

ACUITY **LAW**

**DISPUTES**  
**NEWSLETTER**

**October-December 2021**

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## 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](http://acuitylaw.co.in) or write to us at [al@acuitylaw.co.in](mailto:al@acuitylaw.co.in).

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## INTRODUCTION

This newsletter covers key updates about developments in civil and arbitration disputes for the quarter October - December 2021.

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) PRE-DEPOSIT OF 75% OF ARBITRATION AWARD AMOUNT UNDER THE MSME ACT IS MANDATORY BEFORE ENTERTAINING AN APPLICATION TO SET ASIDE THE AWARD UNDER THE ARBITRATION ACT.

**Matter:** *Gujarat State Disaster Management Authority v. Aska Equipments Ltd.*

**Order dated:** 08 October 2021.

#### Summary:

A dispute arose between Aska Equipments Ltd. (**Aska**) and Gujarat State Disaster Management Authority (**GSDMA**), which was referred to the Facilitation Council as per the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (**MSME Act**). The Facilitation Council passed an award (**Award**) in favor of Aska, directing GSDMA to pay Aska a sum of INR. 105,053,387 (Indian Rupees One Hundred and Five Million Fifty-Three Thousand Three Hundred and Eighty-Seven only) (**Award Amount**).

Aggrieved by the Award, GSDMA filed an application under the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) to set aside the Award. In the said proceedings, GSDMA was directed to deposit 75% of the Award Amount as per provisions of the MSME Act. However, GSDMA did not comply with the said directions and eventually an appeal was filed before the SC. The main issue before the SC was whether in an appeal filed under the Arbitration Act, the appellate court has any discretion to deviate from directing the appellant from depositing 75% of the awarded amount as a pre-deposit.

The SC interpreted the provisions of the MSME Act and held that the requirement of deposit of 75% of the awarded amount as a pre-deposit is mandatory. The SC further held that if the appellate court is satisfied that there shall be undue hardship caused to the appellant to deposit this 75% of the awarded amount as a pre-deposit at a time, the court may allow the pre-deposit to be made in instalments. Accordingly, the appeal filed by GSDMA was dismissed.

For more information about the MSME Act, please read our article available [here](#).

### 2) FAILURE ON THE PART OF THE ARBITRAL TRIBUNAL TO DECIDE THE DISPUTE IN ACCORDANCE WITH THE TERMS OF THE CONTRACT WOULD AMOUNT TO PATENT ILLEGALITY.

**Matter:** *State of Chhattisgarh and Anr. v. Sal Udyog Pvt. Ltd.*

**Order Dated:** 08 November 2021

#### Summary:

A dispute arose between the State of Madhya Pradesh (**State Government**) and Sal Udyog Pvt. Ltd (**SUPL**) with regards to the termination of a contract by the State Government for supply Sal seeds to SUPL. SUPL claimed refund on the ground that certain excess amount had been paid by it to the State Government for the supply of Sal seeds. The arbitrator allowed the claim of SUPL and a sum of INR 74,346,772 (Indian Rupees Seventy-Four Million Three Hundred and Forty-Six Thousand Seven Hundred and Seventy-Two only) (**Amount Awarded**) was awarded in its favor, along with future interest (**Arbitral Award**).

Aggrieved by the Arbitral Award, State Government filed a petition to set aside the Arbitral Award under the provisions of the Arbitration Act, but the District Judge declined to interfere with the Arbitral Award. This order of the District Judge was appealed by the State Government before the High Court of Chhattisgarh. One of the grounds for appeal was that as per the contract, SUPL was to bear expenses incurred every year by the State Government for supplying Sal seeds. These expenses would not only include the cost of collection, purchase price paid to the growers and commission agents, cost of storage and transportation, but

also include handling and supervision charges. Further, SUPL had been bearing these handling and supervision charges without any demur till the termination of the contract. However, the Amount Awarded included these handling and supervision charges and the same therefore became payable by the State Government to SUPL. SUPL argued that as the State Government had in its petition to set aside the arbitral award, not raised any objection relating to the inclusion of handling and supervision charges in the Awarded Amount, the State Government had waived its right to raise this new objection in the appeal. The High Court of Chhattisgarh dismissed the appeal filed by the State Government and the High Court's order was then challenged before the SC.

The issue before the SC was whether any interference was called for in the Arbitral Award on the ground that the arbitral tribunal and the High Court had ignored the binding terms of the contract by including the handling and supervision charges in the Awarded Amount. SC noted that the State Government had raised an objection before the arbitral tribunal regarding inclusion of supervision charges, but the objection was turned down by the arbitral tribunal by giving a complete go by to the terms of the contract. Further, it was not denied by SUPL that the supervision charges were being paid by it from the date when the parties had entered into the contract till its termination. Thus, the SC opined that 'patent illegality' was manifest on the face of the Arbitral Award since the express terms and conditions of the contract governing the parties were ignored completely.

Further, SC rejected SUPL's plea that as the State Government did not raise such an objection in its earlier petition, it is estopped from raising it in the appeal. SC held that failure on the part of the arbitral tribunal to decide in accordance with the terms of the contract would attract the patent illegality ground, which was not only apparent on the face of the Arbitral Award but went to the very root of the matter and deserved interference. Accordingly, the appeal was partially allowed to the extent that the Arbitral Award allowed refund of the supervision charges.

### 3) **ARBITRATION ATTEMPT MANDATORY AFTER FAILURE OF CONCILIATION UNDER MSMED ACT AS PROCEEDINGS CANNOT BE CLUBBED**

**Matter:** *Jharkhand Urja Vikas Nigam Limited v. The State of Rajasthan*

**Order dated:** 15 December 2021

#### **Summary:**

Jharkhand Urja Vikas Nigam Limited (**JUVNL**) had entered into a contract with Anamika Conductors Ltd. which approached the Rajasthan Micro and Small Enterprises Facilitation Council (**Facilitation Council**) for recovery of pending payments from JUVNL. As JUVNL failed to appear before the Facilitation Council despite receipt of summons, an order was passed directing JUVNL to make complete payments within a period of 30 (thirty) days from the date of the order. This order was challenged before Rajasthan High Court, which dismissed the appeal. Eventually, an appeal was preferred by JUVNL before the SC.

The SC noted that as per the provisions of the MSMED Act read with the Arbitration Act, the Facilitation Council, on the failure of the conciliation proceedings between the party, was only empowered to refer the parties to arbitration. SC opined that arbitration and conciliation cannot be clubbed together to pass an award, and any such order would be patently illegal. Accordingly, the appeal was allowed, and the Facilitation Council's order was quashed as it was a nullity and ran contrary not only to the provisions of MSMED Act but also to the mandatory provisions of Arbitration Act. The SC kept it open to either party to refer the dispute to arbitration on their own.

### **ORDERS PASSED BY THE HIGH COURTS (HC)**

### 4) **A PARTY CANNOT RESTRICT THE RIGHT OF THE OTHER PARTY TO INVOKE ARBITRATION TO A LESSER PERIOD THAN THAT PROVIDED UNDER THE ARBITRATION ACT**

**Matter:** *Sagar Constructions v. Govt. of NCT of Delhi*

**Order dated:** 06 October 2021

#### **Summary:**

Sagar Constructions had been awarded construction work and after failure on part of the government of Delhi to release the payments as per the agreed terms of the contract, it invoked the arbitration clause. However, Sagar Constructions' request to appoint an Arbitrator for adjudication of the disputes was denied on the ground that it had not invoked the Dispute Resolution Clause within a period of 120 (one hundred and twenty) days from the date of preparation of the Final Bill, as mandated under the arbitration clause. .

Sagar Constructions filed a petition before the Delhi HC under the Arbitration Act praying for appointment of arbitrator. The HC held that a party cannot restrict the right of the other party to invoke arbitration to a lesser period than provided under the Arbitration Act. It held that the right of the party to invoke arbitration would be three years from the date when cause of action arises and the parties cannot circumscribe it to a lesser period through an agreement. An agreement that restricts the period of limitation would be void under the Indian Contract Act, 1872. Accordingly, the HC appointed a sole arbitrator.

#### 5) UNILATERAL APPOINTMENT OF AN ARBITRATOR CANNOT BE CHALLENGED BY PARTY WHO ACTIVELY PARTICIPATED IN ARBITRAL PROCEEDINGS

**Matter:** *Kanodia Infratech Limited v. Dalmia Cement (Bharat) Limited*

**Order dated:** 08 November 2021

##### **Summary:**

Kanodia Infratech Limited (**Kanodia**) and Dalmia Cement (Bharat) Limited (**Dalmia**) were involved in the business of manufacturing and marketing of cement. Dispute arose and Dalmia invoked arbitration and appointed a sole arbitrator who heard both sides and granted several reliefs to Kanodia. Kanodia challenged the arbitral award arguing that the arbitrator lacked inherent jurisdiction to entertain the dispute since he was appointed unilaterally by Dalmia which went contrary to the settled proposition of law. Kanodia also asked the Court to set aside the arbitral award.

The Delhi HC was of the view that unilateral appointment of an arbitrator cannot be challenged through a petition filed under the Arbitration Act as the scope of interference in arbitral award is very limited and can be explored only when an arbitral tribunal goes beyond the scope of contracts or agreements and exceeds its jurisdiction. Further, HC held that the appointment of the arbitrator was not objected to by Kanodia who actively participated in the arbitration proceedings, and therefore relief cannot be claimed at such a later stage. Moreover, as the arbitrator was also a retired judge of Punjab and Haryana HC, the SC was opined that his integrity cannot be doubted. Accordingly, the HC disposed of the petition.

#### 6) UNILATERAL OPT-OUT CLAUSES CANNOT AMOUNT TO A VALID ARBITRATION AGREEMENT AS IT LACKS MUTUALITY

**Matter:** *Tata Capital Finance Limited v. Shri Chand Construction and Apartment Pvt. Ltd.*

**Order dated:** 24 November 2021

##### **Summary:**

Shri Chand Construction and Apartment Pvt. Ltd. (**Shri Chand Construction**) had availed financial facility from Tata Capital Housing Finance Ltd. (**Tata Finance**) for purchase of a property. This loan was secured, and original documents of the property were handed over to Tata Finance. Upon repayment of the entire financial facility, Shri Chand Construction sought the return of the original documents to resell the property. As Tata Finance had misplaced the original documents, the resale was delayed, and the consideration allegedly reduced.

Resultantly, Shri Chand Construction filed a suit seeking compensation from Tata Finance for loss of original property documents. Tata Finance challenged this on the ground that the only remedy available to Shri Chand Construction was arbitration and it cannot approach the court seeking damages. The arbitration clause in the loan agreement also stated that in the event Tata Finance comes under the purview of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**) or the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (**DRT Act**) (which would enable Tata Finance to proceed and recover dues from its borrowers in an expedited manner), then arbitration provisions contained shall, at the option of Tata Finance, cease to have any effect. However, no such right was given to Shri Chand Construction, which was bound to arbitrate its claims. Tata Finance's application before the trial court to refer the matter for arbitration was rejected and this

decision of the trial judge was then challenged by Tata Finance before the HC.

The Delhi HC held that an arbitration agreement that confers unequal power on one party to unilaterally abandon the arbitration proceedings, would be invalid in law, as such an agreement would lack 'mutuality', which is an essential feature of an arbitration agreement. HC further held that an arbitration agreement which provides for arbitration of the claims of one party and provides for a remedy of court for the claim of the other party would also be invalid in law as the same would not only result in splitting of the claims and cause of action but also in the multiplicity of proceedings and conflicting decisions on the same cause of action. Therefore, the Delhi HC upheld the decision of the trial court and dismissed the appeal.

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