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ARBITRATION NEWSLETTER MARCH, 2026

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1. NON-SIGNATORY DISSENTING SOCIETY MEMBER CANNOT BE TREATED AS A VERITABLE PARTY TO THE DEVELOPMENT AGREEMENT OR THE ARBITRATION AGREEMENT CONTAINED THEREIN: BOMBAY HIGH COURT [MARCH 06, 2026]

Introduction:

In the case of M/s. Space Master Realtors v. Mulund Sandhyaprakash CHS Ltd. & Anr. [1], the Hon'ble Bombay High Court held that a member who dissents from the decision by the society and refuses to sign the Development Agreement, however, is forced to act in terms of the Development Agreement by application of principle of loss of individuality *vis-à-vis* society, cannot be treated as a veritable party to the Development Agreement and particularly, to the arbitration agreement contained therein.

Facts:

The Mulund Sandhyaprakash Cooperative Housing Society Limited (“Society”) entered into a Redevelopment Agreement (“DA”) with M/s. Space Masters Realtors (“Applicant”). Respondent No. 2 was the owner and occupier of a flat in the Society’s building and a member of the Society. Respondent No. 2 opposed the redevelopment process from inception. The Applicant was issued Intimation of Disapproval (“IOD”) by the Municipal Corporation of Greater Mumbai and accordingly issued letters to the members to vacate their flats. Ten out of the eleven members agreed to vacate their respective flats, however, Respondent No. 2 refused to vacate.

The Applicant filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (“Arbitration Act”) seeking interim measures against Respondent No. 2 to vacate the flat. The Hon'ble Bombay High Court (“Hon'ble Court”) passed an order recording that the IOD for the 8th floor was not issued and directed the Applicant to issue intimation to Respondent No. 2 upon receipt of the IOD for the 8th floor with a corresponding direction to vacate his flat. The Hon'ble Court further appointed a Court Receiver to take possession of the flat in case the Respondent No. 2 failed to vacate the flat. Respondent No. 2 filed an appeal against the said order of the Hon'ble Court and the same was disposed by an order granting Respondent No. 2 the liberty to raise the issue before the appropriate forum. Accordingly, Respondent No. 2 approached the Hon'ble City Civil Court at Bombay seeking a temporary injunction, however, the same was denied. Thereafter, possession of the flat of Respondent No. 2 was secured through a Court Receiver and subsequently, Respondent No. 2 executed a Permanent Alternate Accommodation Agreement (“PAAA”) with the Applicant.

Alleging that the acts of Respondent No. 2 caused substantial monetary loss since the project was delayed indefinitely and the Applicant demanded payment of a sum of Rs. 13,13,46,245/- from Respondent No. 2. The Applicant invoked Clause 38 of the DA and nominated a mediator and an arbitrator. The Respondent No. 2 rejected the Applicant’s claims and denied the existence of an arbitration agreement. The Society, impleaded as Respondent No. 1, accepted the arbitration through the proposed arbitrator. Respondent No. 2 refused to submit the dispute to arbitration stating that there was no arbitration agreement and that Respondent No. 2 was not a signatory to the DA. Owing to the aforesaid, the Applicant filed an Application under Section 11 (6) of the Arbitration Act before the Hon'ble Court.

Issues:

1. Whether disputes relating to development process can be agitated through private arbitration where one of the parties to the dispute is not a signatory to the DA;
2. Whether a member, who is opposed to redevelopment and has consciously not signed the DA can either initiate arbitration or be made party to the arbitral proceedings.

Held:

The Hon'ble High Court observed that the contractual relationship between the Applicant and Respondent No. 2 stems from the PAAA. It was noted that the Respondent No. 2’s name was scored off from the DA on account of his refusal to sign the same and that he executed the PAAA however, he challenged the redevelopment process in a suit before the Hon'ble City Civil Court.

The Hon'ble Court observed that the PAAA contained an arbitration agreement between the Applicant, the Society and Respondent No. 2, however, the Applicant invoked the arbitration clause in the DA and not the PAAA. On examining the claims of the Applicant, the Hon'ble Court found that the same arose from Respondent No. 2’s failure to adhere to the DA. It observed that since the Applicant’s claim arose from breach of the DA, the arbitration agreement under the DA was consciously invoked and that the pleadings also referred only to the arbitration clause in the DA and not a composite reference to the DA and PAAA. Therefore, Hon'ble Court concluded that the oral submission that reference is sought for adjudication of the disputes arising out of the DA and PAAA and that the contours of the dispute to be arbitrated would unfold only after the constitution of the arbitral tribunal, could not be accepted.

The Hon'ble Court further opined that it would be difficult to accept the proposition that merely because an

[1] 2026:BHC-OS:5802

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individual member may be a beneficiary to the DA executed on his behalf the same would automatically result in creation of an arbitration agreement between such member and Developer. The Hon'ble Court held that merely because Respondent No. 2 is a beneficiary under the DA or that he is bound to act in terms of the DA, the same would not create an arbitration agreement between him and the Applicant.

The Hon'ble Court noted that an arbitration agreement creates an exception to common law remedies where parties agree to resolve disputes and differences through mechanism of private arbitration which is founded on the principle of party autonomy. It ruled that the existence of an express arbitration agreement between the Applicant and the Respondent No. 2 was necessary. Therefore, the Hon'ble Court held that a member of a co-operative society, purely in his capacity as beneficiary of the development agreement, cannot avail adjudicatory mechanism under the development agreement and cannot be forced to undertake the adjudicatory mechanism agreed under the development agreement which he has not signed.

The Hon'ble Court further ruled that if a member of a co-operative society is denied any benefit flowing out of the development agreement, such member may file a suit for the same and, similarly, if a member acts in conflict with the obligations under the development agreement, the developer can sue such member for damages or specific performance. The Hon'ble Court ruled that both the aforementioned actions initiated by the member or the developer are for enforcement of contractual obligations flowing out of the development agreement and the mere factum of the member not being a signatory to the development agreement would not come in the way of enforcement of such contractual obligations.

The Hon'ble Court examined the definitions of the terms 'party' and 'arbitration agreement' under Sections 2 (1) (h) and 7 of the Arbitration Act and held that the combined effect of the aforementioned provisions is that 'parties' must agree to submit the disputes to arbitration. Therefore, if there is no agreement, the dispute cannot be resolved by private arbitration. However, the Hon'ble Court noted that the doctrine of veritable party seeks to include non-signatory parties to the arbitration agreement. It was further noted that the Hon'ble Supreme Court has held that a non-signatory to the agreement could be subjected to arbitration without prior consent based on (i) mutual intent of the parties, (ii) relationship of a non-signatory to a party who is a signatory, (iii) commonality of subject matter, (iv) composite nature of the transaction and (v) performance of the contract. The Hon'ble Court observed that in the present case, Respondent No. 2 could not be a veritable party to the arbitration agreement since he had not voluntarily undertaken contractual obligations arising from the underlying contract i.e., the DA.

he Hon'ble Court observed that Respondent No. 2 had opposed the very execution of the DA and his conduct was not in harmony with the signatory of the same i.e., the Society. The Hon'ble Court further noted that Respondent No. 2 was forced to execute the PAAA after being evicted from his flat. In view of the aforesaid, the Hon'ble Court ruled that a dissenting member to the DA would not be a veritable party to the arbitration agreement contained therein.

The Hon'ble Court further ruled that mere commonality of subject matter of the DA and PAAA and mere composite nature of the transaction cannot be considered in isolation by ignoring the position that a dissenting member is opposed to the execution and performance of the DA. It ruled that if the Applicant and member intended to resolve the disputes arising out of the DA by arbitration, the arbitration clause in the DA ought to have been specifically incorporated in the PAAA.

The Hon'ble High Court noted that the right to arbitrate is a statutory right and that the same can be availed by contract. However, the exercise of a statutory right may be a reason for an individual member to segregate himself from the society and in a given case, an individual member can enter into an agreement to arbitrate by separating himself from the society. The Hon'ble Court ruled that the converse to the aforesaid cannot be true and that a society entering in to a DA may bind individual members in respect of contractual obligations under the DA.

In this view of the aforementioned observations and findings, the Hon'ble High Court held that the arbitration agreement in a development agreement between the developer and the society does not get incorporated into a PAAA executed between the developer and the society members. Accordingly, the Hon'ble Court ruled that since there was no agreement to arbitrate between the Applicant and Respondent No. 2, the Hon'ble High Court could not make reference to arbitration and the application was dismissed.

2.A PARTY THAT HAS ACTIVELY PARTICIPATED IN THE ARBITRAL PROCEEDINGS CANNOT RAISE A JURISDICTIONAL CHALLENGE AT A BELATED STAGE: SUPREME COURT OF INDIA [MARCH 11, 2026]

Introduction:

In the case of **Municipal Corporation of Greater Mumbai v. M/s. R.V. Anderson Associates Limited [2]**, the Hon'ble Supreme Court ruled that mere filing of a jurisdictional challenge under Section 16 of the Arbitration Act would not wipe out past conduct and acquiescence of a party to the arbitral proceedings. It was ruled that a party cannot keep a 'jurisdictional ace' up their sleeve and then belatedly file an application under Section 16 of the Arbitration Act.

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Facts:

The Municipal Corporation of Greater Mumbai (“**Appellant**”) floated a tender and invited proposals for a project funded by the World Bank. M/s. R.V. Anderson Associates Limited (“**Respondent**”) was the successful bidder and the Appellant and Respondent entered into an Agreement for the project (“**Agreement**”). The said project was to be completed in 72 months and the Agreement was to be implemented in stages. Upon completion of the work and submission of the final report by the Respondent to the Appellant, disputes arose between the parties in respect of payment of outstanding dues.

As the Respondent’s claims were rejected, the Respondent invoked the arbitration clause of the Agreement and appointed Hon’ble Mr. Justice S.M. Jhunjhunwala (Retd.) as their nominee arbitrator. The Appellant appointed Mr. Sharad Upasani, former IAS officer as their nominee arbitrator. After unsuccessful attempts to resolve the disputes by conciliation, the Respondent wrote to the Appellant stating that the arbitration proceedings may continue and the two arbitrators could proceed to appoint the third arbitrator in terms of the Agreement.

The two nominee arbitrators jointly appointed Justice D. R. Dhanuka as the Presiding Arbitrator. The Respondent objected to the said appointment based on Clause 8.6 of the Agreement stating that the presiding arbitrator must not be of Indian or Canadian nationality. Thus, Justice Dhanuka resigned as the Presiding Arbitrator and the two arbitrators (“**Co-arbitrators**”) addressed a letter to the parties to enquire about the parties’ interest in participating in the arbitration. While the Respondent replied in the affirmative, the Appellant did not reply. The Co-arbitrators appointed Mr. John Savage as the Presiding Arbitrator however, he also resigned. Eventually, Mr. Anwarul Haque accepted the appointment.

Both parties were present at the preliminary meeting, however, after the meeting, the Appellant wrote to the Presiding Arbitrator alleging that his appointment was contrary to the terms of the Agreement and hence a ‘nullity’. It was contended that the Co-Arbitrators could not have made the appointment beyond 30 days from the date of nomination of the second arbitrator. In response, the Respondent raised a written objection to the Appellant’s allegations and placed on record its statement of claim.

The Appellant filed an application under Section 16 of the Arbitration Act challenging the appointment of the Presiding Arbitrator as a ‘nullity’ and seeking consequential reliefs. The Arbitral Tribunal dismissed the application by a detailed order holding that the appointment of the Presiding Arbitrator was valid.

Eventually, the Arbitral Tribunal passed a final award directing the Appellant to pay the specified amounts to the Respondent. After the payments were made, the award was issued and released to the Appellant.

The Appellant filed an Application to set aside the arbitral award under Section 34 of the Arbitration Act before the Hon’ble Single Judge, Bombay High Court. The said Application and subsequent appeal preferred under Section 37 of the Arbitration Act before the Division Bench of the Hon’ble High Court were dismissed. Aggrieved, the Appellant approached the Hon’ble Supreme Court of India.

Issue:

Whether the arbitral award deserves to be set aside on the ground of lack of jurisdiction due to improper constitution of the arbitral tribunal or patent illegality.

Held:

The Hon’ble Supreme Court noted that the main thrust of the jurisdictional challenge raised by the Appellant was that the Presiding Arbitrator was appointed after the expiry of 30 days from the date on which the Appellant nominated its Arbitrator and therefore, the Arbitral Tribunal was rendered *coram non jure*. Consequently, the Co-Arbitrators had no power to appoint the Presiding Arbitrator, who could have only been appointed by the Secretary General of the International Centre for Settlement of Investment Disputes, Washington D.C. (“**ICSID**”).

The Hon’ble Supreme Court reviewed the findings of the Arbitral Tribunal and the Hon’ble High Court. Upon a review of Clause 8.3(b) of the Agreement i.e., the disputes resolution clause (“**said Clause**”), the Hon’ble Supreme Court noted that each party was entitled to appoint, within 30 days, a third arbitrator who would preside the arbitration panel, then, on the request of either party, the ICSID would appoint a third arbitrator. The Hon’ble Supreme Court noted that the said Clause was enabling in nature and it did not provide in case the two arbitrators do not succeed in appointing the third arbitrator within 30 days, the two arbitrators will lose their power of appointment of the third arbitrator. It was noted that the consequence of non-appointment of the Presiding Arbitrator within 30 days was not specified in the agreement. Instead, the said Clause merely granted liberty to the parties to seek the appointment of the Presiding Arbitrator, after a period of 30 days, before the ICSID.

The Hon’ble Supreme Court observed that the intent of the said Clause appears to be applicable in cases where both arbitrators cause a delay in the appointment of the third arbitrator, then the parties retain the authority to remedy the delay and after 30 days of such non-

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appointment, they would have liberty to apply to the ICSID to address the delay and the ICSID would appoint the third arbitrator. The Hon'ble Supreme Court expressed its agreement over the manner in which the Arbitral Tribunal interpreted the arbitration clause and its enabling nature. It was noted that the parties in their commercial wisdom drafted a 'fail-safe' into the arbitration clause to deal with a contingency where the Co-Arbitrators failed to appoint the third arbitrator so as to leave the dispute resolution process in the balance.

The Hon'ble Supreme Court opined that, at the first instance when the Co-Arbitrators did not succeed in appointing the third arbitrator within 30 days from Mr. Upasani's appointment, neither party exercised the option to approach the ICSID. If they exercised such an option, upon the contingency being triggered, it could have been argued that despite a request being made before the ICSID, the Co-Arbitrators proceeded to appoint the third arbitrator and therefore the tribunal was improperly constituted. It was noted in the present case, the parties had not exercised the option to approach the ICSID and non-exercise of the contingency does not make the initial part of the arbitration clause *otiose*.

The Hon'ble Supreme Court ruled that the use of the word 'shall' in Clause 8.3(b) indicated that the responsibility was cast on the Secretary General of the ICSID to appoint the third Arbitrator only upon a request made by either of the parties. It was observed that it was nobody's case that a request has been made by either party before the ICSID after 30 days and prior to the appointment of the Presiding Arbitrator by the Co-Arbitrators. The Hon'ble Supreme Court ruled that the enabling clause was permissive and only attracted when the condition precedent of making a request before the ICSID was satisfied.

The Hon'ble Supreme Court opined that another important factor was that once the arbitrators were appointed by the parties which initiated the arbitration by sending a notice, it could not be said that the arbitrators would have to indefinitely wait for the parties to apply before the ICSID in order to appoint a Presiding Arbitrator and for the arbitration to proceed. It was held that such an interpretation would lead to commercial irrationality since till the parties approach the ICSID, the two arbitrators would be left in a state of limbo. Thus, the Hon'ble Supreme Court ruled that the aforementioned interpretation could not have been the intent of the parties within the framework of party autonomy.

The Hon'ble Supreme Court also considered whether the Appellant, by its conduct, waived its right to object to the third arbitrator's appointment. From the record, it noted that the Appellant informed their nominee Arbitrator that there was no conciliation and that it was in fact the Respondent who was delaying the appointment of the

Arbitral Tribunal. In the Respondent's letter, it was made clear to the Co-Arbitrators and the Appellant that it intended to proceed with the arbitration. The Appellant did not reply to the Respondent nor did the Appellant plead that due to elapse of 30 days, the Co-Arbitrators had lost their discretion or competence to appoint the Presiding Arbitrator.

It was observed that the Co-Arbitrators' appointment of Justice Dhanuka (Retd.) was the first instance of non-compliance of the Agreement, and the Appellant ought to have raised an objection in relation to the appointment which it admittedly did not do. Instead, it was the Respondent that objected to aforementioned appointment. It was further observed that when the Co-Arbitrators addressed a letter to the parties enquiring about their interest to continue with the arbitral proceedings, the Respondent had replied in affirmative. However, the Appellant had neither responded to the Respondent's letter nor informed the Co-Arbitrators or Respondent that since more than 30 days had elapsed, the appointment necessarily had to be made by the Secretary General ICSID.

Further, the Hon'ble Supreme Court noted that after the appointment of Mr. John Savage, the Appellant neither raised an objection nor pointed out that the Co-Arbitrator had no power to appoint the third arbitrator. It also noted that when Mr. Anwarul Haque was appointed no objection was raised by the Appellant. It was observed that the Appellant raised their objection for the first time more than a month after the preliminary meeting and later filed an Application under Section 16 of the Arbitration Act.

In this view of above, the Hon'ble Supreme Court ruled that the facts of the case did not reveal a situation where the Appellant under protest participated in the appointment of the third arbitrator. The Hon'ble Supreme Court held that in the present case, the Appellant was completely aware about the non-compliance of a contractual requirement and yet it proceeded with the arbitration process without any demur. It was held that in such circumstances, filing of an application under Section 16 of the Arbitration Act cannot regularize or condone its conduct and such conduct is a relevant consideration to decipher the understanding of the contractual terms while deciding the Section 16 Application on merits by the Tribunal, even in the absence of statutory waiver under Section 4 being attracted.

The Hon'ble Supreme Court opined that no party can be permitted to take the dispute resolution process, the nominee arbitrators or the opposite party for a ride. It was ruled that a party cannot keep a 'jurisdictional ace' up their sleeve and then claim that filing of the jurisdictional challenge under Section 16 would go back

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in time and wipe out the past conduct and acquiescence of the party which would clearly evince how the contractual terms were viewed by the parties. The Hon'ble Supreme Court held that if such conduct was permitted, the basic principles of alternative dispute resolution and ethos of arbitration would get eroded.

Thus, the Hon'ble Supreme Court held that the Hon'ble Single Judge and the Division Bench were completely justified in rejecting interference and refusing to set aside the arbitral award.

3.CONTENTS OF THE STATEMENT OF DEFENCE, RATHER THAN ITS FORM, MUST BE SEEN FOR DETERMINING WHETHER A COUNTER-CLAIM HAS BEEN FILED: BOMBAY HIGH COURT [MARCH 17, 2026]

Introduction:

In the case of **ICICI Securities Ltd. v. Ridhi Siddhi Investment & Anr.** [3], the Hon'ble Bombay High Court held that the contents of the statement of defence, rather than its form, must be looked at in order to determine if a counter claim has been filed. It upheld the award of the majority tribunal which rightly considered the contents of the statement of defence rather than adopting a hyper-technical approach.

Facts:

The Petitioner herein is a Trading and Clearing Member ("**Petitioner**") of the Bombay Stock Exchange ("**BSE**") and the National Stock Exchange Limited ("**NSE**") and is registered with the Securities Exchange Board of India ("**SEBI**"). The Respondent No. 1, a partnership firm, opened a trading account with the Petitioner and also opted for a Margin Trading Facility ("**MTF**"). MTF allows the investor to buy stocks by paying only part of their value and the broker funds the remaining amount and charges interest thereon. The Respondent No. 1 opened a trading account with the Petitioner in the name of the partnership firm.

Respondent No. 1 successfully executed its first trade, purchased certain shares of Indian Oil Corporation Limited ("**IOCL**") and the contract note was issued by the Petitioner. The Respondent No. 1 alleged that the Petitioner forgot to activate the Unique Client Code ("**UCC**") allocated to Respondent No. 1 for the demat account and the mandatory pledge of the purchased shares did not take place. It was stated that the Petitioner erroneously uploaded the PAN details of the partner rather than that of Respondent No. 1. Since there was no pledge to secure the purchased shares, the IOCL shares were auctioned by NSE. As the price of the auctioned IOCL shares shot up, Respondent No. 1 was denied the opportunity of re-purchasing them causing significant losses to Respondent No. 1.

Respondent No. 1 complained to the Relationship manager of the Petitioner who took note of the grievance and conducted an internal system check. It was noted that the non-pledging of shares was due to the inadvertent mistake of uploading the PAN details of one of the partners of the Respondent No. 1. The Petitioner rectified the error following which Respondent No. 1 was able to carry out regular trades under MTF.

Respondent No. 1 lodged a complaint with NSE to avail of the online dispute resolution mechanism. The Petitioner responded to Respondent No. 1's complaint inter alia claiming that the compensation claimed by Respondent No. 1 was towards notional loss which was inadmissible. Respondent No. 1's complaint was referred to NSE's online independent institution for alternate dispute resolution and a Conciliator was appointed. Since the Petitioner and Respondent No. 1 failed to arrive at an agreement, the Conciliator treated the proceedings as unsuccessful; however, the Conciliator quantified the 'admissible claim value / directions by conciliator' at Rs. 75,00,000/- ("**Conciliator's Report**").

Though the ascertainment of the claim value was solely for the purpose of determination of arbitration fees, the he Petitioner challenged the Conciliator's Report before a three-member Arbitral Tribunal . The Petitioner filed its statement of claim ("**SOC**") and the Respondent filed its Statement of Defence ("**SOD**") praying for punishment of the Petitioner and a declaration that compensation of Rs. 75,00,000/- was meagre. During the hearing, the Arbitral Tribunal asked Respondent No. 1 if it had filed a counter claim to which the partner of Respondent No. 1 responded in the negative and further stated that he did not intend to file any counter-claim.

After hearing the parties, the Arbitral Tribunal delivered a split verdict whereby the Presiding Arbitrator concluded that the Petitioner did not have any 'arbitration claim' as per the NSE guidelines and dismissed the arbitration application. It was further observed that Respondent No. 1 did not file any counter-claim and therefore no compensation was payable to it. The two co-arbitrators disagreed with the Presiding Arbitrator's award and delivered a separate majority award holding that Respondent No. 1 made a counter claim of Rs. 75,00,000/- in its Statement of Defence and proceeded to award claim in the sum of Rs. 23,30,000/- to Respondent No. 1 along with interest ("**Majority Award**"). Aggrieved by the Majority Award, the Petitioner filed a petition under Section 34 of the Arbitration Act before the Hon'ble Bombay High Court ("**Hon'ble Court**").

Issue:

Whether the Majority Award's treatment of the SOD as the counter-claim, is so irrational that the award is required to be invalidated in exercise of powers under Section 34 of the Arbitration Act.

[3] 2026:BHC-OS:6747

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Held:

The Hon'ble Court observed that the case involved a unique circumstance where both parties labored under a misconception that the amount of Rs. 75,00,000/- determined by the Conciliator was allowed in favour of Respondent No. 1 due to which the Petitioner challenged the same and the Respondent No. 1 did not find it necessary to file a claim or counter claim.

It was observed that as a matter of fact and law, the Conciliator does not have power to award any sum in favour of or against any party. The Hon'ble Court noted that SEBI issued a Master Circular for online dispute resolution mandating all Stock Exchanges and depositories to establish a common online dispute resolution portal. It was observed that the Master Circular specified that if conciliation failed, the conciliator is required to ascertain the admissible claim value which in the opinion of the conciliator is payable to the investor / client and notify the same to the disputed party and the online dispute resolution institution. The Hon'ble Court noted that the ascertainment of the admissible claim was solely for the purpose of determining the appropriate slab for computation of online arbitration fees and that the arbitrator was not bound by such determination while making the Award. After the claim value is ascertained, the investor / client can pursue arbitration by paying the applicable fees.

In light of the abovementioned findings, the Hon'ble Court observed that the amount in the Conciliator's Report was not the amount awarded to any party or against any party and that, the Petitioner unnecessarily challenged the said Report. It was observed that after receiving notice of the Petitioner's arbitration application, Respondent No. 1 appeared before the Arbitral Tribunal and filed its SOD. The Hon'ble Court noted that the partner of the Respondent No. 1 is a layman and not conversant with arbitration procedure.

The Hon'ble Court observed that the Respondent No. 1's SOD dealt with the merits of the dispute and that Respondent No. 1 filed written submissions before the Arbitral Tribunal justifying entitlement of compensation of Rs. 75,00,000/-. Thus, the Hon'ble Court observed that the Arbitral Tribunal was dealing with the twin issues of (i) sufferance of loss by Respondent No. 1 and (ii) the quantum of the loss. The Hon'ble Court opined that the Petitioner had failed to allege that there was no counter-claim by the Respondent No. 1 and had maintained its position that the Conciliator awarded the Respondent No. 1 Rs. 75,00,000/- in the proceedings under Section 34 as well. Thus, the Hon'ble Court held that the Majority Award rightly proceeded to consider the case of Respondent No. 1 on merits rather than rejecting the same by adopting a highly technical approach of non-filing of a formal counter claim.

The Hon'ble Court ruled that absence of the pleading that the Respondent No. 1 failed to file a counter-claim assumes significance since the Petition was filed after noting the observation of the Presiding Arbitrator in the dissenting award whereby the claim for compensation was rejected on the ground of the Respondent No. 1 not filing any counter-claim. The Hon'ble Court held that in such a circumstance, the Petitioner could not be permitted to orally argue the said ground. It was further ruled that even if the ground of failure to file the counter claim was pleaded, it would have been difficult to uphold the same considering that the Petitioner treated the Conciliator's Report as one awarding a claim in the sum of Rs. 75,00,000/-.

Regarding the merits of the claim awarded in favour of Respondent No. 1, the High Court noted the Petitioner had objected to the same on the ground that what was awarded was notional loss and not actual loss. The Hon'ble Court further noted that the Petitioner did not deny its mistake in uploading the incorrect PAN details and instead admitted the same due to which the Respondent was offered an amount of Rs. 65,000/- plus brokerage of Rs. 35,000/-. Thus, the Hon'ble Court held that the Petitioner admitted its liability to compensate Respondent No. 1 and the issue for consideration was the sum that needed to be awarded to the Respondent No. 1. The Hon'ble High Court observed that the majority award was based on a conservative approach considering the peculiar facts. Respondent No. 1 was granted the difference between the value of the shares as on the date of purchase and the value of the shares as on the date of rectification of error by the Petitioner.

The Hon'ble High Court noted the settled position of law that when conclusion of loss caused to the injured party is reached but the Arbitral Tribunal finds it difficult to quantify the exact amount of loss, the Arbitral Tribunal can enter into the realm of guesswork or apply a rough and ready formula for determining the amount of compensation. The Hon'ble Court opined that in the present case, the majority award adopted an extremely conservative yardstick for determining the value of IOCL shares. It was ruled that the approach by the Arbitral Tribunal could not be treated as irrational. The Hon'ble Court clarified that it was not suggesting an abstract proposition that claims for notional losses can be entertained or awarded in stocks related arbitrations, it was of the view that the facts of the case were so peculiar that they did not warrant exercise of the limited powers under Section 34 of the Arbitration Act.

4.MATTERS MAY BE 'EXCEPTED' FROM ARBITRATION, BUT A VACUUM IN LEGAL REMEDIES CANNOT RESULT: SUPREME COURT OF INDIA [MARCH 23, 2026]

Introduction:

In the case of M/s ABS Marine Services v. The Andaman

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and Nicobar Administration [4], noting the one-sided and discriminatory nature of the contract between a private party and a State and its instrumentality, the Hon'ble Supreme Court of India ruled that matters may be excepted from arbitration however, the same cannot result in a vacuum in legal remedies.

Facts:

A Manning Agreement (“**Agreement**”) was entered into between M/s. ABS Marine Services (“**Appellant**”) and The Andaman and Nicobar Administration (“**Respondent**”) for manning 17 vessels. As per the scope of work, the Appellant was responsible for providing complement of officers on board the vessel at all times. During the subsistence of the Agreement, the vessel started drifting from its intended track due to rough sea with winds and struck a submerged rock. At high tide, it refloated on its own and using its engines proceeded to be berthed. However, damage was done.

The Respondent issued a Show Cause Notice to the Appellant for imposition of penalty and initiation recovery process. Upon the Appellant's denial of any liability, the Respondent unilaterally recovered a sum of Rs. 2,87,84,305/- from the pending bills of the Appellant. Eventually the dispute was referred to arbitration.

The Arbitrator passed an award and held that Clause 3.20 of the Agreement (“**Clause 3.20**”), a prohibitory clause, was void and contravened Section 28 of the Indian Contract Act, 1872 (“**Contract Act**”) since it entirely prohibited the parties from invoking arbitration and restrained any decision from being challenged before any court. The Arbitrator found that the arbitration clause i.e., Clause 3.22 (“**Clause 3.22**”) was widely worded and Clause 3.20 had to be read with Clause 3.22 since reading them in isolation would leave the claimant without a remedy. It was found that the Respondent had accepted that arbitration was permissible and never pleaded in any court that the Arbitrator could not be appointed as recovery was made under Clause 3.20. The Arbitrator held that the Respondent could not be permitted to claim that the arbitration proceedings were without jurisdiction. The Arbitrator ordered payment of Rs. 2,87,84,305/- with interest and costs.

The Respondent challenged the Award under Section 34 of the Arbitration Act but the same was dismissed by the Hon'ble District Judge who also held that Clause 3.20 was contrary to Section 28 of the Contract Act. On a further appeal before the Division Bench of the Hon'ble Calcutta High Court (“**Hon'ble High Court**”), the award was set aside stating that the parties could decide which disputes were arbitrable and which were not. It was held that the arbitrator who is the creature of the agreement may not have any authority to decide the propriety of such an agreement or the relevant clause except to the extent that it concerns his jurisdiction and that the courts may have plenary authority to decide the validity of the clause.

Issue:

Whether the aforementioned reasoning of the Hon'ble High Court, while allowing the Section 37 appeal of the respondent under the Arbitration Act, is correct in law.

Held:

At the outset, the Hon'ble Supreme Court examined the meaning of the Clause 3.22 and noted that it was widely worded encapsulating any dispute between the parties. It then proceeded to review the scope of Clause 3.20 and noted that a willful act of omission or neglect by the Manning Agent or his Personnel/Complement causing loss of life accidents or serious financial loss was to be treated as default. It was noted that it was the Respondent's right to recover financial loss that occurred to it or the vessel due to the willful action / omission / commission or negligence of the agent or its employees on board from the amounts due to the agent. In cases where the quantum of financial loss exceeded the amounts due to the agent including performance bank guarantee, the Respondent could initiate proceedings against the agent for the recovery of the difference amount. It was further noted that the Respondent's decision was stipulated to be final and binding on the agent and could not be challenged in any Court of law and no arbitration proceedings could be conducted on this account.

The Hon'ble Supreme Court ruled that whether there was an act of willful omission or negligence could not be decided by the Respondent which is itself the party alleging the breach. It was opined that if the interpretation canvassed by the Respondent was accepted, the fundamental principle of Rule of Law that no party should be a judge in its own cause would be violated. The Hon'ble Supreme Court held that when the Appellant disputed the willful action or negligence, the same had to be adjudicated. It was ruled that Clause 3.20 could be resorted to only where willful action or negligence is disputed and in such a scenario, the quantification could be done by the administrator.

The Hon'ble Supreme Court held that if the Respondent's contention was to be accepted, the same would strike the very heart of the legal maxim '*Ubi jus ibi remedium*' – there is no wrong without a remedy. It was further held that Clause 3.20 was alarming since it barred any action either in a court of law or before a n arbitrator. It was ruled that it is a fundamental rule of interpretation that no construction could be placed which would lead to a vacuum in legal remedies. The Hon'ble Supreme Court rejected the Respondent's contentions and held that the dispute was within the jurisdiction of the Arbitrator.

The Hon'ble Supreme Court thus held that a party to a contract cannot decide whether the other party was in willful breach or has committed neglect when the liability by the other party is disputed. It was ruled that Clause

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3.20 stands only in those cases where a manning agent admits its liability and wants to question the quantum fixed by the administration. It was noted that in the facts at hand, the same was not applicable and hence the Respondent's contention that the arbitrator entered into the arena of an "excepted matter" did not arise. It was observed that matters may be 'excepted' from arbitration, but a vacuum in legal remedies cannot result. It was observed that it must be pointed out that a dispute falls within the domain of an "excepted matter", however, no such arguments in this respect were made by the Respondent.

In light of the foregoing facts, findings and observations, the Hon'ble Supreme Court ruled that the Arbitrator had correctly held that the clauses of the Agreement had to be harmoniously construed and therefore, the Hon'ble Supreme Court set aside the judgment of the Hon'ble High Court and allowed the Petitioner's appeals, thereby restoring the arbitral award.

5.REJECTION OF APPLICATION FOR IMPLEADMENT OF A NON-SIGNATORY FALLS WITHIN THE AMBIT OF SECTIONS 16(2) & (3) AND IS APPEALABLE UNDER SECTION 37: DELHI HIGH COURT [MARCH 23, 2026]

Introduction:

The Hon'ble Delhi High Court ("Hon'ble Court") in the case of **Era Infra Engineering Limited v. National Highways Authority of India & Anr.** [5] held that an appeal filed against an order rejecting an Application for impleadment is maintainable under Section 37 of the Arbitration Act. It was further ruled that while deciding applications for impleadment, the intention of the parties is to be gathered from the clauses of the contract and nothing beyond it. It was held that there could not be a blanket proposition that a non-signatory cannot be impleaded and that the tribunal is vested with jurisdiction to implead a non-signatory connected with or bound by the agreement.

Facts:

The National Highways Authority of India ("Respondent") issued a notice inviting Tenders for a project. ERA Infra Engineering Limited ("Appellant") along with Open Joint Stock Company (OJSC)-SIBMOST entered into a Joint Bidding Agreement and bid as a consortium. They were awarded the said project and as per the Request for Qualifications ("RFQ") and the Letter of Acceptance ("LOA"), a Special Purpose Vehicle ("SPV") was incorporated. The LOA required the Concessionaire i.e., the SPV to furnish an unconditional bank guarantee of Rs. 37.70 crores as performance security.

The SPV and the Respondent entered into a Concession Agreement ("CA"). An Engineering Procurement and Construction Agreement ("EPC Agreement") was executed between the Appellant and the SPV for execution of the project. Owing to disputes between the parties, the CA was terminated by the Respondent and the SPV invoked arbitration. The Appellant filed an application under Section 16 of the Arbitration Act pleading to be a necessary party to the arbitral proceedings and to be bound by the CA despite not being a signatory to the same. The Application was rejected by the Tribunal holding that the CA was between the SPV and the Respondent and that the Tribunal being a creature of the contract should not ordinarily implead a non-signatory as a party. Accordingly, the Tribunal held that it did not have the it would be exceeding the scope of its authority by impleading the appellant as a party. Aggrieved by the award of the Tribunal, the Appellant approached the Hon'ble Court under Section 37 of the Arbitration Act. The Respondent raised a preliminary objection that the Appeal under Section 37 of the Arbitration Act was not maintainable as rejection of an impleadment application did not fall within the ambit of Section 37(2)(a) nor did it amount to acceptance of a plea under Section 16(2) and 16(3) of the Arbitration Act.

Issue:

Whether the order of the Tribunal rejecting the application for impleadment is appealable under Section 37 of the Arbitration Act.

Held:

The Hon'ble Court noted that under Section 37(1) of the Arbitration Act, an appeal against the court orders mentioned therein shall lie to the court authorized to hear appeals against original decrees of such court. Under Section 37(2)(a), an appeal shall lie against an order of the tribunal accepting a plea referred to in sub-sections (2) or (3) of Section 16. The Hon'ble Court also noted that the said provision bars an appeal against any order apart from those specifically mentioned. Further, the Hon'ble Court stated that Section 16 of the Arbitration Act empowers the tribunal to rule on its own jurisdiction.

The Hon'ble Court referred to the decision of the Hon'ble Supreme Court in *Cox & Kings Ltd. v SAP India (p) Ltd. & Anr.* (2024) 4 SCC 1 wherein it was held that determination of parties to the agreement is an issue touching upon the competence of the tribunal. The Hon'ble Court further referred to the decision in *ASF Buildtech (P) Ltd. v Shapoorji Pallonji & Co. (P) Ltd.* (2025) 9 SCC 76 wherein it was held that if the issue of impleadment of a non-signatory is decided by the referral court, the party would have no statutory remedy against

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an order rejecting the prayer of impleadment. Drawing from the aforesaid, the Hon'ble Court observed that the court, on an application for impleadment, passes a procedural order; however, the tribunal in arbitration determines the existence of its jurisdiction vis-à-vis the rights and liabilities of a non-signatory to the agreement. Thus, while deciding the impleadment of a non-signatory, the tribunal deals with issue of jurisdiction and this falls within the ambit of Sections 16(2) and 16(3) of the Arbitration Act.

In view of the above, the Hon'ble Court opined that if the preliminary objection of the Respondent is accepted, the only remedy available to the Appellant would be under Section 34 of the Arbitration Act i.e., after passing of the arbitral award. It was held that prejudice would be caused to the Appellant for having to challenge the award within the limited scope of Section 34 of the Arbitration Act especially without participating in the arbitral proceedings. The Hon'ble Court further opined that if, under Section 34 it is concluded that the Appellant, in spite of being a non-signatory, is a necessary party, the entire proceedings shall come to naught for non-impleadment of a necessary party in arbitral proceedings. It was observed that this would result in delay which would be contrary to the basic objective of speedy and efficient dispute resolution through arbitration.

In light of the aforementioned findings and observations, the Hon'ble Court noted that the SPV was incorporated pursuant to the LOA and the EPC Agreement was executed by the SPV with the Appellant. The Hon'ble Court further observed that the Appellant continued to remain involved in the project and that there was a clear understanding between the consortium and the NHAI that the members of the consortium had accepted the terms and conditions of the CA.

The Hon'ble Court observed that there was a mutual intent between the parties to bind the members of the consortium in relation to the project and that the relationship between the Appellant and the SPV was evident from the financial structuring of the project. It was noted that the performance of the contract affected not only the SPV, but also the Appellant. Further, the consequences of non-performance had a potential impact on the Appellant.

In view of the above, the Hon'ble Court held that while deciding the application for impleadment the intention of the parties is to be gathered from the clauses of the contract and nothing beyond it. It ruled that there cannot be a blanket proposition that a non-signatory to an agreement cannot be impleaded as a party in arbitral proceedings. The Hon'ble Court held that the tribunal is vested with the jurisdiction to implead a non-signatory connected with or bound by the agreement. Holding that the intricate connection between the Respondent, the SPV, the consortium and its members including the

Appellant, was prima facie established, the Hon'ble Court ruled that the Appellant was a proper and necessary party.

6.MERE PARTICIPATION IN ARBITRAL PROCEEDINGS DOES NOT ESTOP A PARTY FROM CHALLENGING THE ARBITRAL PROCEEDINGS WHEN THE ARBITRATOR LACKS INHERENT JURISDICTION: SUPREME COURT OF INDIA [MARCH 24, 2026]

Introduction:

The Hon'ble Supreme Court, in the case of **M/s. Bharat Udyog Ltd. (formerly known as M/s. Jai Hind Contractors Pvt. Ltd.) v. Ambernath Municipal Council Through Commissioner & Anr.** [6] ruled that as per Section 2(a) of the Arbitration Act, 1940 ("1940 Act"), in the absence of a written agreement, parties cannot submit their disputes to arbitration. It was further ruled that mere participation in arbitration proceedings would not amount to estoppel if a party was forced into arbitration without consent and contract.

Facts:

The Ambernath Municipal Council ("**Respondent**") in March 1994, issued a tender for the collection of octroi for a period of one year. The tender notification provided for a reserve price with the term that any offer lower than Rs. 6,74,00,000/- may not be considered and would be rejected. Having submitted its bid for an amount of Rs. 6,75,00,000/-, M/s. Bharat Udyog Ltd. ("Petitioner") was declared successful and the Respondent entered into an agreement with the Petitioner for octroi collection.

After execution of the agreement, the Petitioner commenced work, however, later, the Petitioner addressed a letter to the Respondent requesting that the amount of Rs. 6,74,00,000/- fixed as a minimum reserve price / bid amount be reduced by Rs. 40,78,517/- on the ground that the same was contrary to the norms to determine the minimum reserve price. This was rejected by the Respondent informing that the minimum reserve price for the said tender was fixed as per the guidelines issued by the Government of Maharashtra.

Aggrieved, the Petitioner approached the Hon'ble Bombay High Court ("**Hon'ble High Court**"). However, the Petitioner sought leave to withdraw its Petition with liberty to adopt appropriate proceedings. Following this, the Petitioner approached the Urban Development Department of the Government of Maharashtra and requested the State Government to appoint an arbitrator to resolve the dispute raised by the Petitioner to reduce the minimum reserve price from Rs. 6,74,00,000/- to Rs. 6,33,71,483/-.

Though the State Government was not connected to the agreement, it responded favourably and by a

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Government Resolution, appointed the Commissioner, Konkan Division as an Arbitrator for the dispute. The said Government Resolution recorded that the same was issued under the provisions of Section 143-A(3) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (“said Act”) and as a special case. The Arbitrator was also required to submit an arbitration report to the State Government within one month and conduct the arbitration in accordance with the 1940 Act.

The Arbitrator delivered his award holding that the minimum reserve price of Rs. 6,74,00,000/- as fixed by the Respondent was incorrect and that the minimum reserve price ought to have been Rs. 6,20,89,843/-. The Petitioner proceeded to file a Miscellaneous Application before the Court of the Hon’ble Civil Judge Senior Division (“Hon’ble Civil Judge”) under Section 14 read with Section 17 of the 1940 Act, seeking that the award be made a rule of the Court. Prior to the award being passed, the Respondent addressed a letter to the Minister, Urban Development Department inter alia complaining that the Government Resolution appointing the Arbitrator was issued unilaterally. It was pointed out that there was no provision under the agreement whereby the State Government could appoint an arbitrator. The Respondent also approached the Collector requesting that the arbitrator’s appointment be cancelled.

The Respondent also objected to the Miscellaneous Application filed by the Petitioner and prayed that the Petitioner’s application be dismissed. The Hon’ble Civil Judge noted the Respondent’s submission ; however, proceeded to hold that the objection was barred by limitation. The Petitioner’s Miscellaneous Application was allowed and the Hon’ble Civil Judge directed that a decree be drawn up in terms of the arbitral award. Aggrieved, the Respondent approached the Hon’ble High Court which reversed the decision and set aside the award. Therefore, the Petitioner approached the Hon’ble Supreme Court.

Issue:

Whether the disputes in the present case could be adjudicated through arbitration.

Held:

The Hon’ble Supreme Court noted that the Respondent was a statutory authority, a body corporate with perpetual seal and succession. It further noted that it takes its own decision for the matters with respect to which it has power, jurisdiction and functions to perform. The Hon’ble Supreme Court observed that while Section 143A(3) of the said Act prescribes that the State Government could issue policy directions regarding the manner and procedure by which the power is to be exercised, such power could not, under any circumstances, be extended to appoint an arbitrator

unilaterally, notwithstanding the statutory or contractual relationship that may exist between the Municipal Council and its agent.

The Hon’ble Supreme Court also examined the dispute resolution clause of the agreement and noted that the parties did not agree upon resolving existing disputes through arbitration and that the same provided that a dispute would be referred to the Collector and his decision would be final. It was noted that the dispute resolution clause enabled the parties to file an appeal against the decision of the Collector to the Deputy Commissioner and thereafter to the Urban Development Department. The Hon’ble Supreme Court observed that the dispute resolution clause left no space for resolution of disputes through alternative dispute resolution methodology. It was observed that the reason was that octroi is an important source of income and the power to impose and collect octroi is integral to the jurisdiction and functioning of Municipal bodies and therefore, the power to resolve disputes is kept within the governmental hierarchy.

Upon a review of the findings of the Hon’ble High Court, the Hon’ble Supreme Court agreed with the same and ruled that the special leave petition lacked merit for reasons centered on the following:

1. Absence of a valid arbitration agreement – There was no written agreement between the parties to submit differences to arbitration as per the requisites of Section 2 (a) of the 1940 Act.
2. Lack of Jurisdiction for Appointment – The State Government had no authority under Section 143-A(3) of the said Act to appoint an arbitrator. Further, the exercise of such power by the government cannot be equated to Section 4 of the 1940 Act.
3. Absence of Mutuality – The requirement of *consensus ad idem* for creation of an arbitration agreement as per Section 2 (a) of the 1940 Act was absent.
4. Void Proceedings and Nullity of Award – Since the Arbitrator lacked inherent jurisdiction, the entire proceedings were a nullity and the award was *non-est*.
5. Participation does not confer Jurisdiction – There is no estoppel against the Respondent merely because it initially participated in the arbitral proceedings since they were forced into arbitration without consent and contract.
6. Propriety of Arbitral Proceedings – Arbitral Proceedings were perfunctory and started and concluded in a short period. The circumstances relating to the making of the award indicated in the judgment of the Hon’ble High Court did not warrant interference.

In light of the above, the Hon’ble Supreme Court concluded that there was no merit in the special leave petition and accordingly, the same was dismissed.

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7. IF MERITS HAVE BEEN EVALUATED BY SEAT COURT, ENFORCEMENT COURT IS BARRED BY THE DOCTRINE OF “TRANSNATIONAL ISSUE ESTOPPEL”: SUPREME COURT OF INDIA [MARCH 25, 2026]

Introduction:

The Hon’ble Supreme Court in the case of **Nagaraj V. Mylandla v. PI Opportunities Fund-I & Ors.** [7] held that it was not open to a party whose contentions had been rejected on merits by the seat court to seek a review of the same by the enforcement. It was ruled that such a ‘merits based’ evaluation would be barred by the application of the doctrine of ‘transnational estoppel’ and would be beyond the scope of the enforcement court’s jurisdiction under Section 48 of the Arbitration Act.

Facts:

Background:

In the present case, disputes arose between Financial Software and Systems Private Limited (“FSSPL”), Nagaraj V. Mylandla and Sharada Mylandla (“**Petitioners**”), promoters of FSSPL and NYLIM Jacob Ballas India (FVCI) III LLC along with NYLIM Jacob Ballas India Fund III LLC (“**Nylim I & II**”) (*collectively referred to as “Investors”*). The disputes arose in the context of the ‘exit’ to be provided to the Investors who alleged that FSSPL and its promoters failed to provide them with an exit. Reference to arbitration was made to the dispute resolution clause of the Share Acquisition and Share Holders Agreement (“**SASHA**”), which provided for arbitration. The SASHA was to be governed and construed as per the laws of India and the Courts at Chennai were to have the exclusive jurisdiction over all matters and disputes arising from the SASHA. The Arbitration Rules of Singapore International Arbitration Centre (“**SIAC Rules**”) were to apply to the arbitration and the seat of arbitration was at Singapore.

Impugned Award:

The dispute between the parties was adjudicated by a 3 – member arbitral tribunal (“**Arbitral Tribunal**”). The Arbitral Tribunal observed that Clause 19 of the SASHA vested an absolute obligation upon FSSPL and its promoters to provide an exit to the Investors and requisite notice was given by them. The Arbitral Tribunal took up the exercise of fixing the fair market value of FSSPL’s shares and the ‘exit prices’ were accordingly worked out for the Investors. The Arbitral Tribunal also considered whether the Investors were entitled to claim specific performance by way of enforcing a strategic sale and also to terminate the rights of the promoters. Finally, the Arbitral Tribunal passed a unanimous award (“**Award**”) holding FSSPL and the Petitioners jointly and severally liable to pay damages equivalent to the

“exit price” of the shares as on September 18, 2020. The Arbitral Tribunal held that in the event the damages were not paid by the Petitioners to the Investors within 90 days, the Investors would be entitled to enforce a strategic sale.

Proceedings before the Hon’ble Singapore High Court i.e., Seat Court:

The Petitioners challenged the Award before the General Division of the High Court of the Republic of Singapore (“**Hon’ble Singapore High Court / Seat Court**”). The two grounds urged by the Petitioners were that the Arbitral Tribunal breached the ‘fair hearing rule’ by failing to consider their ‘waiver defence’ and their ‘buy-back defence’.

The Hon’ble Singapore High Court opined that though the ‘waiver defence’ was a standalone defence to the Investors’ claim, the Arbitral Tribunal was not required to expressly address or articulate its decision on that defence. The Hon’ble Singapore High Court further observed that the Petitioners had failed to establish that the breach of natural justice prejudiced their rights. The Hon’ble Singapore High Court dismissed the challenge and thus, the Award was upheld the Seat Court. It is pertinent to note that the order of the Singapore High Court was appealable, however, the Petitioners did not opt for the same.

Proceedings before Hon’ble Madras High Court i.e., Enforcement Court:

The Investors filed petitions under Sections 47 to 49 of the Arbitration Act before the Hon’ble Madras High Court (“**Hon’ble Madras High Court / Enforcement Court**”) for enforcement of the Award. The Petitioners objected to the same under Section 48 of the Arbitration Act on similar grounds as those raised before the Seat Court and that enforcement of the Award would be contrary to the public policy of India.

The Hon’ble Madras High Court extensively examined the law on the subject and observed that Section 48 of the Arbitration Act did not preclude application of the doctrine of ‘transnational issue estoppel’ and that the fundamental policy of Indian law was a broad concept, particularly in the context of arbitration, comprising of core legal tenets. Noting the judgement of the Seat Court, the Hon’ble Madras High Court held that the Petitioners had failed in their attempt to challenge the arbitral award before the Seat Court and were therefore making a last-ditch effort to thwart the enforcement of the award by raising untenable grounds. Finally, the Hon’ble High Court held that the Award was enforceable and deemed the same to be a decree passed by the Court.

Aggrieved by the order of the Hon’ble Madras High Court, the Petitioners approached the Hon’ble Supreme Court of India.

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Issue:

Whether the doctrine of ‘transnational issue estoppel’ is applicable in the present case where a challenge was raised on the ground of ‘public policy’.

Held:

The Hon’ble Supreme Court noted the statutory scheme of the Arbitration Act and reviewed the provisions of Section 46 of the Arbitration Act which provides that any foreign award which would be enforceable under Chapter I in Part II shall be treated as binding for all purposes on the persons between whom it was made and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in India. It was noted that Section 48 (2) (b) of the Arbitration Act provides that the effect of enforcement of an arbitral award may be refused if the court finds that the enforcement of the award would be contrary to the public policy of India. Section 49 of the Arbitration Act states that where the court is satisfied that the foreign award is enforceable under Chapter I, the award shall be deemed to be a decree of that court. It was noted that Section 50 is titled ‘Appealable orders’ and provides under sub-section (1)(b) that an appeal would lie from an order refusing to enforce a foreign award under Section 48 to the court authorized by law to hear appeals from such order. Section 50(2) further provides that no second appeal would lie from an order passed in appeal under Section 50 but nothing would affect or take away any right to appeal to the Hon’ble Supreme Court.

The Hon’ble Supreme Court opined that though the grounds under Section 48 of the Arbitration Act would have to be applied independently, in the course of exercise by the enforcement court in India, a party which has failed in its challenge to the arbitral award before the Seat Court cannot seek to reopen factual issues that were argued on merits and settled by such court once again before the Enforcement Court. It was observed that the sovereign commitment to India to honour foreign awards, except on the exhaustive grounds specified under Article V of the New York Convention had to be adhered to. It was noted that Article V did not advert to what circumstances the Enforcement Court could recognize and enforce such awards. The Hon’ble Supreme Court opined that the Enforcement Court cannot open factual issues which were conclusively settled on merits by the decision of the seat court.

The Hon’ble Supreme Court noted that based on the above context, the doctrine of ‘transnational issue estoppel’ extends the principle of ‘issue estoppel’ to international commercial arbitration and the arbitral awards that arise therefrom.

The Hon’ble Supreme Court referred to multiple case laws on the doctrine of transnational issue estoppel and observed that in the present case the Arbitral Tribunal specifically mentioned in the award that it had carefully and fully considered the applicable law i.e., Indian law. The Hon’ble Supreme Court stated that although the Arbitral Tribunal had considered Indian law, the Enforcement Court was to necessarily consider the challenge to the award in the context of the ‘public policy of India’ ground urged before it. Despite the aforementioned observation, the Hon’ble Supreme Court opined that in the guise of mounting such an attack, it was not open to the party whose contentions had been rejected on the merits by the Seat Court to seek a review of such rejection by the Enforcement Court. It was held that such a ‘merits based’ evaluation was beyond the scope of the Enforcement Court’s jurisdiction under Section 48 of the Arbitration Act and the same would be barred by the application of the doctrine of ‘transnational issue estoppel’.

The Hon’ble Supreme Court ruled that by giving a different colour to a factual issue, it is not open to a party to a foreign award to seek to bring it within the ambit of Section 48 (2) (b) of the Arbitration Act by raising a ‘public policy’ ground. It was held that the doctrine of ‘transnational issue estoppel’ would bar the same. The Hon’ble Supreme Court held that once the Seat Court decided an issue, the same stood settled once and for all and it was not open to the Petitioners to re-open the same under Section 48(2)(b) of the Arbitration Act.

Against this background, the Hon’ble Supreme Court examined the contentions of the Petitioners in relation to the Buy-back of shares, election of remedies by the investors, violation of the provisions of the Specific Relief Act, 1963, termination of rights of the Petitioners, and found the said contentions to be without merit and substance. Accordingly, the special leave petitions stood dismissed.

8.CLAIMANT MUST PROVE ACTUAL LOSS IN ORDER TO CLAIM DAMAGES ELSE REASONABLE DAMAGES MUST BE ASSESSED: DELHI HIGH COURT [MARCH 28, 2026]

Introduction:

The Hon’ble Delhi High Court (“**Hon’ble Court**”), in the case of UEM India Pvt. Ltd. v. ONGC Ltd. [8] held that in order to claim damages under Section 73 of the Indian Contract Act, 1872 (“**Contract Act**”), the claimant would have to prove actual loss and if it was not possible to prove the same, reasonable damages must be assessed. It was ruled that if the basis for quantification is absent, the award of damages would be vitiated for violation of Section 31 (3) of the Arbitration Act which requires a reasoned award to be passed.

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Facts:

The Petitioner i.e. M/s UEM India Pvt. Ltd. (“**Petitioner**”) was the successful bidder in a tender invited by Oil and Natural Gas Corporation (“**Respondent**”) for installation of one Effluent Treatment Plant (“**ETP**”) and three ETP cum Water Injection Plants. The parties entered into a contract on lump sum turnkey basis and the work was awarded for a lump sum amount of Rs.1,19,34,58,347/-. The project was to be completed within thirty-four months from the date of issuance of the Notification of Award (“**NOA**”).

Clause 27 of the General Conditions of Contract (“**GCC**”) provided for dispute resolution through arbitration which the Petitioner invoked. The Petitioner claimed prolongation costs, losses on account of being placed on a holiday list and amounts towards resources committed / consumed, damages, interest on capital cost and illegal invocation of the Advance Bank Guarantee (“**ABG**”) and Performance Guarantee (“**PG**”). The Respondent filed a counter claim seeking compensation towards restitution of loss and damages on account of payments made to third party vendors, production and revenue loss due to non-performance by the Petitioner, establishment costs for the Petitioner’s acts of omission, costs of re-tendering, Liquidated Damages (“**LD**”), refund for provisional progressive payments, PG, interest on non-utilization of advances given by the Respondent to the Petitioner and compensation of the loss and damages due to the wilful non-performance of the contract by the Petitioner.

Eventually, the claim of the Petitioner for services rendered for soil investigation was accepted by the Arbitral Tribunal, the invocation of the ABG was held to be illegal and the Respondent was directed to refund it along with interest @ 12% from the date of encashment till filing of the statement of claim. Interest *pendente lite* was awarded @ 9% p.a. The counter claim for LD was accepted and interest @ 12% was granted from the date of termination of the contract till the counter claim was filed along with *pendente lite* interest @ 9% p.a.

The Petitioner filed a Petition under Section 34 of the Arbitration Act being aggrieved that the damages awarded to the Respondent were over and above the LD and equivalent to the PG along with grant of interest thereon.

Issues:

1. Whether the arbitral tribunal can award damages over and above the liquidated damages;
2. Whether the damages if awarded are legally sustainable.

Held:

The Hon’ble Court noted the Tribunal’s holding that the Respondent was entitled to encash the PG since the Petitioner had completed only 5.86% of the contract which was a miniscule fraction of the work and that the Tribunal considered the economic viability of the project and the abandonment of the contract by the Petitioner. While examining the legal tenability of the award of damages to the Respondent the Hon’ble Court reviewed case law as well as the provisions of the GCC. It was noted that under Clause 3.3.1 the Petitioner had to furnish an unconditional and irrecoverable bank guarantee equivalent to 10% of the contract price for due performance of the contract. As per Clause 3.3.3, the Respondent was entitled to invoke the PG on failure of the Petitioner to honour the contractual obligations. Clause 3.3.5 provided that if there was a delay in completion, the Respondent could operate the PG for recovery of the LD. As per Clause 6.3.2, the Respondent could recover the LD @ 0.5% per week subject to maximum of 10% of the contract price if the work was not completed within the scheduled time. It further stated that upon partial completion and acceptance of part of the work, the LD would apply only to the balance work. The Hon’ble High Court held that a conjoint reading of Clauses 3.3 and 6.3.2 indicated that they operate in different fields. It was observed that Clause 3.3 pertained to securing due performance of the contract and enabled invocation of the PG in case of breach whereas Clause 6.3.2 governs the levy of LD for delay in completing the work.

The Hon’ble Court noted that there was no challenge to the LD awarded for delay in completion of the project. It was further noted that it was undisputed that only 5.86% of the project was completed by the Petitioner and that consequently the PG was invoked and that the main challenge was the quantification of damages in spite of the Respondent’s failure to prove actual loss. It was noted that Clause 3.3 did not stipulate for quantification of damages. In order to claim damages under Section 73 of the Contract Act, the Claimant has to prove the loss suffered and in case it is not possible to prove the actual damages, a reasonable amount of damages is to be assessed. The Hon’ble Court observed that it was neither the case set up before the Tribunal nor was it held that in the facts of the present case, actual damages could not be proved. It was observed that the Respondent failed to prove the counter claims in relation to compensation towards restitution of loss and damages on account of payments made to third party vendors, production and revenue loss due to non-performance by the Petitioner and establishment costs for the Petitioner’s acts of omission. The Hon’ble Court observed that in the absence of proof of actual damages and without

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recording a finding that actual damages could not be proved, the Tribunal proceeded to conclude that 10% of the contract value would be reasonable damages to be awarded over and above the LD. It ruled that the basis for quantification was missing and the award of damages is vitiated for violation of Section 31 (3) of the Arbitration Act whereby a reasoned award is required to be passed.

The Hon'ble High Court observed that the award was self-contradictory as on one hand the Tribunal rejected the counter claims under specific heads for want of proof and on the other hand it awarded damages over and above the LD without identifying the heads of loss suffered. It was ruled that the award of damages was contrary to public policy as it was against the law laid down by the Supreme Court and was in violation of Section 73 of the Contract Act. In this view of the matter the Hon'ble Court set aside the award to the extent of allowing the counter claim of the Respondent awarding damages to the tune of the PG over and above the LD.

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Sonali Mishra - Partner
(Media & Entertainment)

We are delighted to welcome Ms. Sonali Mishra as a Partner in our Media & Entertainment Practice at ANM Global's Hyderabad office.

New office. New Partner.
ANM Global continues its growth in Hyderabad with Ms. Sonali Mishra joining the Media & Entertainment Practice as Partner.

ANM Global advised Applause Entertainment on its Master Agreement with StoryTV App (By Eloelo group), a leading microdrama platform in India, marking an exclusive collaboration to create a curated slate of premium microdramas and push the boundaries of short-form storytelling.



Applause Entertainment & Story TV
to pioneer a new microdrama
revolution in India

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ANM Global is pleased to have represented Tumbaga Media Private Limited (Studio9), successfully advising in relation to all production and exploitation related agreements in relation to the audio-visual content.

ANM Global is pleased to have represented RKD Studios (RK Duggal Studios Private Limited), successfully advising for the acquisition and exploitation of dubbing rights of the film in Hindi and other global languages (excluding South Indian languages).



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ANM Global is pleased to have represented Turtle Adverts (AK Enterprises), providing legal support in drafting, negotiating, and executing agreements with the film's producers for in-film brand integrations.

ANM Global is proud to have successfully represented Applause Entertainment Private Limited, providing comprehensive legal advisory for the Film as well as end-to-end legal support towards drafting, reviewing and negotiation of all production related agreements and exploitation agreement.



ANM Global is proud to have successfully represented Pocket Aces Pictures Private Limited (Clout), providing legal advisory towards negotiating and executing the agreements for influencer Mr. Ravish Shetty for his participation in the reality show.

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