NIRKA
LAW ADVISORY

Arbitration Newsletter

November 2024

Dalmia Family Office Trust v. Getamber Anand, 2024 SCC OnLine Del 7155 – *Delhi High Court affirms arbitration can proceed despite parallel civil proceedings* – The Court addressed the interaction between arbitration clauses and simultaneous civil suits in disputes involving complex financial arrangements, while also penalizing for allegations that were unfounded, and for clearly notable delay tactics.

The petitioner, Dalmia Family Office Trust, had entered into several investment agreements with the respondent, Getamber Anand, the Managing Director of ATS Group, but alleged a breach of contractual obligations. Following this, the Trust filed both a civil suit and initiated arbitration proceedings as stipulated in their agreements.

The core legal issue revolved around whether the existence of a civil suit precluded the parties from proceeding with arbitration. The respondent argued that the petitioner, by filing a civil suit, had effectively waived its right to arbitration, rendering the arbitration clause inoperative. The petitioner contended that filing a civil suit was a precautionary measure and did not amount to a waiver of its right to arbitrate.

The Delhi High Court upheld the petitioner's right to arbitration, emphasizing that the initiation of civil proceedings does not automatically extinguish the validity of an arbitration agreement unless there is a clear, intentional abandonment of arbitration rights. Citing the Supreme Court's guidance on maintaining the sanctity of arbitration clauses in the case of ***Alka Chandewar v. Shamshul Ishrar Khan, (2017) 16 SCC 119***, the Court found that filing concurrent proceedings alone does not constitute a waiver of arbitration unless expressly stated. The Court further observed that the claims in arbitration and civil suits were largely interdependent but distinct enough to allow both to proceed without conflict, maintaining that the arbitral process could address core contractual disputes while the civil suit could cover ancillary claims.

Furthermore, in its verdict, Delhi High Court scrutinized the conduct of the ATS Group throughout the arbitration. It found the challenge to the arbitrator's impartiality both baseless and deliberately timed to hinder the arbitration. The Court emphasized that unsubstantiated claims of bias, particularly those raised without evidence at an advanced stage, cannot serve as a tactic to delay proceedings.

The High Court also criticized the ATS Group's introduction of the legal notice, noting that this notice, ostensibly issued by a third party, was irrelevant to the arbitration and served only to obscure the proceedings. The Court concluded that this maneuver was a calculated attempt to confuse the tribunal and prolong the arbitration process.

As a result, the Delhi High Court imposed a substantial fine on the Respondent, Mr. Getamber Anand, the head of the ATS Group, payable to a charity selected by the arbitrator. The Court found the Respondent's conduct unacceptable, especially his role in orchestrating delay tactics and meritless accusations. Although Mr. Anand apologized, the Court deemed the apology insincere, noting that it came too late to mitigate his actions. The Court further ordered the Respondent to compensate the Petitioner with INR 3,00,000 to cover the costs incurred in the proceedings.

The Court's decision rested on a rigorous application of Sections 12 and 13 of the Arbitration Act, clarifying that Section 12 mandates arbitrators to disclose any potential conflicts, but it is not a tool for tactical delay. The High Court described the ATS Group's allegations, particularly those raised through a third-party notice, as contrived and irrelevant, underscoring that challenges to an arbitrator's impartiality must be brought in good faith with credible evidence.

Arbitrator bias claims require credible evidence and cannot be based on mere suspicions or tactical delays. The Court noted the importance of good faith in filing challenges, as laid out in *Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd., 2016 SCC OnLine Del 6568,* which mandates clear, substantive grounds to justify arbitrator recusal. This case affirms that baseless claims of bias intended to derail arbitration proceedings will not be entertained, supporting arbitration's integrity as an impartial dispute resolution method.

Tata Capital Ltd. v. Priyanka Communications (India) (P) Ltd., 2024 SCC OnLine Bom 3306 – *Bombay High Court addressed the arbitrability of disputes under the Arbitration Act when statutory remedies under the SARFAESI Act have also been invoked.* – The Bombay High Court took up a critical issue of clarifying upon the interaction between arbitration clauses and statutory remedies that are available under special laws like the SARFAESI Act and the Recovery of Debts Due to Banks and Financial Institutions Act ("RDDB Act"). The High Court reiterated that the initiation of statutory proceedings under these laws does not inherently invalidate an arbitration agreement, unless the statute explicitly prohibits it.

The central issue was the arbitrability of the dispute given the simultaneous invocation of statutory remedies under the SARFAESI and RDDB Acts. The Respondents argued that once

Tata Capital opted for these statutory remedies, the matter became non-arbitrable, as the jurisdiction of the Debt Recovery Tribunal (DRT) under the RDDB Act is deemed exclusive for debt recovery. They further argued that by choosing SARFAESI and summary suit proceedings, Tata Capital had effectively waived its right to arbitration and was attempting to pursue inconsistent remedies.

Tata Capital, however, contended that the arbitration clause remained intact and that the court's role under Section 11 of the Arbitration and Conciliation Act, 1996, was limited to confirming the existence of a valid arbitration agreement. The Applicant argued that the statutory proceedings under SARFAESI did not eliminate the enforceability of the arbitration clause, as they were independent remedies allowed under the law.

The Bombay High Court upheld the principle that financial institutions can pursue concurrent remedies under the SARFAESI Act and the Arbitration Act, clarifying that the arbitration clause remains enforceable unless SARFAESI remedies are fully exhausted. Citing Supreme Court rulings, including ***M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd., (2017) 16 SCC 741*** and ***Indiabulls Housing Finance Ltd. v. Deccan Chronicle Holdings Ltd., (2018) 14 SCC 783***, the court reaffirmed that arbitration can proceed alongside SARFAESI proceedings, provided that these remedies are not mutually exclusive or contradictory in purpose.

On the issue of non-arbitrability under the RDDB Act, the High Court dismissed the Respondents' argument, highlighting that Tata Capital, as a Non-Banking Financial Company (NBFC), was not authorized to initiate proceedings before the DRT under the RDDB Act. The court reasoned that the arbitration process, initiated on the basis of the 2019 Sanction Letter, was separate from the larger debt claims that might be handled through statutory channels, allowing arbitration to address this particular aspect of the financial dispute without conflicting with the exclusive jurisdiction of the DRT.

Addressing the Respondents' contention that Tata Capital had waived its arbitration rights by pursuing summary suit and SARFAESI remedies, the High Court found no merit in this argument. The court emphasized that merely initiating parallel proceedings does not amount to an automatic waiver of arbitration rights, especially when the claims in arbitration are distinct from those in statutory proceedings. The court noted that no formal waiver had been declared, and Tata Capital's actions did not contradict or invalidate the arbitration clause.

In its examination under Section 11 of the Arbitration Act, the court clarified that its role was strictly to determine the existence of a valid arbitration agreement, in line with the Supreme Court's decision in ***Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1***. <u>The High Court stressed that questions of non-arbitrability, especially those involving statutory remedies, should primarily be resolved by the arbitral tribunal itself, unless the non-arbitrability is plainly evident.</u> In this case, the court found no such clear conflict between the arbitration clause and statutory remedies, and therefore appointed an arbitrator to resolve the matter.

The Court's verdict in this case is a pivotal affirmation of the flexibility financial institutions have in pursuing both arbitration and statutory remedies in debt recovery scenarios. By supporting the parallel enforcement of arbitration clauses alongside SARFAESI proceedings, the court bolstered the principle that invoking statutory measures does not nullify an existing arbitration agreement. The judgment also underscores the High Court's restrained approach in Section 11 inquiries, reinforcing that arbitrators are the appropriate authority to assess non-arbitrability issues unless the conflict is manifestly clear. This case sets a significant precedent for the financial sector, ensuring that arbitration remains a robust mechanism for dispute resolution, even in complex, multi-tiered debt recovery actions.

In ***Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1***, the Supreme Court of India delivered a landmark judgment clarifying the concept of arbitrability. The Court held that issues involving public rights or matters requiring specific judicial oversight—such as tenancy or criminal cases—are non-arbitrable, as they impact public policy. In contrast, purely private disputes with no significant implications on public interest or statutory rights are considered arbitrable.

The judgment also established the **fourfold test** for determining arbitrability, examining (1) whether the dispute affects public rights, (2) whether it is expressly barred by law from arbitration, (3) whether it requires specialized adjudication, and (4) whether the dispute is inherently suited for arbitration. Additionally, the Court affirmed that non-arbitrability can be determined at the referral stage by the courts, strengthening the role of judicial intervention when public interest is at stake.

FLFL Travel Retail Lucknow (P) Ltd. v. Airports Authority of India, 2024 SCC OnLine Del 7080 – ***Delhi High Court examines arbitrator impartiality and allegations of bias in***

***proceedings under Section 12 of the Arbitration Act* – The verdict of the Court was particularly concerned with the arbitrator's failure to provide the requisite disclosures and the receipt of documents ex-parte after the award proceedings were reserved. The significance of upholding the mandatory disclosure requirements under Section 12 of the Arbitration and Conciliation Act, 1996 ("the Act") and maintaining procedural fairness in arbitration has been reaffirmed by the judgment.**

In FLFL Travel Retail Lucknow Pvt. Ltd. v. Airports Authority of India, a dispute arose from a Concession Agreement granting FLFL the right to develop and operate retail outlets at airports, including the Chaudhary Charan Singh Airport in Lucknow. FLFL alleged that delays caused by AAI in obtaining necessary security clearances prevented it from operating its outlets fully, leading to claims for a concession fee refund totaling over INR 4 crores. An arbitrator awarded FLFL a partial sum, which FLFL challenged under Section 34 of the Arbitration Act, citing two major procedural grievances: failure to disclose the arbitrator's subsequent appointment by AAI and ex parte receipt of documents post-reservation of the award.

The petitioner argued that after reserving the award, the arbitrator accepted a new appointment in another arbitration for AAI without disclosing this in writing, as mandated by Section 12 of the Arbitration Act. This omission, FLFL claimed, compromised the arbitrator's independence, as continuous disclosure of potential conflicts is required throughout the arbitration. The petitioner further contended that receiving ex parte documents from AAI without timely notice denied it a fair opportunity to respond, violating Section 24(3) of the Act, which requires equal access to evidence.

<u>The High Court ruled that the arbitrator's failure to disclose the subsequent appointment in writing breached Section 12(2), which demands ongoing, written disclosures of conflicts of interest.</u> A telephonic disclosure was deemed inadequate and contrary to statutory requirements. Citing established jurisprudence on impartiality such as that of ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd., 2016 SCC OnLine Del 6568***, the Court found that this lack of transparency raised valid concerns about the arbitrator's independence, undermining the legitimacy of the award.

The Court also agreed with FLFL's assertion regarding Section 24(3), finding that receiving and considering ex parte documents from AAI without notifying FLFL in a reasonable time violated principles of natural justice. This conduct was viewed as a procedural irregularity that deprived the petitioner of a fair chance to present its case fully.

The Delhi High Court set aside the arbitral award, holding that both the lack of written disclosure and the ex parte receipt of evidence were serious procedural violations under the Arbitration Act. The decision underscores the importance of procedural fairness in arbitration, stressing that adherence to statutory requirements for disclosure and natural justice is crucial to maintaining the integrity of the arbitral process.

Agarwal Associates (Promoters) Ltd. v. Sharda Developers, 2024 SCC OnLine Del 6984 – *Delhi High Court clarifies limits of judicial intervention in arbitration through writ jurisdiction* – The Delhi High Court reaffirmed the limited scope of judicial interference under Article 227 of the Constitution of India in matters involving arbitral proceedings.

The case arose from a dispute between Agarwal Associates, a prominent real estate developer, and Sharda Developers over an infrastructure project. The parties, bound by an arbitration clause in their agreement, encountered multiple disagreements, leading Sharda Developers to initiate arbitration. During the proceedings, Agarwal Associates filed a writ petition, seeking intervention on procedural grounds and alleging bias on the part of the arbitrator. The petition requested that the High Court set aside the proceedings, contending that the arbitration process was marred by a lack of impartiality and procedural irregularities.

The question before the Delhi High Court was the extent to which a High Court could exercise its writ jurisdiction to interfere with ongoing arbitration proceedings. Agarwal Associates argued that the arbitration process was fundamentally flawed, claiming that the arbitrator's conduct indicated bias and a disregard for due process. The petitioner contended that these issues warranted judicial intervention under Article 227 of the Constitution to prevent a potentially unjust outcome.

Sharda Developers countered that the petitioner's concerns fell within the remit of the Arbitration and Conciliation Act, 1996, which provides structured avenues for addressing grievances within arbitration proceedings. They argued that the writ petition was an attempt to bypass statutory remedies available under the Act, and that judicial intervention at this stage would undermine the autonomy of the arbitral process and its intended efficiency.

The Delhi High Court dismissed the writ petition, underscoring the limited scope for judicial intervention in arbitration matters, particularly when adequate remedies exist within the Arbitration Act. The Court emphasized that writ jurisdiction should be exercised sparingly in cases concerning arbitration, with intervention restricted to instances where there is a clear and substantial violation of fundamental rights or a patent lack of jurisdiction. The Court noted that the grounds presented by Agarwal Associates – allegations of bias and procedural lapses – did not meet the high threshold required for writ intervention, as these issues could be effectively addressed through mechanisms under the Arbitration Act itself.

Citing the Supreme Court's rulings in ***Puri Investments v. Young Friends & Co., 2022 SCC OnLine SC 283*** and ***IDFC First Bank Limited v. Hitachi MGRM Net Limited, (2023) 3 HCC (Del) 660***, the High Court reaffirmed that arbitration proceedings should remain shielded from unwarranted judicial interference to uphold their efficiency and finality. The Court clarified that arbitration's autonomy is a central tenet of the Arbitration Act, with built-in safeguards such as challenges to the arbitrator under Section 12 and recourse against awards under Section 34. The Court thus concluded that Agarwal Associates' concerns were more appropriately suited to these statutory remedies rather than writ intervention, noting that judicial overreach at this juncture could disrupt the arbitration process.

In its decision, the Court underscored the importance of the doctrine of non-interference in arbitration, a principle aimed at minimizing judicial involvement in disputes resolved through arbitration. By upholding the doctrine, the Court reaffirmed the notion that judicial scrutiny of arbitral proceedings is limited to prevent arbitration from being reduced to another tier of litigation. The Court observed that judicial interference in arbitration should occur only in exceptional circumstances, particularly where statutory safeguards under the Arbitration Act are either inapplicable or ineffective. It also highlighted that the writ jurisdiction, while broad, is not meant to serve as an appellate remedy for grievances arising within the ambit of arbitration.

The judgment of the Court serves as an important clarification on the boundaries of judicial oversight in arbitration matters, reinforcing that writ jurisdiction is not intended as a substitute for the statutory remedies embedded within the Arbitration Act. By adhering to the principles of non-interference, the Court preserved the sanctity and autonomy of arbitration as an effective dispute resolution mechanism. The decision further illustrates the Court's commitment to upholding arbitration's streamlined nature, ensuring that parties adhere to the procedural framework established within the Act rather than seeking recourse through writ petitions. This case reinforces the judiciary's cautious approach to intervention, thereby supporting arbitration's role as a self-contained process, insulated from unwarranted judicial disruption.

Section 227 of the Indian Constitution empowers High Courts to oversee all lower courts and tribunals within their jurisdiction, ensuring justice is administered fairly and within the bounds of the law. Under this provision, High Courts can review and correct errors in judicial proceedings, including procedural irregularities, that occur in subordinate courts.

The supervisory power under Section 227 is discretionary, and HCs can step in only in exceptional circumstances where there is an evident miscarriage of justice or a fundamental violation of legal principles. High Courts exercise this power cautiously to maintain a balance between ensuring judicial accountability and respecting the independence of subordinate courts.

Airports Authority of India v. Delhi International Airport Ltd., 2024 SCC OnLine Del 7284 – *Delhi High Court addresses the scope of arbitral authority in concession agreements involving public entities* – The Court, provided clarity upon the calculation of "Revenue" for determining the Annual Fee payable under the Operation, Management, and Development Agreement (OMDA).

The dispute arose between the Airports Authority of India (AAI) and Delhi International Airport Ltd. (DIAL) over the calculation of "Revenue" for determining the Annual Fee payable under the Operation, Management, and Development Agreement (OMDA). AAI contended that all forms of pre-tax gross revenue, including other income sources and without deductions for capital costs, were part of the revenue on which the fee should be based. DIAL argued that certain deductions, such as capital costs (depreciation, interest on borrowed funds, and equity returns), should be excluded.

The central issue therefore, to be determined by the courts, was regarding the interpretation of "Revenue" and whether it should encompass all income streams without deductions. AAI insisted that OMDA's definition of "Revenue" allowed only specified exclusions, meaning the total pre-tax gross revenue without any further reductions. DIAL countered, asserting that additional deductions for capital costs should be permitted to align with project agreements like the State Support Agreement, which allows similar deductions.

In their verdict, The High Court upheld the arbitral award's majority decision, agreeing with

AAI's interpretation that "Revenue" includes all income sources pre-tax, as specified in the OMDA. The Court emphasized that the OMDA's clear language limited exclusions to five specific categories, without accommodating additional deductions for capital costs. Citing established principles from the cases of ***Transmission Corporation of Andhra Pradesh v. GMR Vemagiri Power Generation Ltd., (2018) 3 SCC 716*** and ***Public Service Co. of Colorado v. Denver, 387 P.2d 33 (Colo. 1963) and Lane Electric Cooperative Inc. v. Department of Revenue, 765 P.2d 1237 (Or. 1988)***, the Court rejected DIAL's reliance on related agreements, noting that OMDA's terms were self-contained and unambiguous.

The Court further supported the arbitral tribunal's application of judicial restraint, affirming that contract language should govern unless there is ambiguity. In this instance, OMDA's explicit definition of revenue reinforced the Annual Fee structure, maintaining AAI's position on revenue calculation.

This judgment affirms the significance of adhering to specific contractual terms, particularly in high-stakes public-private agreements. The Delhi High Court's refusal to allow additional revenue exclusions reinforces the principle that explicit contractual language governs financial obligations, limiting interpretative expansions absent clear contractual basis.

Operation, Management, and Development Agreements (OMDAs) are contractual frameworks used primarily in public-private partnerships (PPPs) where a private entity is granted the rights to operate, manage, and develop a public asset or infrastructure, such as airports, ports, or railway stations. These agreements outline the roles, responsibilities, and financial obligations of both the public authority and the private operator, allowing for the efficient management and expansion of public assets through private sector involvement.

Typically, an OMDA defines critical terms such as revenue-sharing mechanisms, service quality standards, and maintenance requirements. The private party, in exchange for the right to operate and develop the asset, often pays an annual fee or a percentage of revenue to the public authority, while adhering to regulatory requirements and service expectations. OMDAs balance public and private interests by leveraging private sector expertise and capital to improve infrastructure and services, while the public entity maintains oversight to ensure that operations align with public welfare and policy objectives.