Issue 72 C.A.N March 2025

Construction Arbitration
Newsletter

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Construction Arbitration Law Firm

- **Right to commence fresh arbitration after the award is set aside - whether the disputes between the parties stood adjudicated on merits and is barred by res judicata preventing the same issues being adjudicated a second time - the setting aside of an arbitral award would place parties to the arbitration in the original position that they were in, before the proceedings began, leaving it open to them to arbitrate again - is an essential feature of the legislative design and structure of the Act - the court cannot correct errors of the arbitral tribunal - it can only quash the award leaving the parties free to begin the arbitration again if it is desired - therefore, parties would be restored to the original pre-arbitral award position.**

[Batliboi Environmental Engineering Ltd. v. Hindustan Petroleum Corporation Limited - Bombay High Court - Decided on 11.3.2025]

- **Computation of damages - reliance on rough but just calculations where exactitude is unattainable - discretion of arbitral tribunal to adopt 'honest guesswork' for determining damages or claims in the absence of precise evidence, provided such discretion is exercised reasonably.**

- **Force majeure event - no clause in the contract - when a contract explicitly provides a force majeure clause, the parties must adhere to its invocation procedure, failing which relief under the clause is unavailable - government notification of pandemic issued stipulated that there must be specific information of the invocation of the force majeure clause before any benefit is taken - where the contract explicitly requires a party to notify the other in writing to claim force majeure, either of the parties must formally invoke the force majeure clause, and any subsequent reliance without such invocation is legally impermissible.**

[IL&FS Paradip Refinery Water Limited v. Indian Oil Corporation - Delhi High Court - Decided on 17.4.2025]

Batliboi Environmental Engineering Ltd. v. Hindustan Petroleum Corporation Limited - Bombay High Court - Decided on 11.3.2025

The Contractor was awarded the work for construction of a sewage treatment reclamation plant at a refinery of the Employer on a turnkey basis. Disputes between the parties were referred to arbitration. The award in favour of the Contractor was set aside by the Court. The Contractor invoked fresh arbitration on the ground that the award had been set aside and the Contractor's claims had not been dismissed on merits. The Court observed that the jurisdiction created for purposes of judicial review by the courts of an arbitral award is a limited one, which is governed by sections 34 and 37 of the Arbitration Act. The Supreme Court in appeal, had expressly stated that it did not intend to pronounce upon the merits of the matter. The setting aside of an arbitral award would place parties to the arbitration in the original position that they were in, before the proceedings began, leaving it open to them to arbitrate again, is an essential feature of the legislative design and structure of the Act. No court is permitted to modify the arbitral award, and to substitute its judgment for the judgment of the arbitral tribunal. The section 34 judgment essentially examined if the arbitral award was in conflict with the most basic notions of morality and legality, or was perverse, that it warranted being set aside. It came to the view that the arbitral award did not deserve to be set aside. The section 37 judgment essentially examined if the section 34 judgment was valid in refusing to interfere, and came to the view that the arbitral award deserved to be set aside. The Supreme Court judgment reviewed the section 37 judgment and held it to be a judgment validly arrived at, unworthy of interference. The necessary corollary would be that the position of the parties undisturbed by the arbitral award would stand restored. The Court in the section 37 proceeding was not exercising an appellate power over the arbitral award but only an appellate review over the section 34 judgment. The Supreme Court held that the arbitral award itself was not an expression of an opinion on merits. The Supreme Court had observed that arbitral award was not accurate in its approach and assessment. The Supreme Court had ruled that there is an overlap and a partial double-count of losses in the arbitral award. Therefore, the arbitral award, in its terms, was not defensible and it would not translate into a finding on merits on what the amount of damage for the loss ought to be awarded, if at all. The Supreme Court was returning findings on how the arbitral award did not provide reasons. The law indeed required consideration of the merits of the appeal before the Supreme Court i.e. to adjudicate whether the arbitral award was rightly held to be invalid in terms of the contours of the jurisdiction under section 37 read with section 34 of the Act. The decision of the Supreme Court was a negation of the validity of the arbitral award and not a positive affirmation of the merits of either party's case. The Court concluded that the parties should be restored to the original pre-arbitral award position.

IL&FS Paradip Refinery Water Limited v. Indian Oil Corporation - Delhi High Court - Decided on 17.4.2025

The Contractor was awarded the work for transportation of water from Mahanadi River at Cuttack to Paradip for Employer's Paradip Refinery Project on Build-Own-Operate-Transfer Basis. Upon project completion, disputes arose between the parties leading to claims by the Contractor. The arbitral tribunal held that the claim for additional cost due to change in alignment for laying pipeline had been agreed in the minutes of meeting, which was accepted by the Contractor. It was held that the Contractor unequivocally accepted the offer of the Employer and waived its right to claim any further amount on this account. However, the arbitral tribunal went on to hold that the said amount was only towards extra work done and not towards the de-scoped work. The Court observed that a one-time down payment had been approved by the competent authority for payment to be made to the Contractor instead of a payment in monthly equated instalments. Therefore, the single judge was correct in setting aside the award of claim for additional costs due to change in alignment which was the descoped work. The Contractor contended that neither the arbitral tribunal nor the learned single judge considered the fact that there was no invocation of the force majeure clause by the Employer and that the plea of force majeure was taken ex-post facto without any basis. Therefore, disallowing the claim for interest due to extended construction period was not correct. The Contractor relied on the government notification issued by the Ministry of Finance in this regard which stated that there must be specific information of the invocation of the force majeure clause before any benefit is taken. The Court observed that the notification was issued after the pandemic but the contract was entered into prior to pandemic. There was no clause in the contract which stipulated that any party seeking to invoke the force majeure clause must give notice. The deduction of amount made by the Employer in the form of counter claim against the Contractor towards descoping of the work was contrary to its averment of one-time payment and therefore, could not have been allowed by the single judge.

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