



ELP Arbitration: Update



IN AN “INTERNATIONAL COMMERCIAL ARBITRATION”, THE BOMBAY HC APPOINTED AN ARBITRATOR ALTHOUGH THE ACT VESTS SUCH JURISDICTION ONLY IN THE SUPREME COURT. IN REVIEW, THE HC RECALLED THE ORDER APPOINTING THE ARBITRATOR AS THE SAME WAS PASSED WITHOUT JURISDICTION AND IS NON-EST. THE HON’BLE DIVISION BENCH HAS SET ASIDE THE REVIEW ORDER. A SPECIAL LEAVE PETITION HAS BEEN FILED AND IS PRESENTLY PENDING BEFORE THE SUPREME COURT.

*Adani Enterprises Limited v. Antikeros Shipping Corporation*¹

BACKGROUND

ARBITRATION PROCEEDINGS

- It is trite law that in case of an “*international commercial arbitration*”, when parties are unable to agree upon the appointment of, or fail to appoint an arbitrator/arbitral tribunal, an application under section 11 of the Arbitration and Conciliation Act, 1996 (**the Act**), for appointment of arbitrator would lie to the Hon’ble Supreme Court of India, pursuant to section 11(12)(a) of the Act.
- In the present case, disputes arose between Antikeros Shipping Corporation, a body corporate incorporated in Liberia, and Adani Enterprises Limited, a company incorporated under the laws of India. Antikeros Shipping Corporation (**Respondent**) (the Claimant in the arbitration proceedings) filed an Application under section 11 of the Act (**Arbitration Application**) for the appointment of an arbitrator, before the Bombay High Court (**High Court**). The High Court passed an order dated April 21, 2011 (**Section 11 Order**) in the Arbitration Application under section 11 of the Act and appointed an arbitrator. It is pertinent to note that Adani Enterprises Limited (**Petitioner**) (the Respondent in the arbitration proceedings) did not appear before the High Court in the aforesaid Arbitration Application.

¹ Special Leave to Appeal (C) No(s). 8454-8455/2020
 (Arising out of impugned final judgment and order dated February 18, 2020 in AN No. 533/2019 18-02-2020 in AN No. 535/2019 passed by the High Court Of Judicature At Bombay)
Adani Enterprises Limited v. Antikeros Shipping Corporation

REVIEW PETITION IN ARBITRATION APPLICATION

- During the pendency of the arbitration proceedings, the Petitioner filed a review petition in August 2018 (**Review Petition**) before the High Court seeking review of the Section 11 Order on the ground that the arbitration was an “international commercial arbitration” and since the High Court inherently lacked jurisdiction to appoint an arbitrator in an “international commercial arbitration”, the Order is non-est and void in law. The Petitioner also filed a Notice of Motion (**Notice of Motion**) in the Review Petition seeking condonation of delay of around seven years in filing the Review Petition.
- The issues which arose for consideration before the High Court were as follows:
 - Whether the Section 11 Order in the case of an “International Commercial Arbitration” as defined in Section 2(1) (f) of the Act is without jurisdiction, and is ab initio null and void;
 - Whether the High Court has the power of procedural review; and
 - Whether delay or laches can be a ground to deny review of an Order, which ex-facie is void ab-initio.
- By an Order dated March 22, 2019 in the Review Petition and Notice of Motion (**Review Order**), the Ld. Single Judge of the High Court *inter alia* held that since the arbitration was an “international commercial arbitration”, the Respondent ought to have filed the Arbitration Application before the Hon’ble Supreme Court of India and not the High Court. The High Court *inter alia* held that the Order was non-est in law and admittedly passed without jurisdiction. The High Court condoned the delay of seven years in filing the Review Petition, allowed it, and recalled the Section 11 Order. A copy of our detailed analysis of the Review Order is available [here](#).
- Summarily, under the Review Order, the Ld. Single Judge of the High Court observed as follows:
 - That it was undisputed that the Respondent was a body corporate incorporated outside India and hence, the arbitration qualified as an “international commercial arbitration” under section 2(1) (f) of the Act. Therefore, an application under section 11 of the Act would lie before the Apex Court – the Section 11 Order suffers from inherent lack of jurisdiction;
 - Jurisdiction can only be vested by a statute and not by consent, acquiescence, or waiver;
 - Section 11 of the Act is a non-derogable provision;
 - Review Petition is maintainable as it is a procedural review and not a review on merits;
 - Review Petition is maintainable to correct the Section 11 Order passed under the Act; and
 - Delay or laches is no bar to recall an order which is bad in law.

APPEAL AGAINST THE REVIEW ORDER BEFORE THE DIVISION BENCH

- In May 2019, the Respondent filed the Appeal No. 535 of 2019 in Review Petition No. 3 of 2019 in Arbitration Application No. 57 of 2011 (**Appeal in Review**) and Appeal No. 533 of 2019 in Notice of Motion No. 1015 of 2019 in Review Petition No. 3 of 2019 in Arbitration Application No. 57 of 2011 against the Review Order (**Appeal in Notice of Motion**) against the Review Order. (Appeal in Review and Appeal in Notice of Motion are collectively referred to as **Appeals**).
- Under the impugned order dated February 18, 2020 (**Impugned Order**), the High Court allowed the Appeals. Concluding that (i) the review sought in the Review Petition was in the nature of a substantive review and (ii) the power exercised while passing the Section 11 Order was not power vested in Constitutional Courts, being courts of record, but power vested in Chief Justice or his delegate, the High Court set aside the Review Order.

SPECIAL LEAVE PETITION BEFORE THE SUPREME COURT

- The Petitioner preferred a Special Leave Petition (**SLP**) challenging the Impugned Order passed by the Hon’ble Division Bench of the High Court, in the Appeals. In the meanwhile, while the SLP was pending, the tribunal passed the award. By an order dated August 4, 2020, the Supreme Court has issued Notice in the matter and the matter is pending.

CONCLUSION AND ANALYSIS

- As set out above, by the Review Order, the Review Petition was allowed, the delay was condoned, and the Section 11 Order in the Arbitration Application was recalled as non-est for want of jurisdiction. Thereafter, the Hon'ble Division Bench allowed the Appeals and set aside the Review Order.
- The matter is now pending before the Supreme Court, and it remains to be seen whether the Supreme Court will strike down the Section 11 Order or whether the Supreme Court will uphold the Impugned Order.

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