S&A Law Offices

INDIAN LEGAL IMPETUS

Newsletter

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Editorial

S & A Law Offices

Manoj K. Singh

Dear Friends,

We are elated to present to you December 2023, Edition of our monthly newsletter "Indian Legal Impetus" covering all the insights on recent developments, case laws, and issues relating to various disciplines of law. We sincerely hope that you will find this issue of Indian Legal Impetus informative and engaging.

To start off, the first article discusses the issue of whether a court should consider the adequacy of stamp duty paid on an arbitration agreement during a Section 9 application under the Arbitration and Conciliation Act, 1996 which has also been a topic of diverse judicial opinions. It is an analysis of the chronological judgments throwing light to the adequacy of stamp duty paid in arbitration agreement specifically under a section 9 of Arbitration and Conciliation Act, 1996.

Further, the second article unravels the changing landscape of the Court's power in appointment of Arbitrators under Section 11 application. The article presents Appointment through a Judicial Lens vide a Prima Facie Approach vs. an Expanding Horizons.

The third article in this edition speaks about the 7-Judge bench judgment in the In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899. The article extensively discusses the overall harmonious play of Arbitration Act, Stamp Act and the Contract Act.

The fourth article in this edition speaks about dilemma of GST on food delivery services a tussle of Swiggy and Zomato. The Article discusses the need of clarification from the Government issuing a suitable clarification to address the ambiguity that has arisen with these pre-consultation notices issued to Swiggy and Zomato.

Next in line is the fifth article that whether the illegality of appointment procedure is fatal to the entire Arbitration Proceedings. It discusses the scope of the commercial document having an arbitration clause being interpreted in such a manner so as to give effect to the agreement rather than invalidate it.

Our sixth article discusses the Doctrine of Group of Companies, an analysis across jurisdictions. It deals in detail the observation of the Hon'ble Supreme Court in Cox and Kings Ltd. vs SAP India Pvt. Ltd. The article while throwing light on the judgment, deals with the doctrine on other jurisdictions.

The seventh article covers the issue of the 'Attachment of Property' under Section 9 of the Arbitration & Conciliation Act, 1996. It deals with the question whether Court can oversight the Prerequisites under Order 38 Rule 5 of the CPC. It deals with how an interim order granting "attachment before judgment" is a more stringent interim order than other interim relief against defendant.

The last article analyses the recent judgment Lombardi Engineering Limited v Uttarakhand Jal Vidyut Nigam Limited and how an Arbitration Agreement has to comply with the Kelson's theory of law and layers of Grundnorm.

We hope that our esteemed readers find this information useful, and it also enables them to understand and interpret the recent legal developments. We welcome all kinds of suggestions, opinions, queries, or comments from all our readers. Please feel to reach out to us with your valuable insights and thoughts at newsletter@sandalawoffices.com.

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Table Of Contents

Managing Editor
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INDIAN LEGAL IMPETUS
Volume XVI, Issue XII

S & A Law Offices

WHETHER COURT HAS TO LOOK INTO THE ADEQUACY OF STAMP DUTY PAID ON AN ARBITRATION AGREEMENT AT THE STAGE OF SECTION 9 APPLICATION

- *Adhip Kumar Ray & Vidhi Agarwal*

Introduction

The issue of whether a court should consider the adequacy of stamp duty paid on an arbitration agreement during a Section 9 application under the Arbitration and Conciliation Act, 1996 (hereinafter 'ACA') has been a topic of diverse judicial opinions. A notable juncture in the legal landscape was reached with the Constitutional bench's pronouncement in *N.N. Global Mercantile Private Limited v. Indo Unique Flame Limited*[1], wherein, while dealing with Application under Section 11 of the ACA, the Hon'ble Supreme Court confirmed that the non-payment of stamp duty renders an arbitration agreement unenforceable. However, with respect to Section 9, the Court expressly stated – *"We make it clear that we have not pronounced on the matter with reference to Section 9 of the Act."*

In the wake of pronouncement of the Constitutional Bench decision, the Bombay High Court (hereinafter 'Bombay HC'), in its judgment in *L&T Finance v. Diamond Projects*[2], meticulously analyzed the effect of unstamped documents drawing on a trajectory of prior cases and statutory provisions. This decision navigates the delicate balance between evidentiary and non-evidentiary stages, especially concerning the admissibility of unstamped documents at the stage of Section 9 applications.

This decision of the Bombay HC has been tacitly affirmed through the recent 7-judge Bench Supreme Court (hereinafter 'SC') judgment *In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*,[3] a decision which has caused a seismic shift in the juridical terrain, conclusively settling the legal question on stamping of arbitration agreements.

Scope of Section 9 of the Act

Section 9 of the ACA allows parties to seek interim remedies from the court before, during, or after commencement of arbitral proceedings but before enforcement of the arbitral award. These measures act as vital protective mechanisms in the ACA, aimed at securing claims through securities, guarantees, or other court determined measures.

Understanding the scope of section 9 is essential as the Bombay HC's reasoning hinges on the distinct scope of sections 9 and 11 and the varied treatment of applications under these sections. Given the urgent nature of interim reliefs resorted to before the courts, they would require immediate intervention by the judiciary to further the intention of the legislature, which would not be to denude the powers of a court, as has been highlighted in *Arcelor Mittal Nippon Steel India Ltd. v Essar Bulk Terminal Ltd.*,[4]

[1] N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2023) 7 SCC 1.

[2] L&T Finance Limited v. Diamond Projects Limited & Ors; Comm. Arbitration Petition No. 1430 of 2019.

[3] In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899; Curative Petition No, 44 0f 2023.

[4] Arcelor Mittal Nippon Steel India Ltd v. Essar Bulk Terminal Ltd; Civil Appeal No. 5700 of 2021 (Supreme Court of India).

Position of Section 9 applications prior to N.N. Global

Before the 7-judge bench decision became part of the larger picture, it would have been a risk to presume a conclusive determination of the validity of unstamped agreements in relation to a request for interim reliefs under the ACA. While stamping *vis-à-vis* section 11 had been the subject matter of a catena of judgments, the same could not have been said about section 9.

As an attempt to bridge this gap in jurisprudence, a chronological account of adjudications by the Indian courts has been relied on by the Bombay HC, illustrating the different spheres in which the two sections operate.

The outset of these decisions can be traced to a Full Bench decision of the Bombay HC in *Gautam Landscapes v. Shailesh S. Shah,*[5] where the court placed section 9 and 11 on the same pedestal holding that the legislative intent behind enactment of the Act would be conflicted if an issue raised under the Stamp Act is awaited till its conclusion in either of the provisions. This decision, however, went on to be partially overruled with the pronouncement of *Garware Wall Ropes v. Coastal Marine Constructions & Engineering*[6], in terms of an application under section 11.

This issue was further deliberated upon by the Bombay HC in *Saifee Developers v. Shanklesha Constructions*[7], where the court distinguished *Garware Wall Ropes (Supra)*, saying that a decision has not been rendered on the legal status of an unstamped agreement at the stage of a section 9 application and is only in terms of a Section 11 application.

As a result, *Gautam Landscapes (Supra)* was granted a partial approval to the extent of validity of an interim relief application under section 9.

Interestingly, the HC interpreted *Garware Wall Ropes (Supra)* to be a binding precedent on them in terms of letting a Section 9 petition continue, even though no legal principle in a positive sense had been enunciated to that effect.

Reference to N.N. Global

The three-judge bench in *M/s.N.N.Global Mercantile v. M/s.Indo Unique Flame*[8] upset the prevailing position of law relying on the Doctrine of Separability of an Arbitration Agreement to hold that non-payment of stamp duty, being a curable defect, would not render it unenforceable, since the agreement has its independent existence from the commercial contract in question.

As far as providing interim relief under section 9 is concerned, it was categorically held that when a Contract/Instrument is unstamped, the Court may grant ad-interim relief to safeguard the subject matter of the arbitration, while directing the parties to take necessary steps for payment of requisite stamp duty within a time-bound manner.

This issue was further considered by a Constitutional Bench in the same case, only to overturn the decision and the reasoning of the three-judge bench by a 3:2 majority. It was propounded that "*even an arbitration agreement on its own may be required to be stamped*". This inevitably leads to the conclusion that on consideration of provisions under the Contract Act, Stamp Act and Arbitration Act, any arbitration agreement which is unstamped would have a non-existent legal status and hence would not be open to the courts to adjudicate upon in terms of a petition under section 11.

However, a careful reflection is needed on the concluding remarks of the court where it specifically

[5] Gautam Landscapes Pvt. Ltd. v. Shailesh S. Shah, 2019 SCC OnLine Bom 563; gave approval to Universals Enterprises v. Deluxe Laboratories Pvt. Ltd. 2017(2) ALLMR 779.
[6] Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209.
[7] Saifee Developers (P) Ltd. v. Shanklesha Constructions, 2019 SCC OnLine Bom 13047.

[9] M/s.N.N.Global Mercantile (P) Limited Vs. M/s.Indo Unique Flame Ltd. & Ors2021(4) SCC 379

mentions that adjudication has been made on the scope of section 11 and not on section 9, something which is outside the present scope of consideration before the court.

Ruling of the Bombay HC

Justice Bharati Dangre's extensive analysis, considering the effect of unstamped documents through a trajectory of previously decided cases and provisions of the Maharashtra Stamp Act, its corresponding provisions in the Indian Stamp Act, 1899 along with relevant sections from the ACA, provides a nuanced perspective.

The reasoning on which Justice Dangre places reliance majorly emanates from admissibility of documents and the stage at which that is necessary to be done. Justice Dangre agrees with the argument that the Stamp Act itself, particularly, section 33 read with section 34 contemplates a difference in evidentiary and non-evidentiary stages, talking about the authority who is authorized to receive and admit in evidence, such unstamped document.

When the validity of a document under section 11 is under question, the line of cases starting with SMS Tea Estates v. Chandmari Tea[9] do not inspect the defect of unstamping as a curable one. Consequently, if the instrument is found to be not duly stamped, it would be "stillborn" and the arbitration clause therein will not kick-in. The Court shall then impound the document and follow the procedure until the stamping as per the provisions of the Stamp Act is done, and only then can the document be admitted before the court, for any purpose.

Per contra, the same principle will not be applicable to section 9 wherein petitions for interim relief are inherently applications which are required to be disposed of on expeditious basis as they act in aid of final relief.[10]

The Bombay HC decision vis-à-vis the 7-bench verdict

Leaning on principles from the Contract Act and ACA, the Court highlighted the difference between inadmissibility and voidness, and its interplay with the Stamp Act, a violation of which would lead the agreement to be inadmissible and not void, that too with the defect being 'curable'. Moreover, as a fiscal measure, the legislative intent behind the Stamp Act is to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant with '*a weapon of technicality*' and impede the process of judicial determination of rights.

The Hon'ble Supreme Court has revived the reasoning of the three-judge bench judgment bringing up fundamental postulates such as minimal judicial interference, separability of the arbitration agreement, and *kompetenz-kompetenz* to justify the harmonious construction of the provision of the statutes in question. According to the court, Section 8 and 11 of the ACA and the principles behind them will gain a certain precedence over the other statutes, the Act being a special statute.

The SC talked about Section 9 as a stage where a limited judicial intervention over the substantive dispute is stipulated in the Act. However, the court placed reliance on the same principles as other provisions making it evident that courts are not required to deal with the issue of stamping at the stage of granting interim measures under Section 9, and hence, granting acceptance to the reasoning and conclusions arrived at by the Bombay HC.

[9] SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66.
[10] Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125

Conclusion and Analysis

The legal trajectory surrounding the adequacy of stamp duty paid on arbitration agreements during Section 9 applications has clarified significantly. The Constitutional bench's ruling in N.N. Global Mercantile set a precedent, deeming non-payment of stamp duty as rendering arbitration agreements unenforceable. Subsequent to this, the Bombay High Court's nuanced analysis in L&T Finance v. Diamond Projects and the 7-judge Bench Supreme Court decision clarified that the stamping issue need not be addressed at the Section 9 stage. The emphasis on minimal judicial interference, the urgency of interim reliefs, and the protection of the subject matter of arbitration provides a clearer perspective on this complex legal question. The consensus now favours addressing stamping concerns in a subsequent stage of the arbitration process, offering clarity and coherence to the legal framework.

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INDIAN LEGAL IMPETUS
Volume XVI, Issue XII

S & A Law Offices

EVOLVING DIMENSIONS: UNRAVELING THE CHANGING LANDSCAPE OF COURT'S POWERS IN ARBITRATOR APPOINTMENTS UNDER SECTION 11

- *Abhishree Manikantan*

Modeled after the UNCITRAL Model Code, the Arbitration & Conciliation Act, 1996 ("**the Act**"), has been updated, among other times, in 2015, 2019 and 2021 to underscore the significance of prompt dispute settlement. Minimizing judicial interference with the arbitration process is one of the Act's core principles.[1] Nevertheless, in the process of "clarifying" the Act, different courts have construed these clauses in different ways, creating contradictory precedents and necessitating a merit-based review of each case.

Appointment through a Judicial Lens – Prima Facie Approach vs. Expanding Horizons

Unquestionably, there are situations where the court's supervisory jurisdiction is necessary. Appointment of arbitrators under Section 11 of the Act is one such circumstance. The Amendment of 2015 inserted Section 11(6A) which required the competent court acting under Section 11 to confine its examination to "*the existence of an arbitration agreement*". The Supreme Court in *Duro Felgura*[2] echoed this sentiment and accordingly propounded this "prima facie approach". Despite this, the Supreme Court soon thereafter passed divergent judgments in *Oriental Insurance Company*[3] and *United India Insurance*,[4] wherein the court began examining the arbitrability of claims. In *Antique Art Exports,*[5] the court went a step further and entered the merits of the dispute to find that "*…no supportive prima facie evidence being placed on record in absence thereof, it must follow that the claim had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the arbitrator for adjudication*." This enlargement of scope continued with the Supreme Court's decision in the first *Vidya Drolia,*[6] wherein it was observed that the "validity" of an arbitration agreement is distinct from its "existence".

For a time thereafter, the debate was settled by the decision of a three-judge bench of the Supreme Court in *Mayavati Trading,*[7] which reverted the court's ambit of powers to merely concluding the existing of an arbitration agreement. However, just a year later another three-judge bench concluded that it was empowered under Section 11 to conduct a prima facie review to "*cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid*". Accordingly, the court in the second *Vidya Drolia*[8] held that at this stage it could examine:

a) Whether the arbitration agreement was in writing? or

[1] Section 5, Arbitration & Conciliation Act, 1996; Associate Builders v. DDA, (2015) 3 SCC 49.
[2] Duro Felgura, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729.
[3] Oriental Insurance Company Ltd. v. Narbheram Power and Steel Pvt. Ltd., (2018) 6 SCC 534.
607
[4] United India Insurance Company Ltd. and Anr. v. Hyundai Engineering and Construction Co. Ltd. and Ors., (2018) 17 SCC
[5] United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362.
[6] Vidya Drolia and Ors. v. Durga Trading Corpn., (2019) 20 SCC 406.
[7] Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714.
[8] Vidya Drolia & Ors. v. Durga Trading Corpn., (2021) 2 SCC 1 at Para 237.

b) Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?
c) Whether the core contractual ingredients qua the arbitration agreement were fulfilled?
d) On rare occasions, whether the subject matter of dispute is arbitrable?

As expected, the floodgates were once again opened and in DLF Home Developers it was held that courts must "apply their mind to the core preliminary issues, albeit, within the framework of Section 11(6-A) of the Act."[9] In Indian Oil Corpn., the Apex Court "specifically observed and held that aspects with regard to "accord and satisfaction" of the claims can be considered by the Court at the stage of deciding Section 11(6) application".[10] The Supreme Court exercising powers under Section 11(6) also remitted a matter back to Hugh Court for a "preliminary inquiry".[11]

Cutting to the Chase – Kompetenz-Kompetenz in 2023

In light of the above decisions, the Supreme Court most recently further expanded the scope of review under Section 11 in SPML Infra,[12] expounding the "eye of the needle" scrutiny test. Two inquiries are to be undertaken at this referral stage: primary and secondary. A comprehensive investigation by the referral court is necessary for the primary inquiry, which concerns "the existence and validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement."

The dispute's non-arbitrability is the subject of the secondary investigation, which has been constrained to a prima facie review. The redeeming feature of this decision is the Supreme Court's observation that the arbitral tribunal "is the preferred first authority to determine and decide all questions of non-arbitrability," and that only where claims are "*manifestly and ex – facie non – arbitrable*" would the court reject reference.

Furthermore, while it has been noted that "*courts must not undertake a full review of the contested facts: they must be only confined to a primary first review*" and that the Court's endeavor must be to let "*facts speak for themselves*", they are still required "*to examine whether the assertion on arbitrability is bona fide or not*".

It is evident from the language of the decision that an attempt has been made to preserve the principle of kompetenz-kompetenz and the legislative policy of minimizing judicial interference in arbitral processes. However, it is undeniable that the direct ramification of the judgment has been, yet again, an enlargement of the scope of court interference at pre-reference stages. In fact, the Supreme Court in Magic Eye[13] took note of the decision in SPML Infra[14] and went on to hold that the existence and legality of an arbitration agreement are fundamental issues that the court must resolve "conclusively and finally and should not leave the said issue to be determined by the arbitral tribunal." Hence, there is again a requirement for the issue to be clarified.

[9] DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd., (2021) 16 SCC 743 at Para 24.
[10] Indian Oil Corpn. Ltd. v. NCC Ltd., (2023) 2 SCC 539 at Para 91.
[11] Emaar India Ltd. v. Tarun Aggarwal Projects LLP & Anr., (2022) SCC Online SC 1328.
[12] NTPC v. SPML Infra, (2023) SCC Online SC 389.
[13] Magic Eye Developers (P) Ltd. v. Green Edge Infrastructure (P) Ltd., (2023) 8 SCC 50 at Para 12.
[14] *Supra,* note 12.

Conclusion

In navigating the evolution of court powers under Section 11, the judiciary has grappled with balancing party autonomy and efficient dispute resolution. The "eye of the needle" test, while attempting to preserve kompetenz-kompetenz, inadvertently expands court scrutiny. Striking a delicate balance between judicial intervention and arbitration efficiency remains an ongoing challenge, necessitating a nuanced approach to uphold the principles of the Arbitration and Conciliation Act, 1996.

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INDIAN LEGAL IMPETUS
Volume XVI, Issue XII

S & A Law Offices

A FRISSON OF SCHADENFREUDE: THE HARMONIOUS CONSTRUCTION OF THE ARBITRATION ACT, THE STAMP ACT, AND THE CONTRACT ACT

- *Saima Mahmood*

The recent judgment of **7** Judge Bench in the in Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899, the Court has extensively dealt with the overall harmonious play of Arbitration Act, Stamp Act and the Contract Act. The Court's purpose to dwell in this aspect was the Five-Judge Bench in N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.[1] which directly impacts the business and commercial transaction in the country as it has raised a vital question to the entire interpretation and application of the Arbitration Law in India.

Position of Law prior to In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899:

A Division Bench of the Supreme Court in SMS Tea Estates vs Chandmari Tea Co (P) Ltd[2] had held that if any document is found to be unstamped/insufficiently stamped then even the arbitration clauses shall become invalid as per Section 35 of the Stamp Act.
After this judgement, a legislative amendment was inserted as Section 11(6) of the Arbitration and Conciliation Act which limited the scope of judicial intervention to merely "examine" the existence of arbitration agreement. The Supreme Court further clarified that the role of Courts under Section 11 of the Arbitration Act shall confine to analyzing the existence of arbitration agreement at the stage of appointment of Arbitrator(s).

Subsequent to the insertion, a Three-bench judge in Vidya Drolia v. Durga Trading Corpn.[3],held that the existence and validity of an arbitration agreement would not exist if it were illegal or does not satisfy the mandatory legal requirements for it to be enforceable which includes a stamp duty.
Subsequent to this position, a Three-judge Bench of the Supreme Court, in N.N. Global Mercantile Private Limited v. Indo Unique Flame Limited[4] doubted this position and observed that since arbitration agreement is an independent agreement, it cannot be invalidated merely on insufficiently stamped main contract.

Since both the judgments were passed by 3-judge Bench, the Supreme Court referred the issue to a larger bench to render the verdict of this issue. Thereafter, a Five Judge Bench decided the reference by a 3:2 majority summarizing as below[5]:

a. An unstamped instrument containing an arbitration agreement is void under Section 2(g) of the Contract Act;
b. An unstamped instrument, not being a contract and not enforceable in law, cannot exist in law. The arbitration agreement in such an instrument can be acted upon only after it is duly stamped;
c. The "existence" of an arbitration agreement contemplated under Section 11(6A) of the Arbitration Act is not merely a facial existence or existence in fact, but also "existence in law";

[1] (2023) 7 SCC 1
[2] (2011) 14 SCC 66
[3] (2021) 2 SCC 1
[4] (2021) 4 SCC 379
[5] Para 5 of the judgment

d. The Court acting under Section 11 of the Arbitration Act cannot disregard the mandate of Sections 33 and 35 of the Stamp Act requiring it to examine and impound an unstamped or insufficiently stamped instrument; and the certified copy of an arbitration agreement.

Thereafter, The Supreme Court has meticulously dealt with every aspect of Stamp Act, Arbitration Act and Contract Act to in the 7-judge bench judgement in Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899

The scope and effect of Stamp Act:

The court discussed the procedure envisaged in the Stamp Act regarding failure to stamp an instrument. Section 17 of the Stamp Act provides that all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution. Further, section 62 penalizes any failure to comply with Section 17 of the Stamp Act. The Court further discussed other ways vide which an instrument may not be properly stamped including the following[6]:

a. The duty may have been paid under an incorrect description under Schedule I;
b. The duty paid may be of a sufficient amount but of improper description;
c. The provisions of Section 5 which govern instruments relating to several distinct matters may not have been complied with; or
d. The instrument may be written in contravention of Sections 13 and 14, and thereby deemed to be unstamped in terms of Section 15.

The court observed that the legislature realized that the mandate of Stamp Act maybe not be complied for reasons as mentioned and thus Sch IV was enacted. Further, Section 35 of the Stamp Act provides that instruments which are not duly stamped are inadmissible in evidence and it shall not be acted upon, registered, or authenticated[7]. The Court also explained that Clause (a) of the proviso to Section 35 stipulates that the bar contained in the provision is removed upon the payment of duty and the penalty. Thus, the party or parties may pay the duty chargeable to the person who has the authority to receive evidence by law or by consent of parties. Further under Section 38 of the Stamp Act, the Collector is granted with power to impound an instrument under section 33 of the Stamp Act. In terms of Section 42 of the Stamp Act, an instrument is admissible in evidence once the payment of duty and a penalty is complete. It is clear that section 38 of the Stamp Act stipulates that either the person admitting the instrument in evidence or the Collector, as the case may be, shall certify by endorsement that the proper duty has been paid.

The procedure contemplated by the Stamp Act facilitates the collection of revenue. It permits instruments to be impounded not only by persons in charge of a public office or those who are empowered by law to receive evidence but also by any person who is empowered to receive evidence by consent of parties. The statute then sets out the procedure to be followed upon impounding a document. This procedure ensures that stamp-duty is paid. After the payment of the appropriate amount under the appropriate description in Schedule I and the penalty (if any), the Stamp Act provides for the certification of such payment by an endorsement by the appropriate authority.

[6] Para 38 of the judgment

[7] Subject to the provison to Section 35

Once an instrument has been endorsed, it may be admitted into evidence, registered, acted upon or authenticated as if it had been duly stamped.

Distinctiveness between inadmissibility and voidness of arbitration agreements

The next question that emanated from the above observation of the Court is the distinctiveness between inadmissibility (Stamp Act) and voidness (As per Contract Law) of an agreement. Whether the impact of an inadmissibility of documents hold the same weightage as voidness of contract. This question was also answered by the Court, wherein the Court concluded that in essence the difference is that when an agreement is void, it raises the question of enforceability of the agreement before the Court of Law whereas when the question of inadmissibility arises, it raises the issue whether such a document maybe considered by the court while adjudication of the case.

Therefore, the Court held that paying inadequate duty or not paying it, would only render an instrument inadmissible in evidence and not void.

Harmonious Intent under Indian Laws

The Court further analyzed the scope of Harmonious Intent under Indian Laws. While going into the harmonious construct, the Court defined that the cardinal principle of interpretation of statutes is to discover and give effect to the legislative intention. If a statute is susceptible to two interpretations, the court will have to reject the construction which will defeat the plain intention of the legislation[8]. The purpose of judiciary is to not only truly interpret the clause but the entirety of a statute.

The Court relied on Sultana Begum v. Prem Chand Jain[9], to enumerate the principles pertaining to harmonious construction of statue which includes that an interpretation which reduces one of the provisions to a "dead letter" or "useless lumber" is not harmonious construction; and to harmonize is not to destroy any statutory provision or to render it otiose[10].

It is clear understanding that the challenge before the Court is to harmonize the provisions of the of the Arbitration Act and the Stamp Act. The object of the Arbitration Act is to inter alia ensure an efficacious process of arbitration and minimize the supervisory role of courts in the arbitral process. On the other hand, the object of the Stamp Act is to secure revenue for State.

It is a cardinal principle of interpretation of statutes that provisions contained in two statutes must be, if possible, interpreted in a harmonious manner to give full effect to both the statutes[11].

The Court discussed the primacy of Arbitration Act for arbitration agreements over Contract Act and Stamp Act. The reasons opined by the Court were as follows:

1. Arbitration Act is a special law and the Indian Contract Act, and the Stamp Act are general laws.

2. Scope of Section 5 of the Arbitration Act restricts the scope of judicial intervention in the Arbitration Act. The courts can only intervene if the same is provided in the Arbitration Act.

[8] CIT v. Hindustan Bulk Carriers, (2003) 3 SCC 57

[9] (1997) 1 SCC 373
[10] (1997) 1 SCC 373
[11] Jagdish Singh v. Lt. Governor, Delhi, (1997) 4 SCC 435

The Court further observed that one of the primary objectives of the Arbitration Act was to minimize the supervisory role of the courts in the arbitral process[12] and therefore, dissented from the N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.[13] view that effect of Sections 33 and 35 of the Stamp Act shall prevail despite the interdict in Section 5.

3. Parliament was aware of the Stamp Act when it enacted the Arbitration Act, thus despite being aware of the mandate of Section 33 of the Stamp Act, the Parliament at the time of enactment of Arbitration Act, did not specify stamping as a pre-condition to the existence of a valid arbitration agreement.

Upon establishing the primacy of Arbitration Act for arbitration agreements over Contract Act and Stamp Act, the Court further enumerated the Harmonious construction of the three statutes.

1. **EFFECT OF COMPETENCE-COMPETENCE DOCTRINE:** The effect of the principle of competence-competence is that the arbitral tribunal is vested with the power and authority to determine its enforceability. The question of enforceability survives, pending the curing of the defect which renders the instrument inadmissible. By appointing a tribunal or its members, this Court is merely giving effect to the principle enshrined in Section 16. The Court further observed that Arbitration requires to provide "a one-stop forum" for resolution of all disputes and held:

    a) Courts must give effect to the commercial understanding of parties to arbitration agreements that arbitration is efficacious; and
    b) This can be done by minimizing judicial intervention[14]

2. **SCOPE OF ARBITRAL TRIBUNAL:** The Court goes on to say that issues which concern the payment of stamp-duty fall within the remit of the arbitral tribunal and it is understood from the legislative intent that courts are not required to deal with the issue of stamping at the stage of granting interim measures under Section 9.

3. **SCOPE AND INTERPRETATION OF WORD "SHALL" IN SECTION 33 AND 35 OF STAMP ACT:** The Court while interpreting the term shall has expressly stated that while ordinarily term "shall" is mandatory, however sometimes it may be read directory which depends on the intent of the legislature. Therefore, it is pertinent that the interplay of the three statutes and the intent of the legislature must be evaluated in the context of interpreting "shall".

4. Fourthly, another important aspect which the Court discussed was the interpretation of the law must give effect to the purpose of the Arbitration Act in addition to Stamp Act.

Conclusion:

For the above observation, the Court concluded as follows:

a) Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered *void* or *void ab initio* or unenforceable;
b) Non-stamping or inadequate stamping is a curable defect;
c) An objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The concerned court must examine whether the arbitration agreement *prima facie* exists;

[12] Statements of Objects and Reasons, Arbitration Act
[13] (2023) 7 SCC 1
[14] (2016) 10 SCC 386

d) Any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal; and
e) The decision in SMS Tea estates vs Chandmari Tea Co (P) Ltd[15] and N N Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.[16] are overruled.

The aforementioned detailed observations of the Supreme Court makes it clear that any non-payment or incorrect or inadequate stamp duty will not render an instrument invalid or void. Further it was highlighted the objective of the Arbitration Act is to reduce the judicial intervention or supervisory role in arbitration mattes. This judgment has brought immense clarity to the Arbitration Laws in India, it is a perfect epiphany to the harmonious intent in Indian Laws. This ruling brings great relief to parties entering commercial contracts and other business related transactions.

DILEMMA OF GST ON FOOD DELIVERY SERVICES: SWIGGY - ZOMATO CONUNDRUM

- *Khushboo Jain & Harsh Mawar*

The tax landscape for many industries has seen major shifts since the introduction of (GST) in 2017. While the technology has eased out the compliance and reporting, the frequent changes for some sectors in compliances have been challenging. Further, we have seen in recent times that the taxability of certain services has also led to tussle between authorities and assesses. One such sector which has seen multiple changes in its taxability and is constantly under the radar of the GST authorities is that of food aggregators.

The investigative wing of GST i.e., DGGI has recently taken online food delivery giants Swiggy and Zomato under their scrutiny, by issuing GST demand notices of combined Rs. 750 crores over unpaid dues on online delivery fees charged by them from the customers on behalf of the delivery partners.

The taxability of these food aggregators has seen significant changes through 6 years of GST regime. Earlier these platforms were mandated to collect and deposit GST on behalf of the restaurants for the sales made through these platforms. From January 1, 2022, the Government included restaurant services and cloud kitchens under Section 9(5) of the CGST Act, 2017 which resulted in entities like Swiggy and Zomato paying 5% GST on 'restaurant services' provided through their platform. However, no clarity was provided on the taxability of the delivery fee collected by these platforms even after knowing the fact that these platforms are collecting delivery charges on behalf of the delivery partner and the same will directly go to them.

Now the DGGI has raked up another taxability issue for these food aggregators wherein department is demanding GST on delivery charges charged by these food aggregators on behalf of the gig workers treating the same as income for these food aggregators. The Department's case is that both the companies operate as a service provider, therefore, the food aggregators are liable to pay GST@18% on the delivery fee collected by them. Whereas the food aggregators are of the view that the delivery charges are directly passed on to the delivery partners and thus, the delivery fee so collected is not recognized as revenue by the food aggregators. Further, another line of argument is that the food aggregators are just acting as an intermediary and thus, not liable to pay GST on the delivery charges collected on behalf of the delivery partners.

From the annual report of one of these companies it has been observed that the food aggregators categorize delivery charges into two groups based on their revenue recognition policies:

i) Where the food aggregator is merely a technology platform provider for delivery partners, (not providing or taking responsibility of the said services), the food aggregator has recorded net delivery charges as expenses. For the service provided by the food aggregator to the delivery partners, the food aggregator charges a platform fee from the delivery partners.

ii) Where the food aggregator is responsible for delivery of food to the end users, the delivery fees received from the end user is recognized as revenue, as the food aggregator considers itself as a principal in arrangement with delivery partners.

Accordingly, where the food aggregator is just providing the platform to the delivery partner, to claim exemption on the ground that it is acting as a "pass through" between the customer and the delivery partner, the onus would lie on such food aggregator to prove its case. However, wherein the food aggregator is responsible for delivery of goods, the food aggregator would be liable to pay GST on the delivery charges as the same is part of its revenue.

It is interesting to note that the Government has never provided any clarity on the taxability of the delivery charges that have been collected by these food aggregators since the inception of their businesses and left such an important issue open-ended till date. Also, the food aggregators have never sought any clarification on the taxability of the delivery charges keeping in view that these delivery charges are being collected by them through their platform. Further, another important point adding complexity to the entire issue is the fact that the gig workers who operate on per-delivery basis and fall below INR 20 Lakhs threshold.

This scenario clearly shows that there are loopholes for taxing the gig workers and the same is required to be addressed at the earliest. It is not a clear cut case of malafide tax evasion as claimed by DGGI. Further, it is also a reminder for the businesses to proactively keep clear communication with the regulatory bodies to avoid such litigation that may have huge impact on the business.

The notices from DGGI demanding tax on delivery charges is unfair keeping in view that these delivery charges are actually income of the gig workers and food aggregators are being asked to pay taxes on such income. Thus, it is important that the Government issues a suitable clarification to address the ambiguity and avoid long-drawn litigation that has arisen with these pre-consultation notices issued to Swiggy and Zomato. The clarification will not only lay rest to this issue but will also provide clarity to other online delivery platforms which includes online grocery, medicines delivery firms etc. which are highly dependent on fleet of contractual delivery workers.

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WHETHER ILLEGALITY OF APPOINTMENT PROCEDURE IS FATAL TO THE ENTIRE ARBITRATION PROCEEDINGS.

- *Ankita Sinha & Neelambika Singh*

Under the Arbitration & Conciliation Act, 1996 ("Act") – the procedure for appointment of arbitrator is provided under Section 11 of the Act. However, the procedure for appointment of arbitrator is not limited by the Section, in fact, under Sections 7 and 10 of the Act, the parties are at complete liberty to set out the manner in which they will appoint the arbitrator. In fact, the parties determine the number of arbitrators, as to whether the arbitration will be an institutional arbitration etc, at the time of entering into the arbitration agreement.

The Act in providing the parties full autonomy w.r.t the appointment of Arbitrators and constitution of an Arbitral Tribunal to adjudicate on the inter-se disputes, aimed for paving the way for commencement of the proceedings, however, the said objective has often been met with resistance in situations where a party is questioning the validity or enforceability of the 'Arbitration Agreement' itself. Many of such instances have arisen before the courts in India, where parties have argued that the matter was not to be referred to an arbitration at all.

In the present Article, by way of the recent judgments of the Hon'ble High Courts of Delhi and Bombay, the authors have attempted to explore– as to whether the illegality of appointment procedure is fatal to the entire Arbitration Proceedings.

In a recent judgment dated 04 May 2023 of Hon'ble Bombay High Court in the matter of ***Sunil Kumar Jindal* v. *Union of India*, 2023 SCC OnLine Bom 1691,** the bone of contention was regarding clause 13 -A (b) and clause 25 (ii) of the agreement between the Applicants and Respondent, which provided that it is a term of the contract that no person other than the person appointed by the competent authority of CII/CMD of subsidiary company should act as an arbitrator, and that if for any reason that is not possible, the matter is not to be referred to arbitration at all.

However, the Hon'ble Bombay High Court referred to the Hon'ble Apex Court's Judgments in ***Jagdish Chander* v. *Ramesh Chander*, (2007) 5 SCC 719** and ***Babanrao Rajaram Pund* v. *Samarth Builders & Developers*, (2022) 9 SCC 691** and found that if the Arbitration clause in question discloses the intention and obligation of the parties to be bound by the decision of the Arbitral Tribunal, it can be gleaned from other parts of the arbitration agreement that the intention of the parties was surely to refer the disputes to arbitration.

In the face of conflicting positions taken by the parties, the Hon'ble High Court held that once the non-applicants had agreed for resolution of the dispute, by way of an arbitration, as a dispute resolution mechanism between them. They cannot be permitted, to wriggle out of the same on the plea that the clause required arbitration by certain officer of the non-applicant or not at all, as it will have to be held that the entire clause, in that regard, was capable of being severed in furtherance of the intention to arbitrate as specifically spelt out from clause 13-A and clause 25 (ii), as all the essential elements which constitute a binding

arbitration agreement, between the parties, were satisfied by the above referred clauses.

The said interpretation to enable Arbitration Proceedings between parties has also been upheld by the Hon'ble High Court of Delhi in its decision dated 01 December 2023 in the matter of ***S K Engineering and Construction Company India* v. *Bharat Heavy Electrical Ltd.***, where, in the context of a Contract between the Petitioner and the Respondent for work relating to "*Execution and Handing Over of Civil Works for Land Development and Boundary work for 400/110 KV Switchyard at Thappagundu in Tamil Nadu";* disputes had arisen between the parties in reference to Clause 26.0 of the Contract, which provided that *"no person other than a person appointed by such Head TBG as aforesaid should act as arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all".*

Hence, it was the argument of the non-agreeable party that the parties have agreed to a conditional arbitration clause and that on occurrence of the contingency mentioned in the arbitration clause there is a withdrawal of consent to arbitration and therefore, there was no valid arbitration agreement in terms of Section 7 of the Act.

The petitioner's relied on the Hon'ble Supreme Court's judgment in ***Perkins Eastman Architects DPC & Anr.* v. *HSCC (India) Ltd.*, (2020) 20 SCC 760** argued that it is impermissible for the respondent to unilaterally appoint an arbitrator and that an independent sole arbitrator is liable to be appointed. It was further argued that the intention of the parties to refer their disputes to arbitration is manifest from the arbitration clause and procedure for appointment of an arbitrator being contrary to law should be excised therefrom.

In line with the findings of the Hon'ble Supreme Court and more recently, the Hon'ble Bombay High Court, the Hon'ble High Court of Delhi rightfully rejected the contentions of the Respondent. The Court reasoned that, just because the procedure for appointment of an arbitrator has been rendered invalid or unenforceable by technical reasons, it would not imply that the entire arbitration clause is rendered invalid or void. It was held that the procedure for appointment of an arbitrator is clearly distinct and separable from the agreement to refer disputes to arbitration, even if these are contained in the same arbitration clause.

Therefore, to answer the question, it is safe to conclude that the law is well settled that a commercial document having an arbitration clause must be interpreted in such a manner so as to give effect to the agreement rather than invalidate it. While construing an arbitration agreement, the Courts must lean in favour of giving effect to the arbitration agreement between the parties. This conclusion is in line with the intension of the legislature as the Act itself severely limits the scope of judicial interference and gives paramount importance to the intension and autonomy of the parties in such matters.

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INDIAN LEGAL IMPETUS
Volume XVI, Issue XII

S & A Law Offices

DOCTRINE OF GROUP OF COMPANIES: AN ANALYSIS ACROSS JURISDICTIONS

- *Jagatjeet Singh and Jagrati Maru*[1]

Introduction

In a landmark ruling[2], the Hon'ble Apex Court has ruled on the finality of the long-standing debate of Group of Companies Doctrine (hereinafter referred to as *'GOC Doctrine'*) being a challenge to the foundational principles of arbitration law being party autonomy, privity of contract, consensus ad idem and separate legal personality. The doctrine postulates that an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates if the "*circumstances are such as to demonstrate the mutual intention of the parties to bind both signatories and non-signatories*". This article attempts to dissect the GOC Doctrine from the perspective of foreign jurisdictions and discuss the implications of the judgment upon Indian Arbitration Jurisprudence.

Observations of the Hon'ble Supreme Court in Cox and Kings Ltd. v. SAP India Pvt. Ltd.

The Supreme Court while upholding the GOC Doctrine has concluded, the following:

i. Definition of "parties" in Section 2(1)(h) of the read with the Section 7 Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'A&C Act') includes both signatories and non-signatories.
ii. Consent to be bound by an arbitration shall be inferred from the conduct of the non-signatory.
iii. Section 7 of A&C Act requirement of written arbitration agreement does not exclude the possibility of a non-signatory party.
iv. Under the A&C Act, "party" and "persons claiming through or under" a party are distinct and different terms.
v. Basis of the application of the GOC Doctrine is for maintaining the corporate separateness of group of companies while determining common intention of parties to bind a non-signatory party.
vi. Piercing of Corporate veil or the Doctrine of Alter Ego cannot be the foundation for the application of the GOC Doctrine.
vii. GOC Doctrine is a principle of law which stems from the conjoint reading of Section 2(1)(h) and Section 7 of the A&C Act.
viii. Single Economic Unit cannot be sole basis for invoking the GOC Doctrine.
ix. Persons "claiming through or under" can only assert their right in a derivative capacity.
x. GOC Doctrine shall be retained 'considering its utility in determining the intention of the parties in context of complex transactions involving multiple parties.
xi. At referral stage (under Section 11 or Section 8 of the A&C Act), the referral Court shall leave it to the Arbitral Tribunal whether non-signatory is bound by the arbitration agreement.

[1] The authors are Associates at S&A Law Offices, Gurugram in Dispute Resolution practice.
[2] *Cox and Kings Ltd. v. SAP India Pvt. Ltd. and Anr.* 2023 SCC OnLine SC 1634.

Overview of the Doctrine in other Jurisdictions

France

The Doctrine finds its origin from France wherein an ICC tribunal as early as in 1982 passed an interim award in an arbitration titled *Dow Chemical v. Isover Saint Gobain*[3], holding the Dow Chemical (France) and Dow Chemical Company, non-signatories to the contracts, to be a party to the arbitration. The Tribunal observed that Dow Chemical (France) played vital role in the negotiation, performance and termination of the contract and Dow Chemical Company was the holding company who owned the trademarks under which the products were sold in France and also had absolute control over its subsidiary, the signatory to the contracts. In French law an arbitration agreement can be extended on the non-signatory parties, if it can be stablished that all the parties had a common intention to be bound by the agreement. Such common intention is subjective and is inferred on the objective conduct of the said party during the 'negotiation, performance and termination of the contract containing the arbitration agreement.[4]

Switzerland

The Swiss law considers the consent of the parties, either implied or express by their conduct to determine whether a non-signatory is bound by an arbitration agreement. In Swiss law, the mere fact that a non-signatory is a part of the same group of companies is not enough justification for binding the said non-signatory to the arbitration agreement[5]. The Swiss law, similar to the French, mandates a subjective willingness of a non-signatory derived through certain behaviour or conduct which is expressed through an objective element such as involvement in negotiation and performance of the contract for a non-signatory to be bound to the arbitration agreement.[6]

England

Under the English law, even non-signatory parties may be bound by an arbitration agreement but only if they are claiming under or through the original party to the agreement. Therefore, the doctrine of privity is adhered to strictly and an arbitration agreement is extended to non-signatory parties on the basis of traditional contractual principles and doctrines such as agency, novation, assignment, operation of law, and merger and succession. English Courts have discarded the applicability of the Doctrine of Group of Companies. For instance, in *Peterson Farms INC case*[7] the Respondent claimed damages suffered by its group entities against the Petitioner and some of these group entities were non-signatories to the arbitration agreement. While the tribunal opined that by virtue of the GOC Doctrine the Respondent was entitled to claim damages suffered by its group entities against the Petitioner, on appeal the Commercial Court held that English Law excludes the application of GOC Doctrine and arbitration agreement, therefore, cannot be extended to non-signatory parties.

USA

The US Federal Arbitration Act does not provide for joinder of non-signatory parties to arbitration agreements. The US Courts have used non-consensual doctrines to extend arbitration agreements to non-signatory parties. For example, where parent company completely exercised control over subsidiary, the Courts have pierced corporate veil and held the alter ego liable in exceptional circumstances.

[3] *Dow Chemical v. Isover Saint Goblain,* Interim Award, ICC Case No. 4131, 23 September 2023.
[4] ICC award in Case No. 11405 of 2001.
[5] Saudi Butec Ltd et Al Fouzan Trading v. Saudi Arabian Saipem Ltd, unpublished ICC Interim Award of 25 October.
1994, confirmed by DFT on 29 January 1996, ASA Bulletin (1996) Vol 3 p 496.
[6] Cox and Kings Ltd. (Supra).
[7] Peterson Farms INC v. C & M Farming Limited [2004] EWHC 121 (Comm).

The US Supreme Court in *GE Energy case*[8] held that the New York Convention is silent on the aspect of whether non-signatories can enforce an arbitration agreement and therefore the Convention does not conflict with the application of domestic law equitable estoppel doctrines to third parties.

Brazil

The Brazilian Arbitration Act, 1996 does not envisage any express provision governing joinder of third parties however, the rule finds its recognition in several institutional arbitration rules.

A look at the jurisprudence on the GOC doctrine, it can be observed that the Courts in Brazil have relied on the GOC Doctrine in limited circumstances. The Doctrine finds its recognition in Court of Appeals decisions wherein the Doctrine has been used to find the very consent to arbitrate when non-signatories from the same group of companies of one of the parties were involved in the negotiation or performance of underlying contract. The Superior Court of Justice in one case pierced corporate veil under Article 50 of the Brazilian Civil Code invoking an exceptional circumstance to find implicit consent when the signatory and non- signatory parties belonging to the same Group of Companies had abused their rights by committing fraud and acting malafide[9].

Japan

The Japanese Arbitration Act does not contain provisions to enable an Arbitral Tribunal to assume or assert its jurisdiction over individuals or companies who are not a party to the arbitration. The Japanese Law, in stark contrast to the French, Indian and the Swiss, dictates that no parent company or subsidiary company of a signatory shall be bound by the arbitration under the doctrine of group of companies even though the same may have played a vital role in the negotiation, performance and termination of the contract. However, a District Court in Nagoya, Japan in 1995 had held that '*an arbitration clause in a contract entered into by a company would extend to the individuals closely associated with the said company.*'[10]

Singapore

The Singapore High Court has taken a concurrent view with the English Courts in rejecting the Group of Companies Doctrine on reasoning that the doctrine is "anathema to the logic of consensual basis of an agreement to arbitrate; and second, ordering of companies within a broader group did not mean one could dispense with separate legal entity[11]." Following the English decision in Peterson Farms (supra), it was observed that enforceable obligations cannot be imposed on "strangers" to an arbitration agreement.

Conclusion

The Hon'ble Supreme Court while listing its reasoning for upholding the GOC Doctrine has referred to and explored numerous jurisdictions and foreign case laws with respect to the GOC Doctrine. The Court has recognised implied consent for binding non-signatories to an arbitration agreement.

To conclude, this decision has crystalized the applicability of GOC Doctrine in the Indian Arbitration Law landscape and paved way for a comprehensive standard in determining the intention of parties, particularly in a multi-party commercial setup.

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[8] 140 S.Ct. 1637 (2020).
[9] Commerical Arbitration : Brazil, *Global Arbitration Review* https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/brazil last accessed 22.12.2023.
[10] *International Arbitration Laws and Regulations Japan 2023*, (Iwata Good 2023) < International Arbitration Laws and Regulations Report 2023 Japan (iclg.com)> last accessed on 26.12.2023.
[11] *Manuchar Steel Hong Kong Limited v. Star Pacific Line Pte Ltd.* [2014] SGHC 181.

INDIAN LEGAL IMPETUS
Volume XVI, Issue XII

S & A Law Offices

'ATTACHMENT OF PROPERTY' UNDER SECTION 9 OF THE ARBITRATION & CONCILIATION ACT, 1996: WHETHER COURT CAN OVERSIGHT THE PREREQUISITES UNDER ORDER 38 RULE 5 OF THE CPC.

- *Sahil Kumar Purvey*

Introduction

'The Arbitration and Conciliation Act, 1996' (the Act/the 1996 Act), is the cardinal law on arbitration and aimed to expeditiously dissolve disputes following the principles of party autonomy and minimum judicial interference[1]. Once the arbitral tribunal commences, a party can seek interim relief from the arbitral tribunal under Section 17 of the Act to ensure the prospective arbitral claims of a party are protected in the form of security, guarantees or any other measures. However, in certain cases, the paucity of time makes remedy under Section 17 of the Act inefficacious. Therefore, in urgent matters, the Act allows a party to seek similar interim relief under Section 9 of the Act from the court prior to commencement or during the arbitration proceeding, or at any time after the passing of the award but before it is enforced under Section 36 of the Act.

The 2015 Amendment Act mandates that once the arbitral tribunal has been constituted, the Court shall not entertain an application under Section 9 of the Act. However, the role of Judiciary in granting interim relief under Section 9 of the Act becomes significant prior to commencement of the arbitral proceedings or even after the constitution of arbitral tribunal if the circumstances exists which render the remedy provided under Section 17 inefficacious[2].

One of the remedy under Section 9 is securing the amount in dispute in the arbitration by attaching the property[3]. However, the Act does not laid down criteria for granting relief of attachment of property under Section 9. Therefore, Court relies on CPC while hearing the application under Section 9. Order 38 Rule 5 of the CPC provides the procedure to be followed for attachment of defendant/respondent' property prior to completion of trial. The Supreme Court had led down three prerequisites for attachment of property under the Order 38 Rule 5 of the CPC[4].

First, the court should be satisfied that the plaintiff has a prima facie case and balance of convenience favours him.
Second, Plaintiff has a bonafide case.
Third, the plaintiff must also establish that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. However, Pro-arbitration approach advocates that the aforesaid three requisites is a high threshold for the relief of attachment of property and the Court while hearing the application under Section 9 of the Act should not follow rigors under Order 38 Rule 5 of the CPC. The same has been a judicial quandary. Therefore, this article analyses whether the high bar of Order 38 Rule 5 of the CPC could be waived in the case of Section 9 application or not.

[1] Uttarakhand Purv Sainik Kalyan Nigam Ltd. vs. Northern Coal Field Ltd. (2020) 2 SCC 455
[2] The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), Section 9(3); and Arcelor Mittal Nippon Steel India Ltd. Vs. Essar Bulk Terminal Ltd., (2022) 1 SCC 712
[3] The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), Section 9(1)(ii)(b)
[4] Raman Tech v. Solanki Traders, (2008) 2 SCC 302

View of High Courts

Various High Courts have given different findings on the question of extent to which the provisions of the CPC would apply to proceedings under Section 9 of the Act. Approach of several high courts could be divided into two parts as follows;

1. **Inclusive Approach[5]:** This approach advocates that proceedings under Section 9 of the Act to be in line with the procedures under Order 38 Rule 5 of the CPC. Therefore, the principles of Order 38 Rule 5 must be followed[6] while granting interim relief under Section 9 of the Act despite CPC is not binding on the arbitral proceeding[7].
2. **Exclusive Approach[8]:** This approach advocates that the technicalities of Order 38 Rule 5 of the CPC will be merely a guideline[9] and need not be mandatorily adhered while granting relief under Section 9 of the Act.

View of Supreme Courts

The Supreme Court in *Arvind Constructions v. Kalinga Mining Corporation*[10] acknowledge that several High court have diverse opinion on the issue of extent to which the provisions of the CPC would apply to proceedings under Section 9 of the Act. However, Court therein did not settle the issue and left this to be examined in an appropriate case.

On September 14, 2022, in ***Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited***[11], ***(Essar),*** a Division Bench of the Apex Court settled the quandary by observing that technicalities under Order 38 Rule 5 of the CPC will not be applicable while granting interim relief of "attachment before judgment" under Section 9 of the Act. The Apex Court observed that the power of the Court while granting interim relief under Section 9 of the Act is wider than the powers under the provisions of the CPC[12] and procedural technicalities of Order 38 Rule 5 of CPC cannot constrain the Court. However, basic principles of procedural law ought not to be ignored. Therefore, if the Applicant establishes a prima facie case and the balance of convenience favours him then court should grant interim relief under Section 9 of the Act. Defendant does not need to establish actual threat to the property required to be attached and a possibility of asset diminution would be sufficient.

On September 30, 2022, in ***Sanghi Industries Ltd. v. Ravin Cables Ltd.,***[13] ***(Sanghi),*** another Division bench of the Supreme Court observed that the Court while granting interim relief of "attachment before judgment" under Section 9 of the Act must follow all the requisites of the Order 38 Rule 5 of the CPC. Before passing such relief the Court must satisfy itself that the conduct of defendant would defeat the award that may be passed in the arbitral proceeding.

Way forward

Both the judgments of Apex Court are conflicting. Though, ***Sanghi*** was later in time, but cannot be considered as precedent because both the judgment are of a division bench.

[5] Om Sakthi Renergies Limited vs Megatech Control Limited, MANU/TN/8146/2006; and Anantji Gas Service v. Indian Oil Corporation, MANU/DE/2344/2014
[6] ITI v. Siemens Public Communication, AIR 2002 SC 2308
[7] The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), Section 19(2)
[8] National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd, AIR 2004 Bom 136; and Delta Construction Systems Ltd, Hyderabad v. Narmada Cement Company Ltd, Mumbai, (2002) 2 BOMLR 225
[9] Steel Authority of India v. AMCI Pty Ltd, MANU/DE/3413/2011; and Ajay Singh v. Kal Airways Private Limited, MANU/DE/1820/2017
[10] Arvind Constructions v. Kalinga Mining Corporation, AIR 2007 SC 2144
[11] Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited, 2022 SCC Online SC 1219
[12] *Jagdish Ahuja & Anr v. Cupino Limited,* MANU / MH / 0925 / 2020; and *Valentine Maritime Ltd v. Kreuz Subsea Pte Ltd & Anr.,* MANU/MH/0062/2021
[13] Sanghi Industries Ltd. v. Ravin Cables Ltd., 2022 SCC OnLine SC 1329,

Therefore, the contrary opinion of the Apex Court causing diverse opinion from different High Courts on the issue that whether the Court while hearing the application under Section 9 of the Act for "attachment before judgment" should follow all the prerequisites under Order 38 Rule 5 of the CPC or not.

On 06.10.2023, the Calcutta High Court in Prathyusha AMR JV vs. Orissa Steel Expressway Private Limited.[14], while following Essar, held that the Court in Section 9 proceeding, should does not compel a party to satisfy the rigours of Order 38 Rule 5 and ask him to substantiate the apprehension on which an order for security is prayed for. Otherwise, the same would result in nullifying the object of Section 9. Whereas on 10.11.2023, the Delhi High Court in Skypower Solar India Private vs. Sterling and Wilson[15], while following Sanghi, held that the Court while exercising powers under Section 9 of the A&C Act cannot disregard of the provisions of the CPC or their underlying principles. Therefore, the 3-judge bench of the Supreme Court have to settle the issue.

The 1996 Act does not contain any provision, which entirely excludes the applicability of the CPC to Section 9 of the Act. Certain provisions of the Act clearly provides where the CPC will be applicable[16] or where it would be excluded[17]. Therefore, even if the rigors of general laws of the CPC is not applicable on the 1996 Act[18], the Court should adhere to the basic principles of CPC while hearing the application under Section 9 of the Act. An interim order granting "attachment before judgment" is a more stringent interim order than other interim relief against defendant. Therefore, threshold of granting such relief should be higher.

The Court should follow a middle path of both the extremes i.e. Order 38 Rule 5 of the CPC need not to be followed at all and all rigors of Order 38 Rule 5 of the CPC must be satisfied. Therefore, as held in Essar, the Plaintiff praying for interim relief must have to establish prima facie case, balance of convenience in his favour and demonstrate, and not simply aver, that the conduct of defendant will defeat the purpose of arbitral proceeding. Plaintiff need not establish the actual threat by defendant to the property or the intent of defendant to defeat the purpose of arbitral proceeding. Therefore, the threshold for the relief of attachment of property would be lower than the rigors of Order 38 Rule 5 of the CPC. This approach would be pro-arbitration while balancing the interest of both the parties and will not lead to unnecessary attachment of property of the defendant.

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[14] Prathyusha AMR JV vs. Orissa Steel Expressway Private Limited, MANU/WB/2128/2023
[15] Skypower Solar India Private vs. Sterling and Wilson, 2020 SCC OnLine Del 7240
[16] The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), Section 36
[17] The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), Section 45
[18] Union of India v. Popular Construction Co., (2001) 8 SCC 470

INDIAN LEGAL IMPETUS
Volume XVI, Issue XII

S & A Law Offices

CONSTITUTION OF INDIA AS THE GRUNDNORM OF ARBITRATION AGREEMENT - CAN AN ARBITRATION AGREEMENT BE LOOKED INTO ON THE ANVIL OF CONSTITUTION OF INDIA?

- *Anshuman Arha*

Introduction

It is a settled position that in arbitrations, the governing law is the Arbitration and Conciliation Act 1996 (the Act). It is also well known that an arbitration agreement cannot be enforced if the same is not in contractually valid. It is therefore crystal that in order to enforce an arbitration agreement, it has to be comply with the requirements of the Arbitration Act and the Indian Contract Act 1872. In a recent development, the Hon'ble Supreme Court in *Lombardi Engineering Limited v Uttarakhand Jal Vidyut Nigam Limited*[1] (Lombardi Engineering) has further extended the requirements that the Arbitration Agreement has to comply with and the same is based on the Kelson's theory of law and layers of Grundnorm. Herein in this article we understand the Kelson's pure theory of law and its application to examination of arbitration agreements with special emphasis to Section 11 proceedings considering the recent Judgement.

Kelson's pure theory of law and Constitution of India

The word 'Grundnorm' is a German word which means fundamental norm. Kelson's theory has its pyramidical structure of hierarchy based on the basic norm of Grundnorm. He has defined it as *'the postulated ultimate rule according to which the norms of this order are established and annulled, receive or lose their validity'.* It is the Grundnorm which determines the content and validates the other norms derived from it.

Grundnorm is a fiction, rather than a hypothesis as proposed by the jurist. The Grundnorm is the starting point in a legal system and from this base; a legal system broadens down in gradation becoming more and more detailed and specific as it progresses.[2]

The Constitution of India under Article 13 provides that all laws which were made either before the commencement of the Constitution, or are made after it, by any competent authority, which are inconsistent with the fundamental rights, are to that extent, void. This unveils the principle of Grundnorm which says there has to be basic rule. The Constitution is the basic and ultimate source of law. In *Government of Andhra Pradesh v Smt. P. Laxmi Devi*[3] while deciding on courts power to declare an Act of the legislature to be invalid, Supreme Court observed as under-

'According to Kelson, in every country there is a hierarchy of legal norms, headed by what calls as the 'grundnorm'. If a legal norm in a higher layer of this hierarchy conflicts with a legal norm in a lower layer the former will prevail. In India the Grundnorm is the Indian Constitution"

Examining the validity of Arbitration Agreement under Section 11 A&C Act 1996

The legislature added sub-section (6A) to Section 11 of the Act 1996 by way of the Arbitration and Conciliation (Amendment) Act, 2015 which reads as under –

[1] 2023 SCC OnLine SC 1422

[2] Application of Grundnorm in India, Zainab Arif Khan, Aligarh Muslim University

[3] (2008) 4 SCC 720

"(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under subsection (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgement, decree or order of any court, confine to the examination of the existence of an arbitration agreement."

The issues with regards to the examination arose after the existence of an arbitration agreement when Hon'ble Supreme Court took cognizance of the legislative change in Duro Felguera, S.A. v. Gangavaram Port Limited[4] and observed that scope of examination under Section 11(6) of the Act is only limited to examining whether an arbitration agreement exists between the parties and nothing more.[5]

This was the restrictive approach that was clarified by Hon'ble Supreme Court in Vidya Drolia and Others v. Durga Trading Corporation[6] and an overarching principle was laid down with respect to pre-referral jurisdiction under Section 11(6) of the Act and scope of judicial review under Section 8 and 11 of the Act. It was held that 'the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment'.[7]

Further in reference to Duro Felguera, it was clarified that the Court therein seems to have read the existence of the arbitration agreement by limiting the examination to an examination of its factual existence. However, that is not so, as the existence of arbitration agreement does not mean anything unless such agreement is contractually valid. A mere agreement is not legally binding, unless it satisfies the core contractual requirements, concerning consent, consideration, legal relationship, etc.'[8]

Hence it is to be noted that the while examining a prima facie case for existence of arbitration agreement, the contractual validity of the arbitration agreement is also to be examined.

Arbitration Agreement and Grundnorm of Indian Law

The next question that arises is whether under Section 11(6) examination is restricted to the contractual validity or the same may consider the objection with regards to arbitrariness of the said arbitration agreement. The Hon'ble Supreme Court in *Lombardi Engineering* has settled the position in this regard. Herein the court was concerned with firstly the validity of the arbitration clause which provides for 7% pre-deposit of the total claim for the purpose of invoking arbitration and secondly, the discretion vested with the Principal Secretary/Secretary (Irrigation) to appoint a sole arbitrator. It was in this aspect that the court discussed whether the validity of the pre-deposit condition as contained in the agreement can be looked into and decided on the anvil of Article 14 of the Constitution in a petition under Section 11(6) of the Act.

The submission from respondents in *Lombardi Engineering* pressed on the concept of 'party autonomy' and consent given by petitioner to the pre-deposit clause at the time of execution of the agreement. Court after taking into consideration the phrase "operation of law" in terms of test under Section 11(6) and observed that the phrase is of wider connotation and covers the Act as well as the Constitution and any other Central or State Law. Further the court looked into Kelson's pure theory of law on the basic norm i.e. 'Grundnorm'.

[4] (2017) 9 SCC 729
[5] ibid at para 46.
[6] (2021) 2 SCC 1
[7] ibid at para 153
[8] supra note 5 at para 236

Court after numerous references and reliance arrived at the conclusion that in the context of the Arbitration Agreement, the layers of the Grundnorm as per Kelsen's theory would be in the following hierarchy:

i. Constitution of India, 1950;
ii. Arbitration and Conciliation Act, 1996 & any other Central/State Law;
iii. Arbitration Agreement entered into by the parties in light of s. 7 of the Arbitration and Conciliation Act, 1996.[9]

Further with respect to the examination of arbitration agreement, it was held that the arbitration agreement has to comply with the requirements of the following and cannot fall foul of:

i. Section 7 of the Act
ii. Any other provisions of the Act & Central/State Law
iii. Constitution of India, 1950[10]

This recent development therefore settles the position with regards to examination of arbitration agreements under Section 11(6) and the extent of examination is extended to examination of arbitrariness.

It is pertinent to note here that Hon'ble Supreme Court in the aforementioned judgement has also clarified a pivotal point in reference to arbitration agreements and party autonomy which need to be highlighted. The court while referring to the Grundnorm of Indian Law i.e. Constitution has held that the concept of 'party autonomy' cannot be stretched to an extent where it violates the fundamental rights under the Constitution. Further the court has conclusively held that for an arbitration clause to be legally binding it has to be in consonance with the 'operation of law' which includes the Grundnorm i.e. the Constitution[11]

and incidental to this ratio, the court directed to ignore the pre-deposit condition in the impugned arbitration clause and the condition giving discretion to the discretion vested with the Principal Secretary/Secretary (Irrigation) to appoint a sole arbitrator.

Conclusion

The Kelson's theory of Law on the basic norm i.e. Grundnorm has been referred and relied upon at various instances and but this development results in the same being extended to Arbitration proceedings. This development therefore implants an additional filter to the arbitration procedure which would eventually result in a fair arbitration process with both parties at equal footing and a comparatively lesser chance of arbitrariness resultantly forwarding the interests of the parties to arbitration.

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[9] supra note 1 at para 81
[10] supra note 1 at para 82
[11] supra note 1 at para 84

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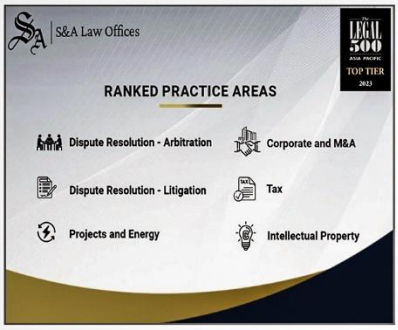

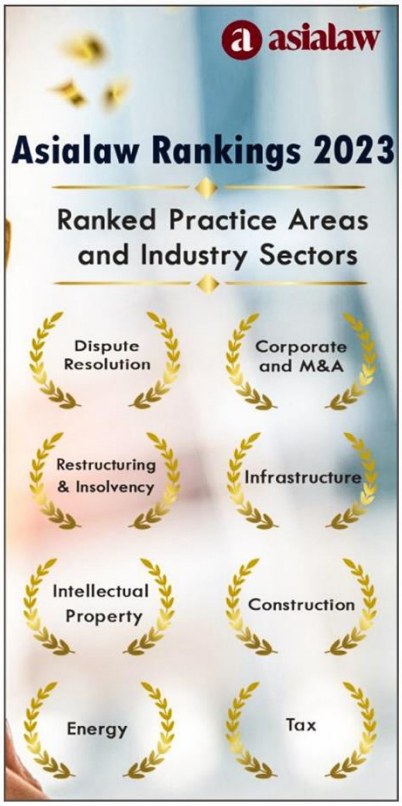

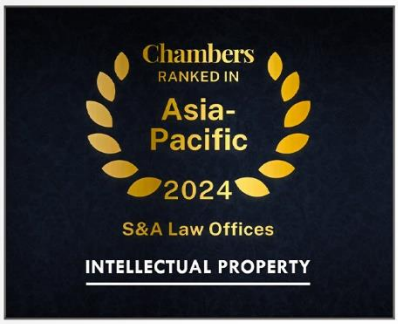

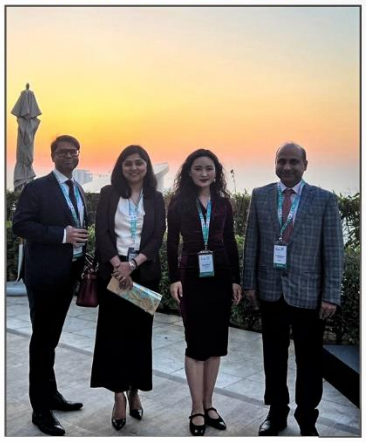

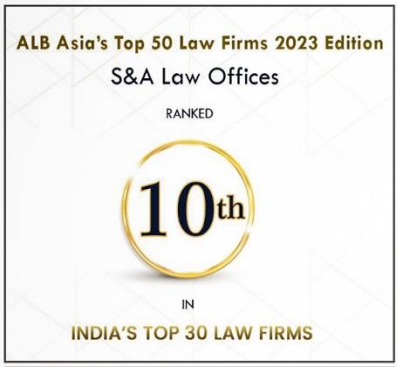

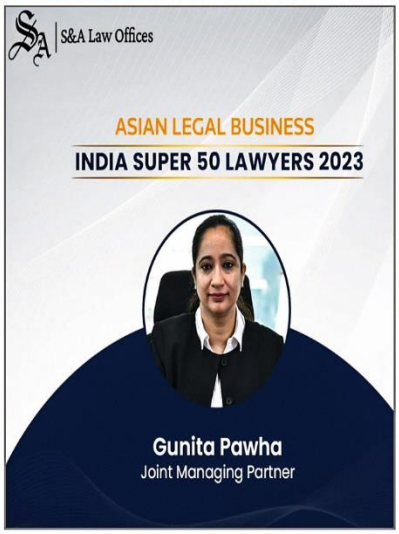

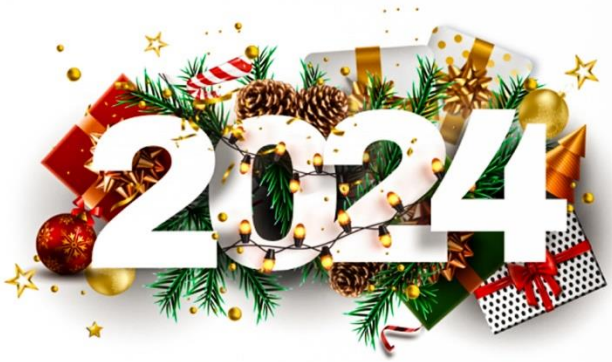

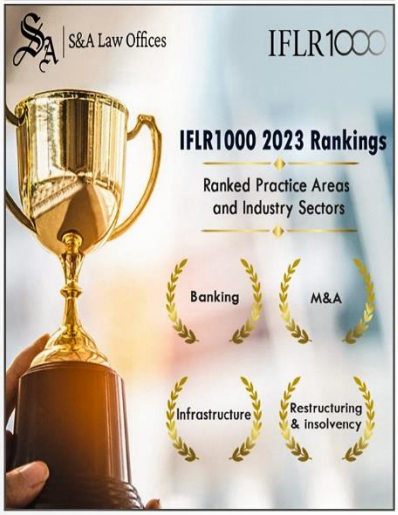

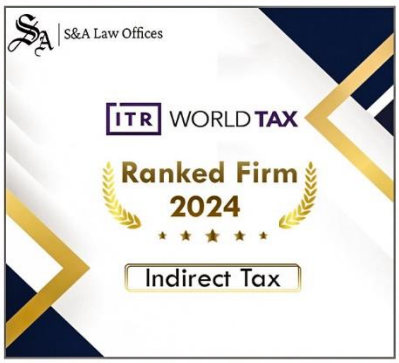

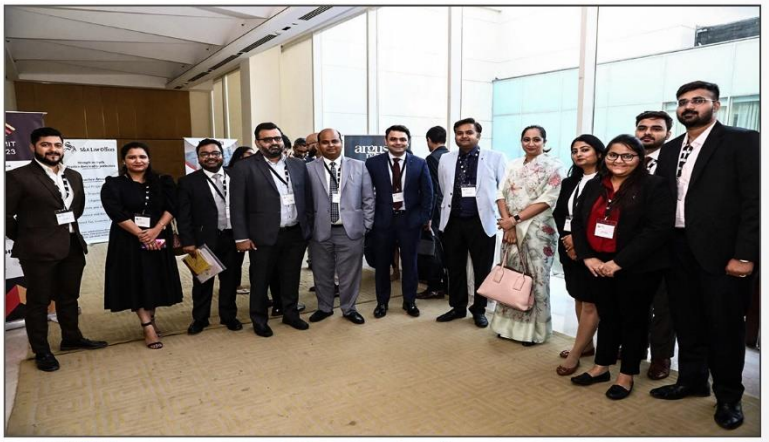

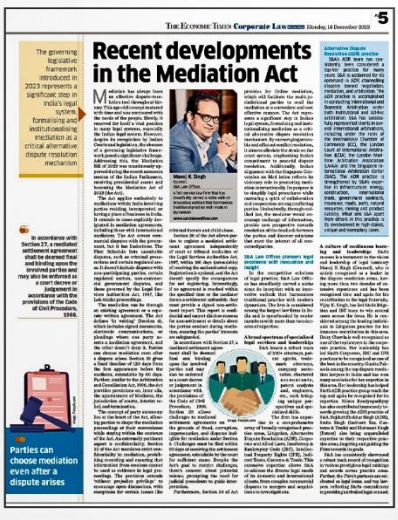

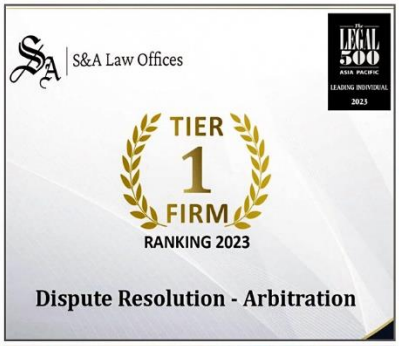

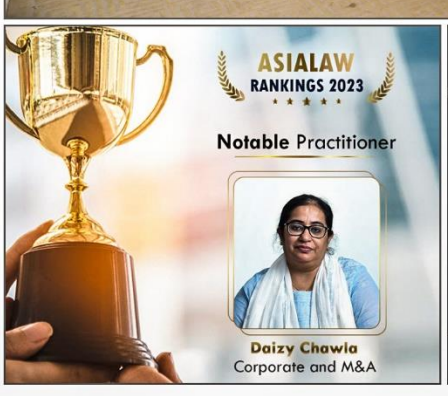

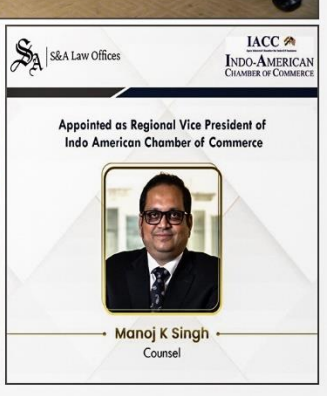

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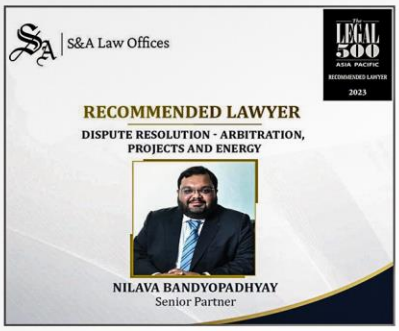

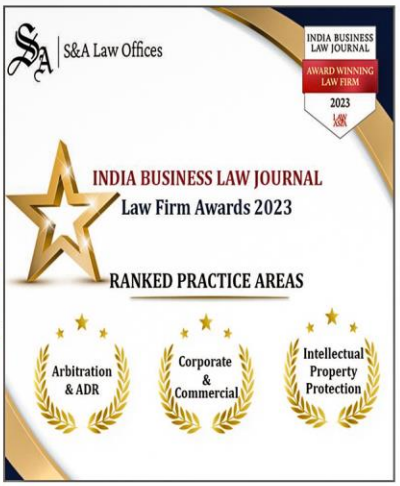

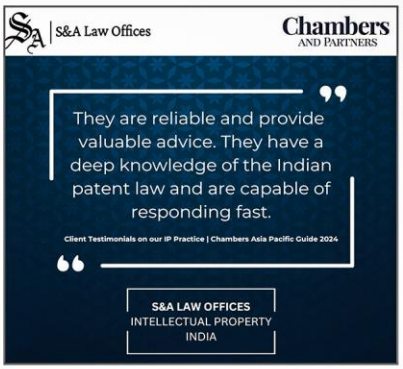

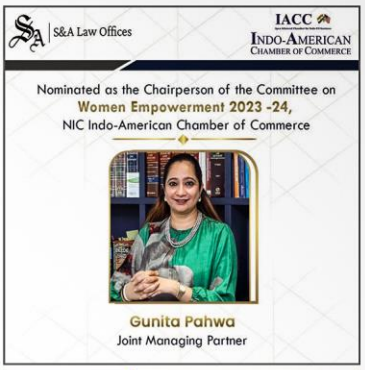

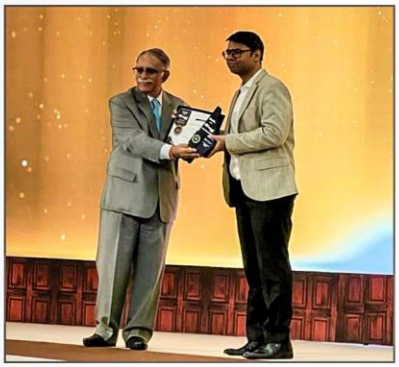

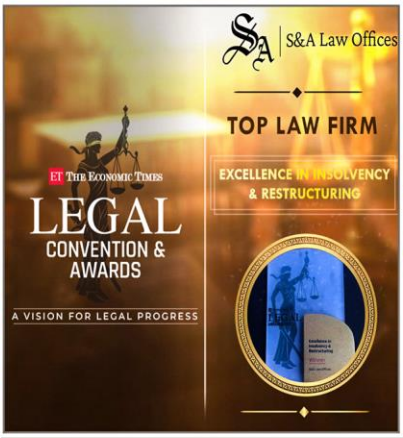

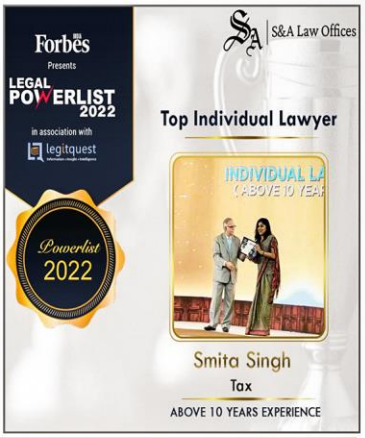

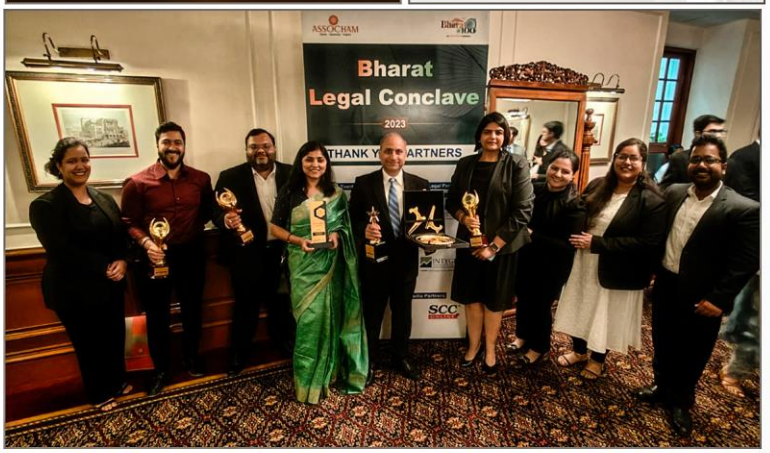

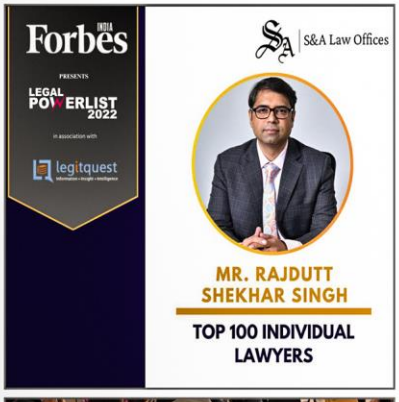

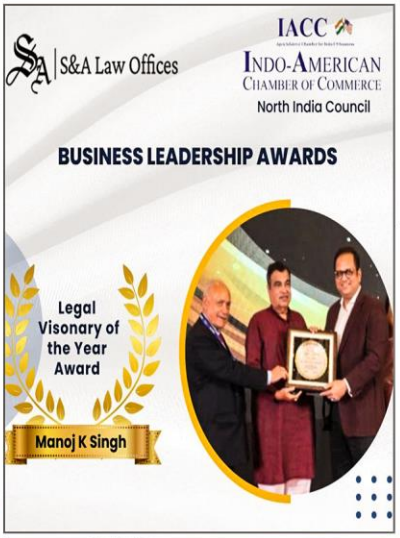

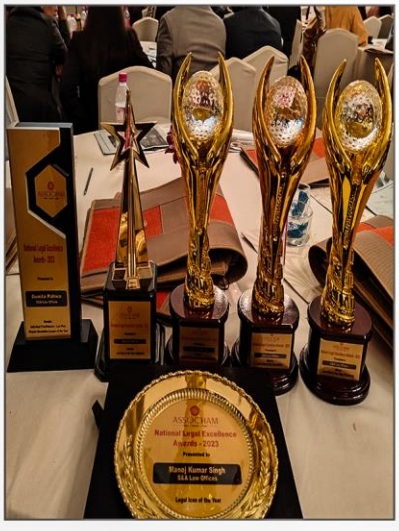

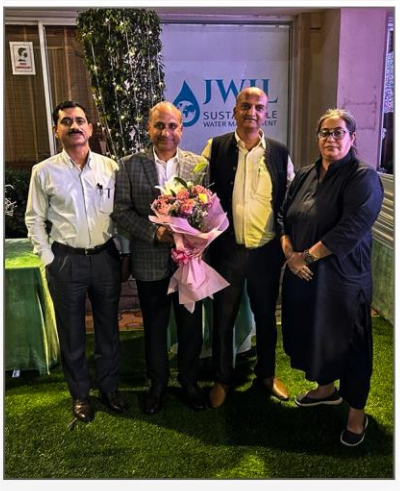

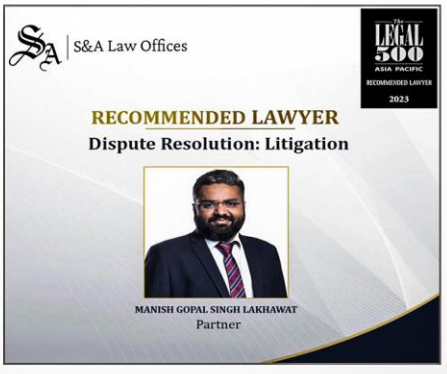

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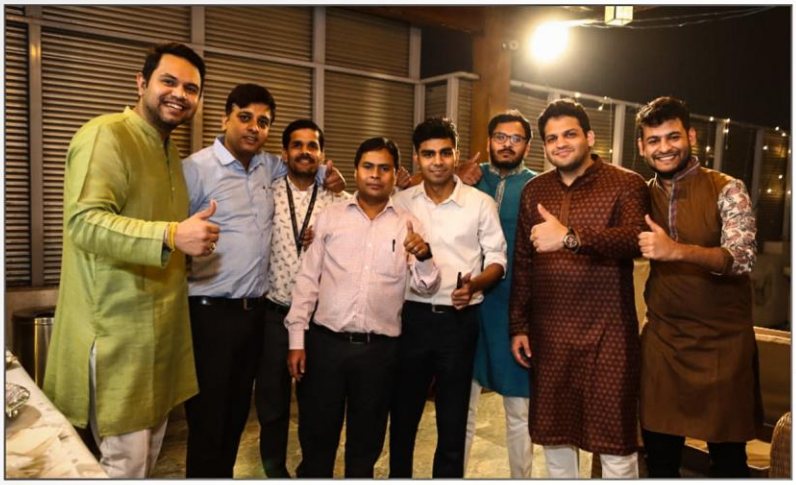

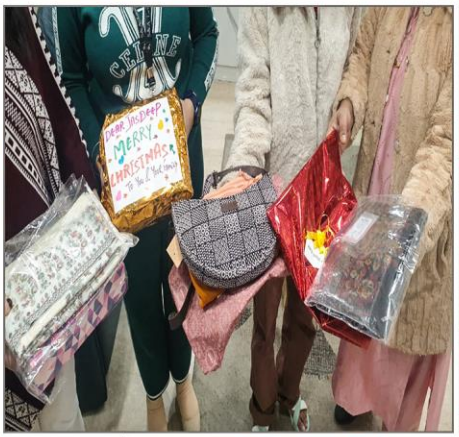

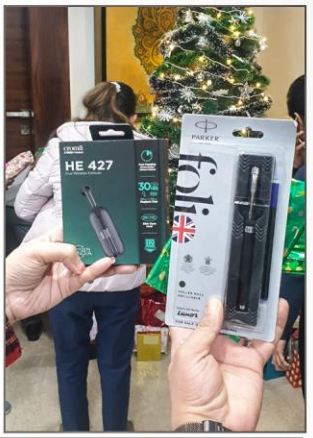

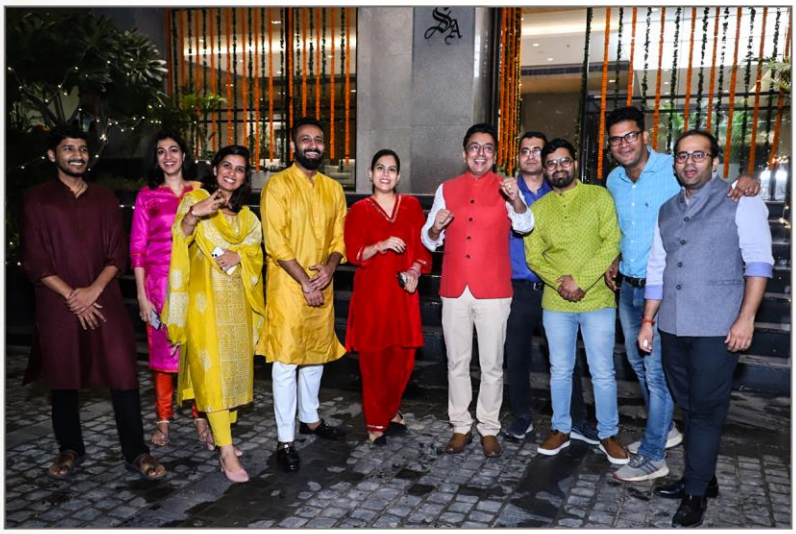

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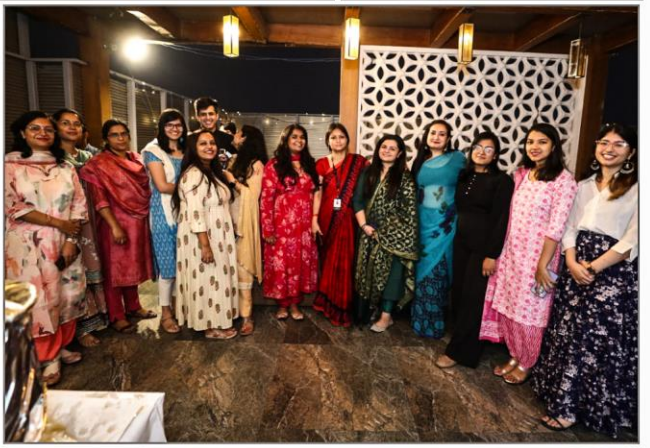

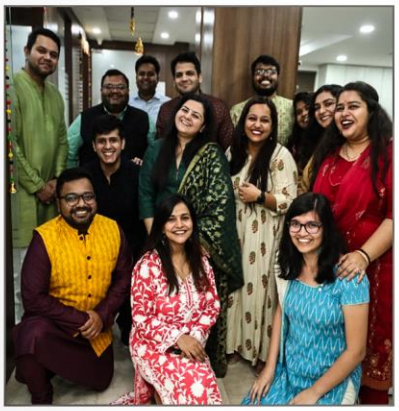

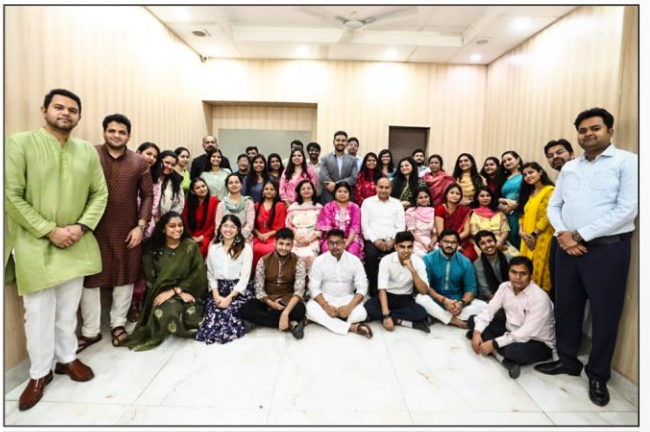

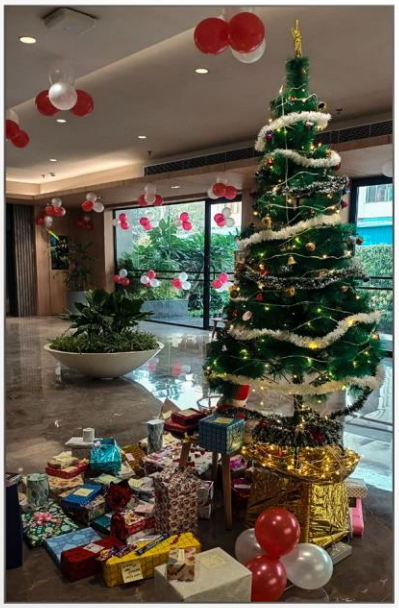

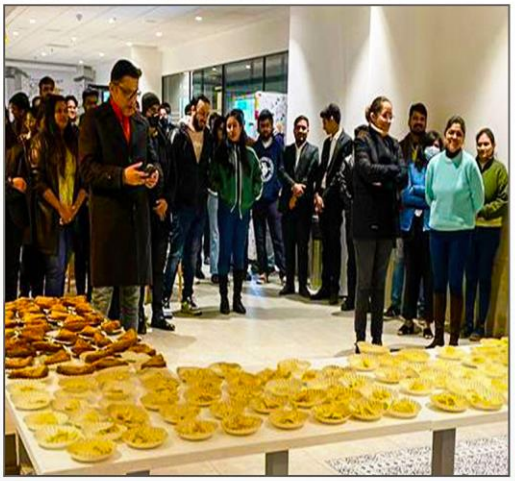

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