolkata) was only intended to be the ‘venue’ for arbitration sittings. SC also noted that earlier, Chhaterjee himself had approached the District Court at Muzaffarpur, Bihar and not a court in Kolkata for interim protection under the Arbitration Act and is therefore estopped from contending that the parties had agreed to confer exclusive jurisdiction to the Calcutta HC. Therefore, SC held that the Calcutta HC had no jurisdiction to appoint an arbitrator, and accordingly quashed the HC order and appointed a new arbitrator.

ORDERS PASSED BY THE HIGH COURTS (HC)

7) BOMBAY HIGH COURT ALLOWS THE APPOINTMENT OF ARBITRATOR ON THE BASIS OF A PHOTOCOPY OF AN INSUFFICIENTLY STAMPED AGREEMENT

Matter: *Pigments & Allied v. Carboline India Pvt. Ltd. & Anr.*

Order date: 28 February 2022

Summary:

Pigments & Allied (“**P&A**”), Carboline India Pvt. Ltd. (“**Carboline**”), and Octamec Engineering Pvt. Ltd. (“**Octamec**”) entered into a tripartite agreement under which P&A was to carry out certain works including construction and maintenance. Due to non-payment of its prescribed fee, P&A invoked the arbitration clause under the tripartite agreement. However, due to refusal of Carboline and Octamec to nominate an arbitrator to constitute the arbitral tribunal, P&A filed a petition before the HC for appointment of the arbitrator under the Arbitration Act.

In the present case, the parties had not disputed the existence of the tripartite agreement and the arbitration clause. The HC had impounded the photocopy of the tripartite agreement as the original was not in possession of either party, and thereafter Octamec had raised an issue that a photocopy of a document is not an “instrument” under the Maharashtra Stamp Act, 1958 and therefore

could not have been impounded. The issue under consideration before the HC was whether an arbitrator can be appointed on the basis of a photocopy of an insufficiently stamped agreement, the original of which was lost.

The HC analysed the relevant provisions under the Maharashtra Stamp Act, 1958 in light of the scheme of the Arbitration Act and observed that arbitration is devised to be a speedy mechanism and to await the decision of whether or not stamp duty is to be paid on the agreement even for the purposes of appointment of an arbitral tribunal would defeat the very purpose of arbitration. The HC further clarified that once the parties have acknowledged the signing and existence of the substantive contract containing the arbitration clause, the non-availability of the original agreement will not prevent the court from appointing an arbitral tribunal. Therefore, the HC proceeded with appointment of the arbitrator and left the questions of insufficient stamping or non-availability of the original agreement open for the consideration of the arbitral tribunal.

Our co-ordinates:

Mumbai

506 Marathon Icon
Off Ganpatrao Kadam Marg
Lower Parel, Mumbai – 400013

Email: al@acuitylaw.co.in