



# DISPUTE RESOLUTIONS

The Bi-Monthly Newsletter of the Nani Palkhivala Arbitration Centre

Volume 2 Issue 5

October 2019



## Message to the Readers

Can an arbitral tribunal hear and determine issues relating to Oppression and Mismanagement (“O&M”) of a company? What must be the approach of authorities before whom a Petition for Oppression and Mismanagement is filed, to determine whether the issues raised in such proceedings must be referred to arbitration? This is one of the perplexing issues in the arbitration regime today.

The Supreme Court, in *Booz Allen and Hamilton Inc vs. SBI Home Finance Ltd.*, (2011) 5 SCC 532, has held, in simple terms, that a dispute *in rem* cannot be referred to arbitration and only a dispute *in personam* can be referred to arbitration. “*In rem*” is a Latin term which means “*in the thing itself*”. Generally, jurisdiction *in rem* assumes that property or status is the primary object of the action. When an action relates to personal liabilities it is stated to be an action “*in personam*.” The primary difference between an action *in rem* and an action *in personam* is that a right *in rem* or a judgment *in rem* binds the world at large as opposed to rights and judgments *inter parties* which only bind those involved in the litigation.

In the arbitration regime this assumes importance. This is because one of the grounds which would be claimed by one of the parties to the dispute to be covered by an arbitration clause is whether the dispute is one that relates to an action *in rem* and whether it is arbitrable at all. In the *Booz Allen case* the Supreme Court held that a court can refer a matter to arbitration only if the arbitral tribunal is competent to adjudicate such disputes. It held that an arbitral tribunal cannot adjudicate disputes *in rem* but only those *in personam*.

Earlier in *Haryana Telecom Ltd vs. Sterlite Industries (India) Ltd.* (1995) 5 SCC 688, the Supreme Court had held that O&M claims cannot be arbitrated and that they can only be resolved before the Company Law Board. This then led to a situation that opened up the possibility of shareholders dressing up even contractual disputes like breaches of shareholders agreement or breach of articles of association of the company as O&M disputes and filing cases before the Company Law Board.

The Bombay High Court in *Rakesh Malhotra vs. Rajinder Malhotra* (2015) 2 Comp. Law Journal page 288 carved out a small exception to the earlier stated long held position and held that O&M petitions before the Company Law Board could be referred to arbitration if it was found that they were malafide, vexatious or had been 'dressed up' to avoid the arbitration clause. This is a welcome development and one hopes that the NCLT (which now has jurisdiction over O&M disputes) does not blindly dismiss applications in O&M proceedings seeking reference to arbitration, but determine arbitrability of the dispute and apply the standards in the *Rakesh Malhotra case*.

N.L. Rajah,

Senior Advocate and Director, NPAC

Nlrajah.advocate@gmail.com

### GOVERNING COUNCIL

**Justice M.N.Venkatachaliah**  
Former Chief Justice of India

**Soli J. Sorabjee**  
Former Attorney General of India

**K.K.Venugopal**  
Attorney General of India, Senior Advocate,  
Supreme Court of India

**Justice AP Shah,**  
Former Chairman, Law Commission of India  
and Former Chief Justice of the High Courts of  
Madras and New Delhi

**B.S. Raghavan, I.A.S. (Retd.),**  
Former Advisor to the United Nations (FAO)

**Iqbal Chagla**  
Senior Advocate, Bombay High Court

**T.S. Krishnamurthy**  
Former Chief Election Commissioner of India

### BOARD OF DIRECTORS

**S. Mahalingam**  
Former Chief Financial Officer,  
Tata Consultancy Services

**Arvind P. Datar**  
Senior Advocate, Madras High Court and  
Supreme Court of India.

**V.S. Jayakumar**  
Advocate, Madras High Court

**N.L. Rajah**  
Senior Advocate, Madras High Court

**R. Anand**  
Chartered Accountant

**R. Murari**  
Senior Advocate, Madras High Court

**M.S. Krishnan**  
Senior Advocate, Madras High Court

**Gaurav Pachnanda**  
Senior Advocate, Supreme Court of India

**K. Balaji**  
Former Director, Kasturi & Sons Ltd.

**Payal Chawla**  
Advocate, Founder, JusContractus

**Aditya Ghosh**  
CEO, OYO Hotels and Homes, South Asia

**Editorial Board:** N.L. Rajah, Senior Advocate, K. Balaji, Former Director, Kasturi and Sons Ltd, Dr. J. Durgalakshmi, Registrar, NPAC, Aishwarya Mahesh, Advocate

## GOVERNMENT NOT ENTITLED TO UNCONDITIONAL STAY OF ARBITRAL AWARD UNDER SECTION 36 OF THE ARBITRATION AND CONCILIATION ACT, 1996

*By Nivedita Shenoy, Associate Partner, AK Law Chambers*

In the recent decision of *Pam Developments Pvt. Ltd. vs. State of West Bengal*, the Hon'ble Supreme Court held that the Government is not entitled to any special treatment in the grant of stay of operation of an arbitral award under Section 36 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”).



### **FACTS**

The matter before the Court related to a contract awarded by the Respondent - State of West Bengal to the Appellant-Pam Developments Pvt. Ltd. Disputes arose between the parties and the Appellant raised claims which were not paid by the Respondent. A petition under Section 11 of the Arbitration Act was filed by the Appellant for the constitution of an arbitral tribunal. The arbitral tribunal was appointed by the High Court of Calcutta. By an award dated 21<sup>st</sup> January 2010, the tribunal allowed some of the claims of the Appellant and directed payment of Rs. 2,87,11,553 by the Respondent along with interest at the rate of 18 per cent per annum.

This award was challenged by the Respondent State under Section 34 of the Arbitration Act. An application was also filed for stay of the arbitral award under Section 36 (2) of the Arbitration Act, as amended in 2015. The said application was dismissed for default. Thereafter, the execution proceedings filed by the Appellant before the High Court of Calcutta were dismissed in view of an order of a coordinate bench of the High Court by which an unconditional stay of award had been granted to the State Government. Subsequently, the Respondent filed a fresh application for stay on which the High Court passed an order of unconditional stay. The said order was challenged before the Supreme Court.

### **DECISION**

The Court discussed in some detail the object behind the amendment to Section 36 of the Arbitration Act in 2015, precluding automatic stay of operation of an arbitral award, on the filing of an application challenging the award under Section 34. Under Section 36 (3) of the Arbitration Act, the Court may grant stay of the operation of the arbitral award, subject to such conditions as it may deem fit. The proviso to Section 36 (3) also requires that in considering an application for grant of stay in the case of an arbitral award for payment of money, the Court shall have due regard to the provisions for grant of stay of a money decree under the Civil Procedure Code, 1908 (“**CPC**”). The proviso was held to be directory and not mandatory i.e., the provision of the CPC would only be a guiding factor.

The Respondent-State relied on Order XXVII Rule 8A of the CPC to contend that where a money decree is passed against the Government and sought to be executed, the said provision would apply and no security shall be required from the Government. It was argued on behalf of the Respondent-State that furnishing of security was the genus and making of deposit was a species, and that therefore, the State cannot also be directed to make a deposit. The Court held that if this contention is accepted, it would mean that the Government would be entitled to automatic stay of the operation of an arbitral award in every case, as the stay order would be passed mechanically and as a matter of course, without imposing any condition on the Government. This would be akin to the position prior to the amendment to Section 36. Further, the provisions of Order XXVII Rule 8A apply only to the furnishing of security by the Government and do not affect the discretion of the Court under Order XLI Rule 5 to require the judgment-debtor to either deposit the amount awarded/decreed or furnish security. Furthermore, the interpretation suggested by the Respondent-State would take away the discretionary power vested with the Court under Section 36 (3) of the Arbitration Act which is a self-contained Code. Having regard to the object of the Arbitration Act and the archaic nature of Order XXVII Rule 8A which was enacted at the time of the British Raj to protect the Crown, the Court held that the said provision cannot be held to preclude the Court from directing the State to deposit the amount of the award as a condition of stay.

#### **COMMENT**

This is a significant and welcome decision in the area of stay and execution of arbitral awards, considering that the Government is one of the biggest litigants in India. The decision rightly emphasizes on the Report of the 246<sup>th</sup> Law Commission of India, which highlights that the automatic (and therefore, unconditional) stay of arbitral awards prior to the amendment, was severely crippling the arbitral process and impeding its efficiency and effectiveness. The grant of an unconditional stay encourages the judgment-debtor to prolong the stage of challenge, which is against the objective of speedy and quick resolution of disputes through arbitration. In addition, it is not cost-effective. Furthermore, as the Court rightly held, the Arbitration Act is a self-contained Code. There is good reason to avoid importation of provisions of the CPC enacted years ago giving special status to the Government such as, notice of two months before institution of the suit, preclusion of grant of an *ex-parte* interim order against the Government etc. No such special provisions exist under the Arbitration Act; an arbitration may be instituted against the Government without prior notice and *ex-parte* interim orders may also be obtained. The decision of the Supreme Court provides further impetus to the pro-arbitration approach along with the efforts to institutionalize the arbitral process to promote India as an arbitration hub.

## WORKSHOP ON INSTITUTIONAL ARBITRATION IN GOVERNMENT AND PSU CONTRACTS FOR LAW EXECUTIVES OF PUBLIC SECTOR ENTERPRISES

Public Sector institutions are a very important part of the Indian economy. However, their involvement in litigation has seen an enormous increase in litigation in the last seven decades after independence, commensurate with the growth of the Indian economy. The existing system of arbitration has necessitated the lawmakers to introduce institutional arbitration through the 2019 amendment in the Arbitration & Conciliation Act. The Law Commission of India which advocated the need for an established mechanism for institutional arbitrations observed that the prevailing system of arbitration was costly and time-consuming and was not producing the desired outcome in most of the cases.

In order to reduce litigation and discourage them from going to courts, the Department of Justice has suggested that Government departments/organisations explore alternate methods of settlement of their disputes. This step of speedier settlement will enhance India's performance in the World Bank's Ease of Doing Business Index.

NPAC has been established with the aim of promoting institutional arbitration in India, keeping in mind the need for an efficient, trustworthy and cost-effective mode of dispute resolution through transparent, fair, impartial arbitration mechanism. As part of our endeavour to disseminate knowledge on alternate methods of dispute resolution, the Delhi Centre organized a one day Workshop for Law Executives of Public Sector Enterprises, on “Institutional Arbitration in Government and PSU Contracts” in Vigyan Bhavan, New Delhi on the 25<sup>th</sup> of September 2019.

Mr. Arvind Datar welcomed the gathering followed by Mr. Ramesh Abhishek, IAS former Secretary to the Government of India who inaugurated the event. The participants were from various public sector undertakings including GAIL, BHEL, NHAI, Power Grid Corporation, Engineers India, Rural Electrification (REC), MECON, Heavy Engineering (HEC) RITES etc and the tutors organized by NPAC were experts in the field of alternate dispute resolution.

The topics focused on important areas of practical utility to the participants and broadly covered the areas of 'Understanding the nuances of various ADR methods'; 'Issues commonly adjudicated through arbitration proceedings'; 'Interplay between arbitration law and Commercial Courts Act, Proceedings under Insolvency & Bankruptcy Code and Special Tribunals & Courts'; 'Extent of interim reliefs granted by courts / arbitration tribunal'.

The first session was handled by Mr. V.S. Jayakumar, Director, NPAC along with Ms Renu Gupta, Member, NPAC Advisory Committee. They covered the processes followed in arbitration & conciliation, common mistakes, interpretation of clauses of contracts and conflicts between parties. This was followed by the presentation by Mr. N.L. Rajah, Director NPAC on the interplay between law of arbitration and (a) Commercial Courts Act, (b) proceedings under IBC and (c) special tribunals & courts.

In the post lunch session, Ms. Tine Abraham spoke about arbitration clauses in contracts awarded under multilateral funding vs domestically funded packages and challenges under Section 34 of the Arbitration and Conciliation Act, 1996.



NPAC empanelled arbitrator, Dr. Subhash Gupta covered the emerging trends with regard to arbitration law and discussed whether conciliation is a viable method of settling disputes in PSUs, along with the latest case laws on the subject. The final presentation was by Ms. Payal Chawla, Director, NPAC who discussed the issues that are commonly adjudicated through arbitration proceedings.

This is the third of the series of training events conducted for Government officers. The first was in the IAS academy at Mussoorie for officers with the rank of Joint Secretaries or above. The second session was for members of the Department of Personnel and Training in Chennai. The entire programme has been well received and the participants have been greatly involved in the discussions.



Mr. Arvind Datar, Director NPAC welcoming the audience



Mr. Ramesh Abhishek, IAS former Secretary to the Government of India speaking at the event



Law Executives of Public Sector Enterprises attending the event



Ms. Payal Chawla, Director, NPAC addressing the gathering

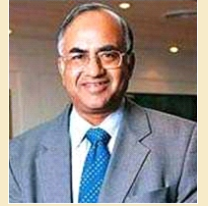


L to R - Mr. Arvind Datar; Mr. Ramesh Abhishek; Mr. V.S. Jayakumar

**PERSONAL INTERACTIONS WITH MR. NANI PALKHIVALA**

*By Mr. S. Mahalingam, Former Chief Financial Officer, Tata Consultancy Services*

It was my great fortune that I had the opportunity to interact with the legendary jurist and the well known public figure Mr. Nani Palkhivala, whose birth centenary falls in January 2020.



Mr. Palkhivala was the Chairman of Tata Consultancy Services, called TCS, from its inception in 1968. TCS was structured as a Division of Tata Sons, the parent company of the Tata Group. Although a Division, TCS was run for all practical purposes as a separate legal entity, governed by an Executive Committee of which Mr. Palkhivala was the Chairman. Mr. F. C. Kohli, who laid the foundations of the Indian IT industry, was its Chief Executive throughout Mr. Palkhivala's tenure. Together, they created the renowned global and highly successful company, which is indeed the jewel of the Tata Group. While Mr. Kohli provided the technological orientation, the values were instilled by Mr. Palkhivala.

In 1983, after I had served TCS for 13 years in India and abroad, I was asked by Mr. Kohli to grow TCS in Madras (as it was then called). I got a call in late 1983 from Mr. Palkhivala- he himself came on the line- telling me that he was coming to Madras to deliver the Devanesan Memorial Lecture on the Future of Education and he wanted to know if I could help with logistics. While I had listened to the annual budget lectures of Mr. Palkhivala from 1965 at Bombay, it was my first experience in working on the logistics, not just handling his stay but also working with the organisers of the event. A large crowd had started building up from 4pm at AVM Rajeswari Kalyana Mandapam for the 6pm public speech. Without any notes, Mr. Palkhivala elevated the thinking of the assembled audience on how we can create an educated society. His vision was compelling and the case he built up, assembling the thoughts of great people over the ages, was mesmerizing. Until then, I had thought that he was only a businessman and a lawyer, that day I realized that he was a great philosopher as well. This was not the only time I listened to him on topics other than Law or Economics. He delivered a lecture on Man- Past, Present and Future, at the Theosophical Society grounds around the end of 1985. It was delivered to an audience which included a number of people from overseas. It was largely philosophical, as it dwelt into the thoughts of great thinkers of India, Persia, Greece and other parts of the world. He was well versed with the philosophical orientation of Hinduism, Zoroastrianism (the faith he belonged to), Judaism, Islam and Christianity- he was truly an internationalist.

During the years 1984 to 1992, I was closely involved in arranging his famous post budget talks in Chennai. Arranging a venue was tough, as the crowds coming to listen to him continued to grow. It was a logistic challenge for him personally, as he had to cover a number of cities in India for this talk. While we would go to great lengths to organize his lectures, nothing mattered once the speech started, as he spelt out his analysis of the budget. The perspectives ranged from economic theories to building a great society, which encouraged innovation and enterprise, while at the same time instilling values. He deeply cared for values and he particularly castigated provisions of the budget which, due to their severity, encouraged people to side-step the law. As an orator, he was beyond comparison. Humour and lyrical passages, interspersed with quotations, made his lectures come alive and kept the large audience spell bound.

In one of his visits to Chennai to deliver the Budget speech, Dr. Badrinath of Sankara Netralaya had come to the airport. He requested Mr. Palkhivala to visit his Hospital on the way to his hotel. Mr. Palkhivala was in two minds, as he had not planned this visit- but he went there for a short visit and I accompanied him. After going there, I realized that he had donated a substantial sum to create a Ward named after his lawyer friend S. P. Mehta. Dr. Badrinath requested him to speak to his team of doctors, nurses and other staff members on that occasion. I personally know that Mr. Palkhivala was totally unprepared, but his speech for the next 15 minutes was one of the most moving speeches I had ever heard. He dwelt on the theme of serving the society, with Dr. Badrinath and Sankara Netralaya as examples.

He would often combine his trip to Chennai with a visit to Kancheepuram to meet with Paramacharya of Kanchi Kamakoti Peetam. He had accepted the request of Paramacharya to chair a Trust called Veda Pata Nidhi Trust. This Trust was established to look after the needs of Vedic Pandits in their old age. Mr. Palkhivala was passionate about the activities of this Trust.

It was my great fortune that I had seen many facets of his personality. He was a great institution builder, as I observed him guiding TCS. He was recognized to be the best legal mind of his generation. He deeply cared for the economic progress of the nation and he shaped many minds in creating a liberal society. His interests were broad and embraced philosophy, tradition and culture.

His centenary year celebration will give us an opportunity to come together to cherish his role as a shaper of public opinion, savior of our Constitution and as a nation builder rooted in values.

**SATYA HEGDE ESSAY COMPETITION**

Nani Palkhivala Arbitration Centre (NPAC) is pleased to announce the next edition of Satya Hegde Essay Competition on arbitration. NPAC invites essays from current students of Law in any College or University in India. The topic is: *“Will the 2015 and 2019 amendments to the Arbitration and Conciliation Act achieve the objective of making the arbitral process more robust.”*

**Word limit:** 2,500 words; **Deadline for submission:** 6:00pm on 30<sup>th</sup> December, 2019.  
Entries should be sent to [npac05shcc@gmail.com](mailto:npac05shcc@gmail.com)

The student securing the first prize shall be awarded an amount of ₹10,000/-, followed by cash awards of ₹ 7,500/- and ₹5,000 for the second and third prize winners. The details of the prize winners shall be announced on 16<sup>th</sup> January, 2020. For guidelines and further details, please send an email to [npac2005@gmail.com](mailto:npac2005@gmail.com).

**NPAC'S ANNUAL CONFERENCE ON ARBITRATION**

The Nani Palkhivala Arbitration Centre conducts an annual International Conference on arbitration with the aim of educating stakeholders on the benefits of institutional arbitration as a viable mode of dispute resolution and endeavours to shape the growth of the law of arbitration.

The Governing Council, the Board of Directors and the entire team of Nani Palkhivala Arbitration Centre (NPAC) have the pleasure of announcing the 12<sup>th</sup> edition of the Annual Conference of the NPAC on the theme **“Re-Inventing Arbitration ways and means”**, scheduled to be held on the 15<sup>th</sup> February, 2020 at **Shangri-La's Eros Hotel**, 19, Ashoka Road, Connaught Place, New Delhi 110001, India.

We would like to invite you to participate in the Conference and make a positive contribution towards understanding the growth of Arbitration Law. For any further details on the Conference, please feel free to contact us at: [nparbitration@gmail.com](mailto:nparbitration@gmail.com) or [npac2005@gmail.com](mailto:npac2005@gmail.com).

**NANI PALKHIVALA ARBITRATION CENTRE**

**Chennai** : New No.22 Karpagambal Nagar, Mylapore, Chennai 600 004, India  
+91 44 24987145/ +91 44 24987745/ +91 44 24986697  
E: [nparbitration@gmail.com](mailto:nparbitration@gmail.com)/[npac2005@gmail.com](mailto:npac2005@gmail.com)

**New Delhi:** Dr. Gopaldas Bhavan, 28, Barakhambha Road, Connaught Place, New Delhi-110001  
011- 2332 5616/ 011-4561 2115 / 011-4561 2114  
E: [hallbookingdelhi@gmail.com](mailto:hallbookingdelhi@gmail.com)/ [npacdelhi@gmail.com](mailto:npacdelhi@gmail.com)  
W: [www.nparbitration.com](http://www.nparbitration.com)