



## ERGO

*Analysing developments impacting business*

### BOMBAY HIGH COURT REFUSES ANTI ARBITRATION INJUNCTION AGAINST ARBITRATION PROCEEDINGS ON THE QUESTION OF APPOINTMENT OF THE TRIBUNAL

26 December 2018

On 17 December 2018, the Hon'ble Bombay High Court (Court), in *Ravi Arya & Ors v. Palm View Overseas Limited & Ors*, passed an important order in relation to an anti-arbitration injunction sought by the Plaintiffs in the matter, against an arbitral proceeding seated in Mumbai.

The Court held that a challenge to the constitution of the tribunal is covered under Section 13 of the Arbitration and Conciliation Act, 1996 (Act) and can be raised at the time of challenging the award under Section 34. Further, the Court also held that where a party has made an application / objection before the arbitral tribunal, challenging the constitution / jurisdiction of the tribunal and such application has been dismissed by the arbitral tribunal, the party does not have the recourse of raising similar issues before a court in a fresh suit.

The Court drew inference that only an order upholding lack of jurisdiction under Section 16 of the Act can be appealed against under Section 37 of the Act and there is no recourse of appeal where the tribunal holds that it has jurisdiction. Therefore, such applications seeking injunctions cannot be entertained.

#### **Brief facts of the case**

Defendant No. 1 was a strategic investor (Investor) in Defendant No. 2 company (Company) and held 49% shares of the Company. The Plaintiffs were one of the promoter groups of the Company. The promoter groups of the Company had disputes *inter se* and thereafter, certain disputes also arose between the Investor and other shareholders of the Company in relation to obligations under the SHA. Accordingly, an arbitral tribunal was constituted to hear the disputes under the SHA between the Investor and other shareholders and the Company. The Plaintiffs, being aggrieved by the constitution of the arbitral tribunal, raised objections challenging the propriety of its constitution. The objections / application of the Plaintiffs was heard and dismissed by the arbitral tribunal against the Plaintiffs. The same was also recorded in the minutes of the arbitral hearing and order of tribunal. Thereafter, the Plaintiffs filed a suit before the Court *inter alia* seeking an anti-arbitration injunction restraining the Defendants (including the Investor) from proceeding with the arbitration, *inter alia* on the ground that the arbitral tribunal was not properly constituted.

### **Arguments on behalf of the Plaintiff**

- The arbitral tribunal was improperly constituted, since one of the arbitrators was nominated on behalf of the Company without proper authorisation and without consulting the Plaintiffs.
- Given such improper appointment, the purported tribunal could not be considered an 'arbitral tribunal' for the purposes of the Act and had no authority in law. As such, provisions of the Act were inapplicable in the present circumstances.
- Accordingly, the Plaintiff sought a declaration and injunction restraining further proceedings in the arbitration.

### **Arguments on behalf of Defendants**

- The Plaintiffs had already raised all these grounds in their application / objection filed before the arbitral tribunal. After considering the said objections, the arbitral tribunal had passed a speaking order dismissing the application / objections.
- Sections 13 (4) and (5) of the Act prescribe the correct procedure for making challenges / objections to the constitution or jurisdiction of an arbitral tribunal.
- Section 34 (2)(a)(v) of the Act specifically permits a challenge to an arbitral award on the ground that the arbitral tribunal was not properly constituted. Plaintiff could not circumvent this process and approach the Court prematurely in a suit to avoid arbitration proceedings.
- Appointment of the tribunal was proper and nomination of arbitrator was undertaken pursuant to a board resolution of the Company specifically providing authority to appoint arbitrators.

### **Reasoning of the Court**

- In the application filed before the arbitral tribunal, the Plaintiffs had raised similar grounds and objections, as those raised before the Court in the suit / interim application.
- The objections of the Plaintiffs had already been heard and dismissed by the tribunal by a speaking order after due consideration.
- In terms of Section 13 clause (4) and (5) read with Section 34 (2)(a)(v) of the Act, since the arbitral tribunal had rejected the application of the Plaintiffs, the tribunal was required to continue proceedings and pass an award. Once such award was passed, it was open for any party to challenge the same under Section 34 of the Act including on the ground of improper appointment of the tribunal.

### **Decision of the Court**

The Plaintiffs were not entitled to interim relief of an anti-arbitration injunction against the proceedings before the arbitral tribunal. Once an award was passed by the arbitral tribunal, the Plaintiffs would be at liberty to challenge the same under Section 34 (2)(a)(v) of the Act. Interim application was accordingly dismissed for the reasons mentioned above.

# ERGO | BOMBAY HIGH COURT REFUSES ANTI ARBITRATION INJUNCTION AGAINST ARBITRATION PROCEEDINGS ON THE QUESTION OF APPOINTMENT OF THE TRIBUNAL

## Comment

Historically, Indian courts have restricted arbitrations in extremely rare cases, notably in cases such as *Dabhol Power case* (Delhi High Court, Suit No. 1268/2003, decided on 5 May 2004), *Vikram Bakshi v. McDonald's India Private Limited* (2014 SCC OnLine Del 7249) (which was subsequently set aside by the Division Bench of the Delhi High Court (2016 SCC OnLine Del 3949) ) and a currently *sub-judice* matter. This order of the Bombay High Court comes in the wake of orders in *Ayyaswamy v. Paramasivam* ((2016) 10 SCC 386), *Union of India v. Vodafone* (2018 SCC OnLine Del 8842), etc and reinforces the pro-arbitration stand taken by Indian courts in recent times. Notably, the order formalises an added restriction to the grant of anti-arbitration injunctions and states that no such injunction may be granted on the ground of jurisdiction / improper appointment of the tribunal, even where there are other seemingly exigent circumstances, since the procedure in this regard is specified under Section 13 of the Act.

Courts in India have consistently held that they have jurisdiction to hear suits seeking anti-arbitration injunctions. In fact, in recent times, anti-arbitration injunctions have been used as strategic methods to try and scuttle proceedings. However, courts have shown remarkable restraint in granting such relief. Such restraint shown by courts in entertaining these actions, has resulted in provisions of the Act being upheld and all matters relating to the arbitration being dealt with, within the framework of the Act. Further, disputes such as *Reliance Industries v. Union of India* ((2014) 7 SCC 603) (where the arbitral tribunal was reconstituted 3 times) have brought to light the practical difficulties associated with appointment of arbitrators.

The present matter brought forth a unique argument where a party refused to submit to the jurisdiction of the tribunal (thus arguing that it is not covered under the Act), and yet requested the tribunal to hold that it has not been constituted properly. Despite this approach, the Court still brought the dispute within the framework of the Act and held that no interference is merited by the Court in such circumstances.

- *Manavendra Mishra (Principal Associate) and Akash Karmarkar (Associate)*

For any queries please contact: [editors@khaitanco.com](mailto:editors@khaitanco.com)

*We have updated our [Privacy Policy](#), which provides details of how we process your personal data and apply security measures. We will continue to communicate with you based on the information available with us. You may choose to unsubscribe from our communications at any time by clicking [here](#).*

### For private circulation only

The contents of this email are for informational purposes only and for the reader's personal non-commercial use. The views expressed are not the professional views of Khaitan & Co and do not constitute legal advice. The contents are intended, but not guaranteed, to be correct, complete, or up to date. Khaitan & Co disclaims all liability to any person for any loss or damage caused by errors or omissions, whether arising from negligence, accident or any other cause.

© 2018 Khaitan & Co. All rights reserved.

### Mumbai

One Indiabulls Centre, 13<sup>th</sup> Floor  
Tower 1 841, Senapati Bapat Marg  
Mumbai 400 013, India

T: +91 22 6636 5000  
E: [mumbai@khaitanco.com](mailto:mumbai@khaitanco.com)

### New Delhi

Ashoka Estate, 12th Floor  
24 Barakhamba Road  
New Delhi 110 001, India

T: +91 11 4151 5454  
E: [delhi@khaitanco.com](mailto:delhi@khaitanco.com)

### Bengaluru

Simal, 2nd Floor  
7/1, Ulsoor Road  
Bengaluru 560 042, India

T: +91 80 4339 7000  
E: [bengaluru@khaitanco.com](mailto:bengaluru@khaitanco.com)

### Kolkata

Emerald House  
1 B Old Post Office Street  
Kolkata 700 001, India

T: +91 33 2248 7000  
E: [kolkata@khaitanco.com](mailto:kolkata@khaitanco.com)