***The State of Bihar & Ors. v. Bihar Rajya Bhumi Vikas Bank Samiti* (Supreme Court, 30 July 2018)**

BRIEF BACKGROUND AND ISSUE BEFORE THE COURT

The Appellant in this case challenged an award under section 34 of the Arbitration and Conciliation Act, 1996 ("**Act**") but admittedly did not issue prior notice to the Respondent as required under section 34(5)[1] of the Act. A Single Judge of the Patna High Court ("**the HC**") adverted to the reasoning in the Supreme Court's ("**SC**") judgment in *Kailash* v. *Nanhku and Ors.*[2] and ruled that the provision was merely directory. However, upon appeal, a Division Bench of the HC held that issuing of notice under section 34(5) is a condition precedent to filing of an application under section 34 of the Act.

The Supreme Court was therefore called upon to decide whether the requirement for issuing notice under section 34(5) of the Arbitration and Conciliation Act, 1996 ("**the Act**") to the other side by a party filing a petition under section 34 of the Act is mandatory.

FINDINGS

The SC referred to the decisions of *Topline Shoes v. Corporation Bank*[3] in the context of section 13(2)(a) of the Consumer Protection Act, 1986, and *Kailash* v. *Nanhku and Ors.*[4] in the context of Order VIII Rule 1 (as it then stood) of the Civil Procedure Code, 1908 where a similar question was before the court. The courts in the said judgments had concluded that the use of the word "shall" does not, by itself, give a mandatory colour to a provision – what must be considered is whether the provisions provided for any consequence for non-compliance. The SC applied this standard in the present case and found that no consequence had been provided for non-compliance with section 34(5), and therefore, the said provision could not be held to be mandatory. The Court further noted that the said provision is a procedural one, and it must be balanced with considerations of "convenience and justice".

The SC also cited with approval, the Bombay High Court's ruling in *Global Aviation Services Private Limited* v. *Airport Authorities of India*[5] wherein it was held that section 34(5) of the Act is directory in nature.

Having thus ruled that section 34(5) of the Act was a directory provision, the SC nevertheless suggested that every court should endeavour to dispose of applications under section 34 within one year from the date of notice being served upon the opposite party, and if notice is issued after the period under section 34(3) of the Act has lapsed, within one year from the date of filing of the application.

CONCLUSION

This present judgment brings much welcome clarity as to the nature of section 34(5) of the Act. As noted in the judgment itself, different High Courts had given conflicting decisions on the nature of the provision, leading to uncertainty. The Court, while concluding that the provision is directory, rightly held that rules of procedure must be weighed against considerations of justice, or else the very purpose for which they were introduced, would be defeated.

Surajmal Yadav v. Delhi State Industrial Infrastructure Development Corporation Ltd. (Delhi High Court, 24 May 2018)

BRIEF BACKGROUND

The Petitioner emerged as the successful bidder for a plot being auctioned by the Respondent, and thereafter paid the earnest money deposit ("**EMD**"), bid amount, and stamp duty for the lease deed which was to be executed. However, the Respondent failed to execute the lease deed and, consequently, the Petitioner initiated arbitration, seeking reimbursement of the three heads of payments made by him, along with interest on all three. While the arbitrator passed the arbitral award ("**Award**") in favour of the Petitioner – granting time-bound execution of lease deed or refund of the amounts plus interest on stamp duty – the Award was

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[1] Section 34(5) – *"An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement."*
[2] (2005) 4 SCC 480.
[3] (2002) 6 SCC 33.
[4] (2005) 4 SCC 480.
[5] 2018 SCC Online Bom 233 ["***Global Aviation***"]. Our previous update on this judgment is available here https://goo.gl/4MGAZj

silent regarding the prayer for interest on EMD and bid amount.

The Petitioner thus challenged the Award before the Delhi High Court ("**HC**") on this limited ground, under section 34 of the Arbitration and Conciliation Act, 1996 ("**the Act**").

ISSUES AND FINDINGS

The HC had to determine what would be the effect of the Award's silence on a particular part of the prayer.

While the Petitioner challenged the Award on the basis that the arbitrator had failed to consider his prayer in its entirety, the Respondent contended that the silence on this aspect necessarily implied that the arbitrator had rejected the claim for interest on EMD and bid amount.

The Court noted the conspicuous absence of any discussion in the Award regarding the prayer for interest on EMD and bid amount. It opined that in view of section 31(3)[6] of the Act, an arbitral award must contain reasons therefore, be it for granting or rejecting a claim. The absence of such reasoning in the present Award meant that the Respondent's contention could not stand, and therefore, there could be no implied rejection of that prayer.

As the remaining Award had not been challenged by either party, the HC gave leave to the Petitioner to reagitate the claim for interest on EMD and bid amount in other appropriate proceedings.

CONCLUSION

Interestingly enough, although section 34(4) of the Act permits the Court to adjourn the proceedings for a period of time and give the arbitral tribunal an opportunity to take necessary action which may eliminate grounds for setting aside of the Award, the HC in this case did not resort to the said provision. This may have been in keeping with the Supreme Court's judgment in *Kinnari Mullick v. Ghanshyam Das*[7], wherein it was held that a court cannot take *suo moto* action under section 34(4) without an application to that effect by either party. Had either of the parties in the present case made such an application, it may have proved a more efficient route for redressal of the lacuna in the Award rather than reagitating the claim.

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[6] Section 31(3) – *"(3) The arbitral award shall state the reasons upon which it is based, unless—*
(a) the parties have agreed that no reasons are to be given, or
(b) the award is an arbitral award on agreed terms under section 30."
[7] (2018) 11 SCC 328.