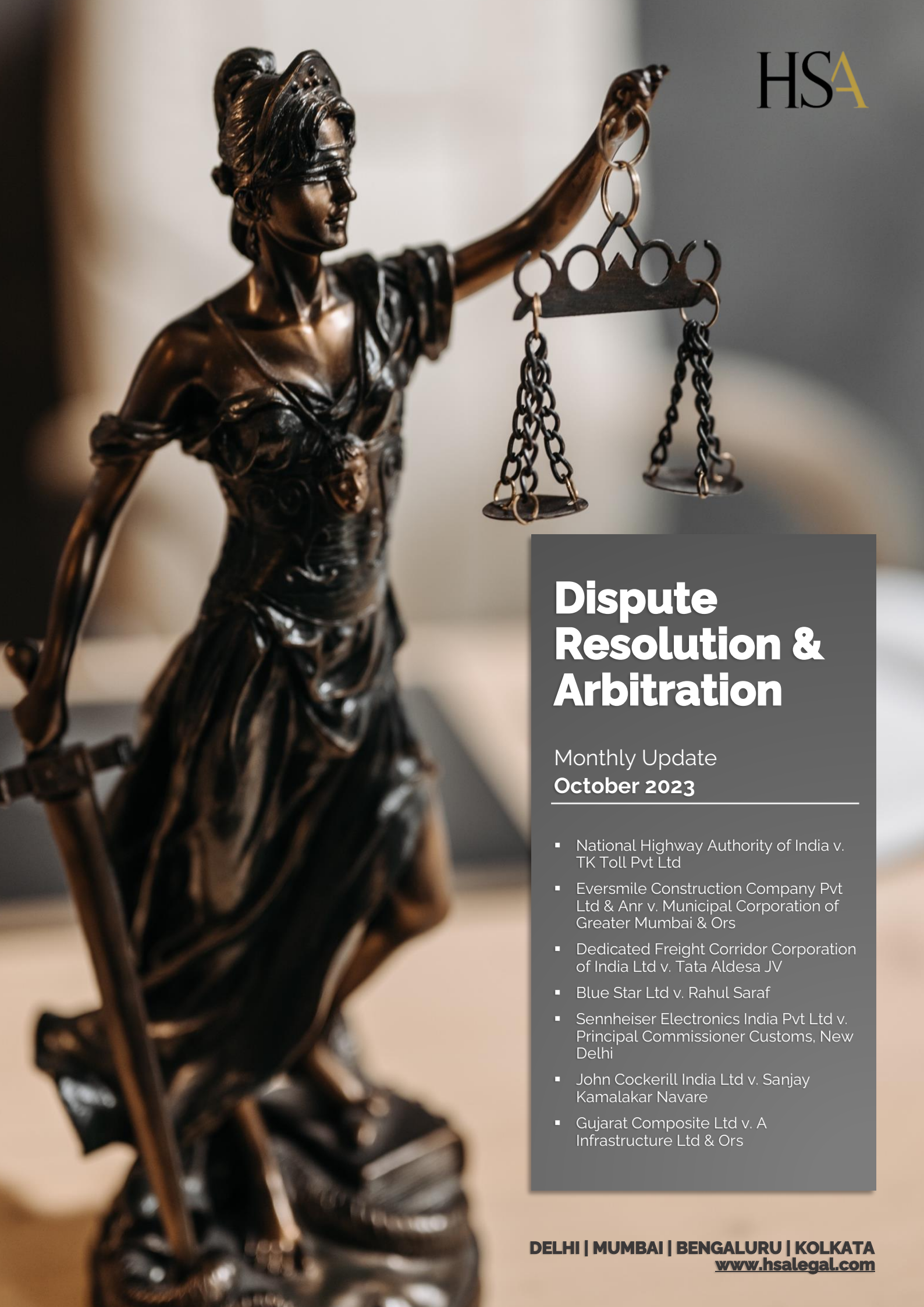

HSA

Dispute Resolution & Arbitration

Monthly Update

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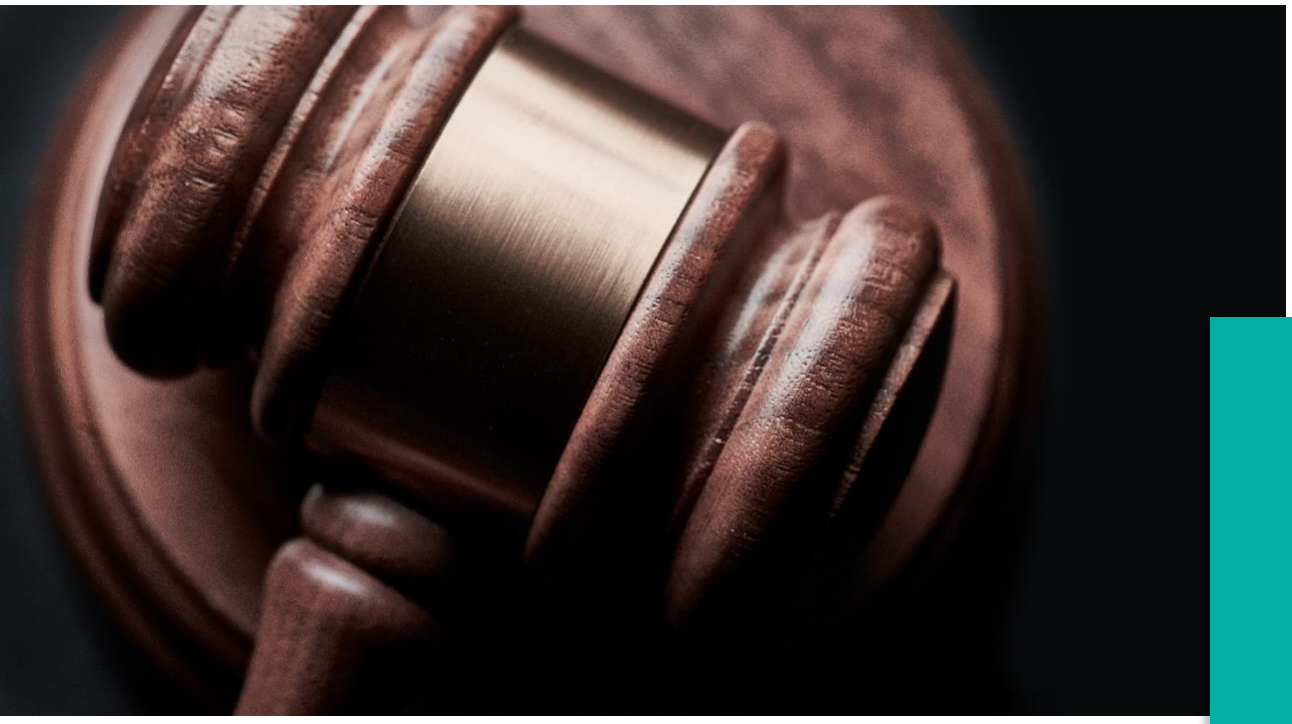
DISPUTE RESOLUTION AND ARBITRATION UPDATE



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National Highway Authority of India v. TK Toll Pvt Ltd

Delhi High Court | OMP (COMM) 24 of 2023

Background facts

- In December 2006, National Highway Authority of1 India (**NHAI**) invited proposals for the design, engineering, finance, construction, operation, and maintenance of Trichy-Karur Section from 135.800 km to 218.000 km of National Highway - 67 in the state of Tamil Nadu. This project intended to augment the current roadway of the Trichy-Karur Section, expand it to four lanes, and enhance its operation and upkeep using a BOT concession model.
- In March 2007, Reliance Energy Ltd (**Contractor**) was declared as the successful bidder for the project, and NHAI issued a Letter of Acceptance (**LoA**) in their favor. The parties executed a Concession Agreement (**CA**) on July 19, 2007. Additionally, a tripartite State Support Agreement (SA**)** was also executed with the Government of Tamil Nadu.
- The project was set to be completed 30 months from the designated Appointed Date, with a concession tenure of 30 years. The Appointed Date, as declared by NHAI, was January 15, 2008. Thus, the scheduled completion date for the project was set as July 14, 2010, with the concession duration extending until January 14, 2038.
- On November 14, 2013, both parties signed a SA which granted the Contractor a PCC, thereby allowing it to start toll collection in a section of the project. The parties also agreed to waive claims on project delays up to the SA date, and the completion date was rescheduled to February 24, 2014.
- However, on account of disputes arising between the parties, the Contractor issued a notice of arbitration to NHAI on December 17, 2018.
- The Arbitral Tribunal passed its final award on October 1, 2022, awarding the Contractor a sum of INR 1056.54 crore. Vis-à-vis the SA, the Tribunal found that it had been executed under coercion.
- Being aggrieved, NHAI challenged the Award before the High Court of Delhi (HC) under Section 34 of the Arbitration and Conciliation Act, 1996 (**Act**), whereas the Contractor filed an application under Section 36(1) of the Act for enforcement of the award. NHAI also sought a stay against the operation of the award under Section 36(3) of the Act.

Issue at hand?

- Whether the Arbitral Tribunal's failure to appreciate that the SA, under which parties had agreed not to raise any claims on account of delay and extension of the project, was a bar on the claims?

Decision of the Court

- At the outset, the HC observed that based on the evidence put forth by the Contractor's expert witness, a delay of 1668 days was attributable to NHAI on account of failure to hand over the project site, while a delay of 300 days was attributable to the Contractor. Such a delay by NHAI could not have been overlooked by the Contractor unless there was pressure to sign the SA. This finding was further corroborated by the testimony of NHAI's witness. During cross-examination, the witness acknowledged the absence of any documentation indicating that the request for the SA originated from the Contractor. The witness had also admitted that without receiving the PCC and the rights to collect tolls, the Contractor could not have recovered any portion of its investment.
- The HC highlighted that NHAI had issued a circular which approved the execution of an SA in the given circumstances. However, the circular mandated that the SA must include an undertaking by the Contractor to forego any claims against the NHAI under any clause of the CA, for delay in handing over the affected stretch of the project highway. Further, the arbitral record showed that the drafts of the SA underwent two revisions, and the Contractor had raised objections to the clause stating that neither party would seek damages against the other.
- Regarding the issue of limitation, the HC observed that NHAI had not dismissed the immediate claims put forward by the Contractor, and without such dismissal the limitation period had not started. The HC noted that since the project was ongoing, the payable dues under each claim could be quantified only after completion of the project. Therefore, there was no question of the claims being barred by limitation.
- Drawing from the aforementioned findings, the HC opined that there was a clear effort on NHAI's part to protect itself from potential financial repercussions stemming from its own delays. Consequently, the HC found that NHAI was unable to demonstrate any apparent glaring error which would entitle it to a stay on the operation thereof. Accordingly, the Application filed by NHAI challenging the arbitral award was dismissed with the observation that no stay was warranted. NHAI was directed to pay 50% of the awarded sum to the Contractor within 4 weeks, and the balance 50% within 4 weeks thereafter.

HSA
Viewpoint

This judgment is surely a step in the right direction since it identifies the power imbalances by considering the state backed authorities' control over aspects such as time extensions and the imposition of liquidated damages. It is quite common that contractors find themselves cornered into meeting such demands. In recent times, it has become increasingly common for supplementary agreements to be executed, often limiting contractors' rights to pursue damages. This decision will facilitate in restoring the legal and contractual rights of the contractors.

Eversmile Construction Company Pvt Ltd & Anr v. Municipal Corporation of Greater Mumbai & Ors

Bombay High Court I Writ Petition No. 2038 of 2016

Background facts

- Maharashtra has two planning authorities - a special planning authority called Mumbai Metropolitan Region Development Authority (**MMRDA**) and the Municipal Corporation of Greater Mumbai (**MCGM**), a statutory planning authority constituted by the Maharashtra Regional and Town Planning Act, 1966.
- Planning Authorities constituted by the Government are empowered under the Right to Fair Compensation Act, 2013 to acquire land for public purposes, provided a fair compensation is paid to the owner of the land. The Right to Fair Compensation Act replaced the Land Acquisition Act.
- However, the MCGM is the only Planning Authority which can issue a Transferrable Development Right (**TDR**), which is given by the MCGM to the owner of a land if the land or a part of the land is acquired by the MCGM. Provision for TDRs is made in the Maharashtra Regional and Town Planning Act, 1966. Later, these became a part of Developmental Control and Promotion Regulations for Greater Mumbai and then were included in the latest DCPR 2034.
- The TDR corresponds to the area acquired, and the holder of the TDR can sell it on the open market or can use it to develop other undeveloped areas barring those mentioned under appropriate laws. TDRs are recorded in a certificate called the Developmental Rights Certificate (**DRC**).
- The Petitioners in this case were the owners of land bearing CTS No: 145 measuring approximately 2200 sq mts. Out of this land, 145/B/3/2 and 145/B/3/3 were used and a Development Plan Road came about. The Development Plan Road was later converted into the Sahar Elevated Road.
- The Sahar Elevated Access Road, also known as SEAR, was an access road connecting the Western Express Highway, near Vile Parle to the Terminal 2 of the Chhatrapati Shivaji International Airport. This Sahar Road was maintained by the Mumbai International Airport Limited (**MIAL**), a privately

owned entity in Public-Private Partnership with the Airports Authority of India. MIAL was mainly concerned with the upkeep and maintenance of the Chhatrapati Shivaji International Airport. It was clear from the description of MIAL itself that it was not a Planning Authority.

- The Petitioners' land was used to build the Sahar Elevated Road, which was used by a lot of people in order to access the Chhatrapati Shivaji International Airport. Arguing that the land acquired in this case was used for 'public purpose', the Petitioners approached the Bombay High Court seeking compensation for a part of their land which was acquired and subsequently made into the Sahar Expressway.
- However, since it was the Planning Authority which can acquire land and then provide compensation in lieu of acquisition, the payer of the compensation became a major issue especially since both the MCGM and the MMRDA claimed that they did not have any jurisdiction over the land where the road was built and hence were not the appropriate Planning Authorities and therefore could not provide compensation to the Petitioner. Both these authorities went so far as to disclaim all 'control, supervision and planning authority rights and responsibilities' over that stretch of road.
- In their petition, the Petitioners put forth 2 very simple scenarios. Some authority had to have acquired the road and then given to MIAL for upkeep and maintenance. Therefore, it was highly likely that:
  - Either the MCGM had acquired the land and built the road, in which case the Petitioners asked the Court to direct the MCGM to give them compensation in the form of TDR.
  - Or the MMRDA had acquired the land and built the road, in which case the Petitioners asked the Court to direct MMRDA to recommend to the MCGM to issue TDR.

Issues at hand?

- Are the Petitioners were entitled to get compensation in the form of TDR?
- Which Planning Authority would have jurisdiction over the stretch of Sahar Road and thus be liable to pay the aforementioned compensation?

Decision of the Court

- **Entitlement for getting compensation in the form of TDR:**
  - The Court carefully perused the facts of the case and recorded that the facts were legitimate and this was actually a case of a private property being taken for a public purpose without paying any compensation to the holder.
  - The Court held that this was a clear case of violation of Article 300A of the Constitution of India which states that 'No person shall be deprived of his property save by authority of law'. Thus, in this case, Right to Fair Compensation must be followed and the Petitioners were entitled to compensation in cash or in kind. Since the Petitioners preferred TDR, TDR was to be granted to them. The State Government, which was a Respondent in the suit, had also made the averment that the Petitioners were entitled to the TDR.
- **Planning Authority liable to pay compensation:**
  - The Court found it very surprising that neither the MCGM nor the MMRDA were claiming jurisdiction over that stretch of road. This was indeed highly improbable as one of the authorities had acquired this land, built a road on it and then handed it over to MIAL.
  - The MCGM had made the averment that it could issue the requisite TDR but if it was directed to do so by the MMRDA, it would. The MMRDA, on the other hand, had averred that as a Special Planning Authority, it had jurisdiction over the airport and the land but had no jurisdiction over that specific strip of road.
  - Therefore, the Court decided to issue the writ of mandamus, since the Petitioner was entitled to TDR. Since it was only MCGM who could issue the TDR, the Court decided to only put the MCGM within the ambit of this writ.
  - The Court made this decision because it could not issue the Mandamus with respect to MMRDA since MMRDA was actively denying any jurisdiction over that stretch of road and even if it was later discovered that the property was under the jurisdiction of the MMRDA, at best, MMRDA could issue a No Objection Certificate (NOC) or direct the MCGM to issue the DRC.
  - Thus, the Court directed MCGM to issue the DRC within a period of 4 weeks from the date of the order, i.e September 13, 2023.

HSA
Viewpoint

The Court relied on the judgment in the matter of Harkishna Mandir Trust v. the State of Maharashtra & Ors wherein the Supreme Court clarified that the High Court can grant relief to a petitioner even if disputed set of facts arise in the case. Further, a writ of mandamus is a writ to ensure enforcement of public duty and once the Petitioner proves that he is entitled to have a certain public duty enforced to grant him relief, then the Court must issue this writ. This judgment underscored a fundamental principle of law where the Court looked at the matter in a holistic manner and understood that more harm than good would be done in allowing the Petitioners to reclaim their land or in dragging the matter when a simple solution, especially in the context of the Supreme Court judgment, was possible.

Dedicated Freight Corridor Corporation of India Ltd v. Tata Aldesa JV

Delhi High Court | OMP (COMM) 105/2021 & IA No. 10346 of 2021

Background facts

- The Petitioner herein is a Special Purpose Vehicle responsible for planning, developing, and operating dedicated freight corridors under the Ministry of Railways' administrative control and the Respondent/Claimant is a joint venture of Tata Projects Ltd, India and Aldesa Constructions, Spain, known as Tata-Aldesa Joint Venture (**JV**).
- The Petitioner had undertaken a project involving the design and construction of civil structures and track works and other connected and ancillary works for a double-line railway in a section of the Eastern Dedicated Freight Corridor. In pursuance of the same, it had awarded a contract to the Respondent/Claimant based on their bid.
- Thereafter, the Respondent/Claimant sought clarification from the Petitioner about the applicability of certain box sizes that were to be used for road crossings beneath railway tracks, and informed the Petitioner that the requirements sought by the Petitioner were variations from the contract agreement and would therefore result in additional time and costs.
- The Petitioner instructed the Respondent/Claimant that the plan submissions should not be delayed for approvals and that the contract required the Respondent/Claimant to design and build according to the contract terms. Both parties agreed on a final list of road crossings, which was included in the plan sent to the Petitioner for approval, with the understanding that any cost and time changes would be discussed later.
- However, the Petitioner's appointed engineer rejected the claim related to the increased number and size changes of Road Under Bridges (**RUBs**) by the PWD, and after stating its reasons, they contended that the same cannot be considered a reason for significant cost increases. The Respondent/Claimant resubmitted the claim, but it was once again rejected by the engineer, resulting in three disputes arising between the parties.
- The first two of the aforesaid issues were directly referred to arbitration and was adjudicated. However, the dispute pertaining to the question whether the increase in the number and changes in the size of the RUBs can be considered as 'variation' or not remained and the dispute was referred to the Dispute Adjudication Board (**DAB**). The claim was granted in favour of the Respondent/Claimant vide Order dated May 29, 2018. However, both the parties were dissatisfied with the decision of the DAB invoked the arbitration clause as stipulated in the Contract.
- The arbitral proceedings culminated in the passing of the final award on September 11 2020 (**Impugned Award**) by which an amount of INR 26,25,15,787 (plus applicable taxes on INR 20,27,46,850) in favor of the Respondent/Claimant. Aggrieved by the Impugned Award, the Petitioner filed the present Petition before the High Court of New Delhi (**HC**).

Issue at hand?

- Whether additional costs were incurred due to increase in scope of work arising from change in sizes/type of listed structures built by Respondent/Claimant, related earthwork and allied works, which amount to variation in terms of the Contract Agreement?

Decision of the Court

- At the outset, the HC delved into a comprehensive analysis of the provisions of the Arbitration and Conciliation Act, 1996 (**Act**), in support whereof the decision of the Supreme Court (SC) in the matter of ***Union of India v. Varindera Constructions Ltd***[1] was cited. Additionally, the scope and nature of Section 34 of the Act was also discussed at length.
- On a perusal of the provisions of the Act, the HC remarked that it is clear that the intent of the legislature while enacting the Act, as well as while carrying out the amendments to the same, was that there should be limited intervention of the Courts in arbitral proceedings, especially after the conclusion of the proceedings. Therefore, it was stated that the only question before the Courts while adjudicating an arbitral challenge is whether the conclusion drawn in the impugned Award is supported by the findings of the Arbitrator, which principle has been reiterated by the SC in ***Anand Brothers (P) Ltd v. Union of India & Ors***[2]. An award may be set aside by a Court only: firstly, when the award contravenes the public policy; secondly, when the award exhibits patent illegality; and lastly, when the Arbitrator fails to adhere to the fundamental principle of natural justice.

HSA
Viewpoint

The HC, following the judicial trend of minimal interference in matters referred to Arbitral Tribunals, has rightly dismissed the present petition. The observations of the HC are in line with earlier precedents and settled principles of law. Setting aside of an arbitral award on ground of patent illegality requires distinct transgression of law and not the mere fact that the award is against the Petitioner, and the same has been rightly reiterated by the HC. It is imperative that these strict parameters, as mentioned in Section 34 of the Act as well as the present judgment, are maintained so as to warrant any kind of interference by a Court and that filing of a petition under Section 34 of the Act does not become a means to challenge an award, simply because it has been passed against a party who is unhappy/ not satisfied with the outcome of an arbitral proceeding.

[1] (2018) 7 SCC 794
[2] (2014) 9 SCC 212

- With specific regards to patent illegality, the Court held that it is an illegality which goes to the root of the matter but excludes the erroneous application of the law by an arbitral tribunal or the re-appreciation of evidence by an Appellate Court or a Court adjudicating the challenge of an Award under Section 34 of the Act. On a perusal of the provisions of the Contractual documents and the interpretation of the term variance by the Arbitral Tribunal, it was clear that the term variation, as defined in the contract itself, encompassed changes in size. These variations had arisen due to factors that could not have been foreseen or evaluated during the bidding phase.
- Thus, the High Court found no grounds for interference with the interpretation of sub-clauses related to the term variation in the contract and its application to the circumstances and therefore, the Court opined that the impugned Award could not be considered legally unsound.
- Regarding claims of violation of principles of natural justice due to the rejection of profiles developed by the petitioner, the High Court was of the view that this rejection would not be a violation of the aforesaid principles as the same had already been taken into consideration by the Tribunal. Consequently, the Court concluded that none of the elements outlined in Section 34 of the Act could be made against the contested Arbitral Award. With regards to the Petitioner's contention that the Arbitrator had misinterpreted the evidence on record and the relevant clauses of the contract agreement, the HC held that the Arbitrator had appropriately relied on pertinent evidence and had accurately interpreted the clause pertaining to the term variation.
- In light of the above, the HC affirmed the conclusion drawn and findings given by the Arbitral Tribunal as they are not of the nature that would shock the conscience of the HC. Finding no reason to set aside the Impugned Award, the Petition was dismissed by the HC.

Blue Star Ltd v. Rahul Saraf

Calcutta High Court I AP No. 852 of 2022

Background facts

- The Petitioner, Blue Star Ltd, entered into a Memorandum of Understanding (**MoU**) with the Respondent, Rahul Saraf, as per which the Petitioner was to render its operation and maintenance services from January 1, 2019 to December 31, 2021.
- Services were provided by the Petitioner, in lieu of which invoices were raised and even paid by the Respondent. However, disputes arose between the parties with respect to non-payment of a few invoices. The Petitioner raised requests for payments vide series of letters.
- On the Respondent's failure to pay the amount demanded, the Petitioner invoked the arbitration clause and nominated an Arbitrator vide notice dated August 29, 2022, which was received by the Respondent on September 1, 2022.
- After expiry of a period of 30 days, the Respondent issued a letter dated November 4, 2022, refusing to accept the appointment of the Arbitrator appointed by the Petitioner and disputed the existence of any valid arbitration clause. Consequently, the Petitioner filed the present application under the Arbitration and Conciliation Act, 1996 (**Act**) praying for appointment of an Arbitrator.
- **Submissions on behalf of the Petitioner:**
  - The dispute is arbitrable in nature and there exists a binding arbitration agreement between the parties which can be easily deduced from the provisions of the MoU, specifically, Clause 7 and 13.
  - Reliance was placed on ***Jagdish Chander v. Ramesh Chander & Ors***[3] to bring home the point that intent of the parties has to be analyzed, which in the present situation was to determinatively refer disputes to arbitration.
- **Submissions on behalf of the Respondents:**
  - A perusal of the dispute resolution clauses would indicate that the ingredients of a valid arbitration clause, as understood on a conjoint reading of Section 2(b) and Section 7 of the Act, are not met. There is no consensus between the parties in the MoU to submit to arbitration.
  - Mere use of the word 'arbitration' or 'Arbitrator' in a heading or clause would not aggregate to an arbitration agreement. Similarly, the mere possibility of parties agreeing to arbitrate in the future, as contrasted from an obligation to refer disputes to arbitration, would not surmount to an arbitration agreement.

[3] (2007) 5 SCC 719

Issues at hand?

- Whether ingredients/requirements of a binding arbitration clause are present or found wanting in the identical agreements in the instant petitions?
- Whether there exists a valid arbitration agreement?

Decision of the Court

- The Court referred to ***NTPC Ltd v. SPML Infra Ltd***[4], ***Jagdish Chander v. Ramesh Chander & Ors***[5], ***Niwas Enterprise v. Rabindra Pandorang Ratnaparkhi & Anr***[6], and ***Nagreeka Indcon Products Pvt Ltd v. Cargocare Logistics (India) Pvt Ltd***[7] and expounded that an arbitration agreement can be couched in various modes and forms. However, mere mentioning of the terms 'arbitration' or 'Arbitrator' in a heading or existence of these terms in a scattered manner in clauses of agreements between parties do not aggregate to being an arbitration agreement. There must exist a clear intention of the parties and a meeting of their minds to mandatorily submit any future dispute, that may arise, to arbitration.
- Such an intention should illuminate itself in the form of an explicit obligation that is binding between the parties and not merely a possibility that may materialize if the parties so decide after a fresh application of mind, post-facto occurrence of disputes.
- The Court also delved into the concerned clauses. Clause 7 makes a reference to 'Arbitration Proceedings' and Clause 13 clarifies what the Arbitrator shall not do. On an examination of Clause 7, no intention or understanding between the parties can be gleaned which specifically and mandatorily requires a reference of future disputes to arbitration.
- The plausible understanding is that a possibility of there being a reference to arbitration is left open, if the parties, in the future, opt for it. As seen in the law discussed before, such a possibility is not enough to consolidate an arbitration agreement.
- The understanding that emerges on reading of Clause 7 and 13 is that if the parties opt for arbitration, then in that limited scenario, the Arbitrator is precluded from granting interest. But arbitration is a possibility which may unravel itself if and only if the parties choose to opt for it, post occurrence of disputes and it is conditional and not a mandatory obligation between the parties to refer the dispute to arbitration.
- In light of the above, there exists no arbitration agreement between the parties and therefore the Court cannot appoint an Arbitrator in exercise of its power under Section 11.
- Accordingly, the Petition was dismissed.

HSA
Viewpoint

This judgment reiterates the settled position of law that a valid arbitration agreement should reflect the definite and explicit intention of the parties unmistakably and unequivocally agreeing that if the dispute arise between the parties, it shall mandatorily be settled by arbitration. Mere adding a particular clause stating arbitration does not imply an arbitration agreement.

Sennheiser Electronics India Pvt Ltd v. Principal Commissioner Customs, New Delhi

Customs Excise & Service Tax Appellate Tribunal, New Delhi I Customs Appeal No. 50983 and 51056 of 2020

Background facts

- Sennheiser Electronic India Pvt Ltd (**Appellant**) imported 2 models of earphones, namely CX275s which had microphone and CX180 which did not have microphone. The Appellant classified these products under custom tariff heading 8518300, which attracted basic custom duty of 15%.
- The Appellant claimed benefit under the amended Exemption Notification No. 22/2018-Cus (**Exemption Notification**) dated February 2, 2018, which provided that all goods falling under tariff heading 8518 shall attract duty of 10%, except the following parts of cellular/mobile phones i.e., microphone, wired headset and receiver.
- During the post audit clearance, the Customs Department (**Department**) felt that Appellant is not entitled to the benefit under the Exemption Notification since the imported goods were wired headset and a part of the cellular or mobile phone. As such, show cause notices were issued to the Appellant to recover the differential duty along with interest and penalty on the differential duty.
- The Principal Commissioner vide order dated February 12, 2020 dropped the demand for differential duty pertaining to CX180 earphones, however he upheld the demands pertaining to CX275s earphone which have microphone, on the ground that it is a wired headset and not eligible for benefit under the Exemption Notification, though he did not impose any penalty on the same.

[4] 2023 SCC OnLine SC 389
[5] (2007) 5 SCC 719,
[6] 2022 SCC OnLine Bom 6472
[7] 2023 SCC OnLine Bom 498

The said order pertained to examination of imported goods for the period between June, 2018 to December, 2018.

- Yet again the Principal Commissioner vide order dated March 1, 2020 dropped the demand for differential duty pertaining to CX180 earphones, however he upheld the demands pertaining to CX275s earphone which have microphone, on the ground that it is a wired headset and not eligible for benefit under the Exemption Notification. In addition, he also imposed penalty of INR 4,53,744 as per Section 112 of the Customs Act. The said order pertained to examination of imported goods for the period between February, 2019 to March, 2019.
- Being aggrieved by the said orders dated February 12, 2020 and March 1, 2020 the Appellant filed the present appeal.

Issue at hand?

- Whether imported CX 275s earphones are a part of cellular, mobile phones and headset forming part of cellular or mobile phone and thereby excluded from benefit of the Exemption Notification?

Decision of the Tribunal

- At the outset, the Tribunal stated that earphone with microphone can be used with laptop, i-pod, mobile phones etc. and perform the same function of providing audio output through speakers and receiving audio input through microphone from devices they are attached to. In view of the same the Tribunal held that utility of earphones is not confined to cellular or mobile phone.
- The Tribunal further stated that cellular or mobile phones are often used without earphones and the earphones are neither a part nor essential for the use of cellular or mobile phones. The Tribunal held that earphones only add additional utility to cellular or mobile phones and hence are not a part of cellular or mobile phones.
- The Tribunal stated that the Exemption Notification contained phrases or expression such as 'parts or sub-parts or accessories to cellular or mobile phone' at Entry No. 10 and 12 and phrase such as 'part of cellular or mobile phone' at Entry No. 18 and held that the two expressions should be considered distinctly and differently from one another. In view of the same it held that the submission made by Department that the word 'parts' in Entry No. 18 is used in a general sense and should be treated as including the earphones is not acceptable.
- The Tribunal further held that it is evident from Entry No. 18 of the Exemption Notification that only such microphone, wired headset and receiver which are a part of cellular or mobile phones are excluded from the benefits under the Exemption Notification.
- The Tribunal held that the judgement in the case of ***Commissioner of Customs (Import) Mumbai v. Dilip Kumar & Company***[8] is not applicable to the present case since there is no ambiguity in the expression used in the Exemption Notification. The Tribunal further held that the judgement in the case of ***Commissioner of Customs (Import) Mumbai (Supra)*** does not rule out the possibility of liberal interpretation of Exemption Notification but reaffirms the judgements in the cases of ***Collector v. Parle Exports Pvt Ltd***[9] and ***Commissioner v. Hari Chand Shri Gopal***[10] where it was held that strict and liberal interpretations of the notification should be applied at different stages.
- The Tribunal held CX 257s earphones are not part of any cellular or mobile phone but are accessories that can be used with variety of electronic gadgets and only for this reason alone the benefits of Exemption Notification cannot be denied for CX 275s earphones so imported.
- Hence, the Tribunal set aside the orders dated February 12, 2020 and March 1, 2020 and thereby allowed the Appeal filed by the Appellant with consequential relief.

HSA
Viewpoint

This decision clarifies that the external wired headset or earphone are mere detachable accessories and cannot be considered to be a part of cellular or mobile phone. The significance of the judgment is that it makes it clear that earphones/wired headset which do not form a part of cellular or mobile phone are eligible for benefits under the Exemption Notification. This judgment removes all ambiguities and makes it clear that external earphones or wired headset only attracts a basic custom duty of 10%.

John Cockerill India Ltd v. Sanjay Kamalakar Navare

Bombay High Court | Commercial Arbitration Application (L) No. 10282 of 2023

Background facts

- John Cockerill India Ltd (**Applicant**) being the employer entered into an Employee Non-Disclosure and Non-Solicitation Agreement (**Agreement**) dated November 15, 2021 with Sanjay Kamalakar Navare (**Respondent**).
- The said Agreement contained an arbitration clause. Certain disputes arose between Applicant and the Respondent. In light of the said disputes, the Applicant invoked the arbitration clause contained in the said Agreement.

[8] 2018 (361) ELT 577 (SC)
[9] 1988 (38) E.L.T. 741 (SC)
[10] 2010 (260) E.L.T. 3 (SC)

- Since the agreed procedure as provided in the Agreement for appointment of the Arbitrator failed, the Applicant filed the present Application under Section 11 of the Arbitration and Conciliation Act, 1996 (Act) before the Bombay High Court (**HC**).

Issues at hand?

- Whether an unstamped agreement containing an arbitration clause can be acted upon for appointment of an Arbitrator?
- Whether a Court can determine and collect the unpaid or deficit stamp duty upon an unstamped agreement or insufficiently stamped agreement, while deciding an application under Section 11 of the Act?

Decision of the Court

- At the outset, the HC perused the Agreement and agreed with the submission of the Applicant that there is no monetary value assigned thereto as it is simply an employee no-disclosure and non-solicitation agreement.
- The HC relied on the judgement of the Supreme Court in the case of ***NN Global Mercantile Pvt Ltd v. Indo Unique Flame Ltd***[11] where it was held that in case of an unstamped or insufficiently stamped agreement, the same cannot be acted upon unless the document is impounded and requisite stamp duty is paid. Therefore, the HC stated that if it has to consider the present application under Section 11 of the Act, the deficiency of stamp duty and penalty, if any, would have to be made good.
- Further, the HC referred to the judgement of the Delhi High Court in the case of ***Splendor Landbase Ltd v. Aparna Ashram Society & Anr***[12] and held that a Court can determine the stamp duty payable on an unstamped document if there is no dispute raised by the parties with respect to amount payable towards stamp duty and the penalty thereof.
- Thereafter, the HC held that in a given case where there is no dispute raised about the amount payable towards stamp duty and penalty, by applying the provisions of the Maharashtra Stamp Act read with the Schedule appended thereto, the HC could conduct the exercise of determining the stamp duty payable and authorizing an officer of the HC to collect the same, to be forwarded to the Collector of Stamps. The Officer, so authorized by the HC, would then be entitled to give an endorsement on the subject agreement/document, to certify that the stamp duty along with penalty, as determined by the Court, has been deposited. As a consequence, the defect of non-payment of stamp duty and penalty, if any, would stand cured and the arbitration agreement could, therefore, be acted upon, facilitating hearing of the application under Section 11 of the Act.
- The HC held that since no monetary value is assigned to the said Agreement and it is simply an employee non-disclosure and non-solicitation Agreement, it would fall under the categories of agreements mentioned in Article 5(h)(B) of the schedule appended to the Maharashtra Stamp Act under which no duty is chargeable on the Agreement. Consequently, the proper stamp duty payable would be INR 100.
- The HC stated that by applying the provision of Section 34 (a)(ii) of the Maharashtra Stamp Act, a penalty of INR 44 is payable on the deficit stamp duty. Hence, a total amount of INR 144 would be payable.
- In view of the above, the HC directed the Prothonotary and Senior Master to impound the Agreement and collect the determined amount from the Applicant and froward the said amount to the Collector of Stamps. Upon payment of the aforesaid amount by the Applicant, the HC directed the Prothonotary and Senior Master to endorse the Agreement, as being duly stamped and issue a certificate in writing in this regard once the party pays the said stamp duty along with the penalty thereof.

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Viewpoint

This decision clarifies that an unstamped document containing an arbitration clause can be acted upon once the defect with respect to deficit stamp duty has been cured. This judgment removes all ambiguities and makes it clear that the Court has the power to determine the stamp duty and collect the same while deciding an application under Section 11 of the Act if the quantum of stamp duty is not disputed by the parties. This judgment marks a significant pro-arbitration development, with far-reaching implications. It allows the Court to determine the stamp duty, thereby expediting the process for appointing an arbitrator in cases involving unstamped documents.

Gujarat Composite Ltd v. A Infrastructure Ltd & Ors

Supreme Court of India | Civil Appeal No. 3259 of 2023 and 3260 of 2023

Background facts

- Gujarat Composite Ltd (**Appellant**) entered into 2 license agreements with A Infrastructure Ltd (**Respondent No. 1**) and its sister concern for licensing the operation of its manufacturing units. Thereafter, the Appellant and Respondent No. 1 executed a supplementary agreement for the advancement of certain sum to the Appellant and it was agreed that Respondent No. 1 would be permitted to create a mortgage on the licensed manufacturing units to secure the ad hoc advance.

[11] (2023) 7 SCC 1
[12] Arbitration Petition No. 366 of 2021

- Subsequently, a tripartite agreement was executed between the Appellant, Respondent No. 1 and Bank of Baroda (**Respondent No. 2**), whereby Respondent No. 2 sanctioned a loan of INR 500 lakh to Respondent No. 1. Further, an amendment was introduced to the tripartite agreement to restrict the transfer of title deeds of the land of Appellant during the term of license agreement.
- The dispute arose between the parties when Respondent No. 1 called upon the Appellant to extend the term of the license agreement. The Appellant, however, denied such proposal. The extension was sought because the Appellant was unable to pay certain dues owed to Respondent No. 1. Thereafter, when the tenure of the original license agreement ended, Respondent No. 1 did not hand over the possession and declared its intention to continue with possession. The Appellant then issued a notice to Respondent No. 1 claiming recovery of possession of the manufacturing units, as well as certain monetary dues on the primary ground that the license had expired by efflux of time and such possession was illegal.
- Since several attempts to amicably resolve the dispute failed, the Appellant served a notice on the Respondent No. 1 invoking arbitration under the license agreement. In response, Respondent No. 1 contested the arbitrability of the dispute since it was inextricably interconnected with other related transactions, asserting that as the jurisdiction of the Arbitrator was derived from the agreement, adjudication of the dispute would go beyond the scope of the said agreement.
- In the aforementioned backdrop of events, the Appellant preferred a composite arbitration petition before the Gujarat High Court (**HC**) against Respondent No. 1. On the other hand, Respondent No. 1 filed commercial civil suit before the Commercial Court at Ahmedabad (**Commercial Court**). Vide Order dated December 13, 2017, the Commercial Court rejected the application of the Appellant under Section 8 of Arbitration & Conciliation Act, 1996 (**Arbitration Act**) and held that there was no arbitration clause in the tripartite agreement and no reference had been made to the original or supplementary contract to give effect or consider the arbitration clause as a part and parcel of the tripartite agreement.
- Thereafter, the Appellant filed an Appeal, and the HC too dismissed it on the grounds that the matter in the suit falls partly within and partly outside the arbitration agreement, and involves non- parties, thus, Section 8 of the Arbitration Act would not be attracted.
- Being aggrieved by the decision of the HC and Commercial Court, the Appellant preferred an Appeal before the Supreme Court (SC).

Issue at hand?

- Whether the issues raised in suit went beyond the license agreement for the purposes of application under Section 8 of the Arbitration & Conciliation Act?

Decision of the Court

- At the outset, the SC perused Section 8 of the Arbitration Act, which deals with the Court referring the parties to arbitration and noted that the suit should be in respect of a matter which the parties have agreed to refer, and which comes within the ambit of arbitration agreement. The SC relied on its judgement in the case of ***Ameet Lalchand Shah v. Rishabh Enterprises & Anr***[13] and observed that the amendment to Section 8 of the Arbitration Act after the decision in ***Sukanya Holdings Pvt Ltd v. Jayesh H Pandya & Ors***[14] could be seen in the background of the recommendations of 246th Law Commission Report in which, inter alia, it was observed that as per the proposed amendment, judicial authority would not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void.
- The SC placed reliance on its judgement in ***Oil and Natural Gas Corporation v. Discovery Enterprises***[15] concerning the group of companies doctrine and noted that the factors:
  - The mutual intent of the parties
  - The relationship of a non-signatory to a party which is a signatory to the agreement
  - The commonality of the subject-matter
  - The composite nature of the transaction
- The performance of the contract is responsible for deciding if a company within a group of companies, which is not a signatory to arbitration agreement, would nonetheless be bound by it. The SC noted that there had been multiple transactions in this case, and further it observed that except the original license agreement, none of the other agreements contained any arbitration clause even if they related to the same property and involved the Appellant and the Respondent No. 1. Moreover, SC noted that the genesis of the contractual relations between Appellant and Respondent No.1 is from the original license agreement, and it does not ipso facto lead to the availability of the arbitration agreement in relation to the dispute in question, which emanates

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Viewpoint

The Supreme Court has rightly dismissed the Appeal and upheld the decision of the Commercial Court and High Court, which had rejected the application of the Appellant for the reference to arbitration under the Section 8 of the Arbitration Act. It is pertinent to note that the language of the provision contained in Section 8 of the Arbitration Act is 'in a matter which is the subject of an arbitration agreement' and the words 'a matter' indicates that the entire subject-matter of the suit should be subject to arbitration agreement. In the present case, there was no arbitration clause in the tripartite agreement and no reference had been made to the original or supplementary license agreement 'which contained arbitration clause' to give effect or consider the arbitration clause as a part and parcel of the tripartite agreement, and thus the SC held that the dispute is outside the subject matter of the arbitration agreement. This judgement clarifies that the Court cannot refer a dispute to Arbitration under Section 8 of the Arbitration Act when a suit is instituted where the subject matter lies outside the arbitration agreement and the substantive relief claimed in the suit lies outside the arbitration agreement.

[13] (2018) 15 SCC 678
[14] (2003) 5 SCC 351
[15] (2022) 8 SCC 42

from the tripartite agreement, and which cannot be determined without reference to the said tripartite agreement and without involving all the parties.

- The SC further observed that there is 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 suit falls outside the arbitration clause in the original license agreement, the view taken by the HC does not appear to be suffering from any infirmity or against any principle laid down by this Court.
- In view of the above, the SC held that the view taken by the Commercial Court and the HC in declining the prayer of the Appellant for reference to arbitration under Section 8 of the Arbitration Act cannot be faulted and accordingly, SC dismissed the Appeal.

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