

Dispute Resolution Hotline

July 06, 2022

SUPREME COURT'S QUICK FIX FOR BACKLOG IN ARBITRAL APPOINTMENTS BY HIGH COURTS

- The Supreme Court took cognizance of the backlog in applications filed under Sections 11(5) and 11(6) of the Arbitration and Conciliation Act 1996 before various High Courts, few of which had been pending for over four or five years.
- The Supreme Court directed the respective High Courts to ensure disposal of such pending applications within a period of six months from the date of the passing of its order (dated 19 May 2022).
- The Court also emphasized that the High Courts need to make an endeavor to dispose of appointment applications within six months from the date on which such applications are filed.

INTRODUCTION

While hearing the special leave petition in *Shree Vishnu Constructions ("Appellant") v. The Engineering in Chief, Military Engineering Service & Ors. ("Respondents")*¹, the backlog of applications for arbitral appointments came into light before the Hon'ble Supreme Court of India ("Supreme Court").

The Supreme Court called for the statement/particulars with respect to the pending applications under Section 11(6) of the Arbitration and Conciliation Act 1996 ("Arbitration Act") from all the High Courts so as to devise the solution for quicker disposal of such applications.

The jurisdiction of High Courts for the appointment of arbitrators can be invoked under Section 11 of the Arbitration Act in case the parties fail to agree on an arbitrator for the resolution of their disputes² or in the event that they fail to act on the appointment procedure agreed upon.³ However, the Arbitration Act does not prescribe any timeline for courts to decide and dispose of such applications filed before Court for appointment of an arbitrator. Such lacuna has resulted in a situation where a number of such appointment applications are pending before various High Courts for years. The Supreme Court took cognizance of this issue which would otherwise defeat the object and purpose of the Arbitration Act itself, i.e., speedy and effective dispute resolution.

BACKGROUND

The special leave petition was filed pursuant to a judgment and order passed by the Hon'ble Telangana High Court⁴ rejecting the Appellant's application for appointment of an arbitrator filed under Section 11(5) of the Arbitration Act.

During the hearings before the Supreme Court, it observed that the Telangana High Court took four years to dispose of the appointment application.

Referring to the amended Arbitration Act, the Supreme Court expressed concern that if an appointment application is not disposed of within one year, it would defeat the object and purpose of the Arbitration Act. Raising these concerns, the Supreme Court directed the Registrar General of the Telangana High Court to submit a detailed report highlighting the number of such appointment applications that are pending before the High Court, and from which year are such disputes pending. The Supreme Court also called for the statement/particulars of such pending applications from all the High Courts.

DIRECTIONS OF THE SUPREME COURT

The Supreme Court took cognizance of the fact that there were volumes of similar appointment applications pending in various other High Courts for more than four or five years. The Court was of the view that courts need to ensure that commercial disputes need to be resolved at the earliest, as pendency shall not only adversely impact the commercial relations between the parties, but also the economic health of the country. In this regard, the Supreme Court referred to the Arbitration Act as well as Commercial Courts Act 2015 which provide for time-bound dispute resolution. More specifically, Commercial Courts Act 2015 mandates that the commercial disputes are to be decided and disposed of within a period of one year. Further, under the Arbitration Act, arbitrators are mandated to render the awards within a period of one year. Therefore, pendency of appointment applications before courts for more than year in a few cases, and beyond a period of four or five years, as was observed in these cases, clearly defeats the objective of the Arbitration Act.

In view of the same, the Supreme Court directed all Chief Justices of the various High Courts to ensure that such pending appointment applications are disposed of within a period of six months from the date of the order of the Supreme Court passed in this case. Further, the High Courts were also directed to submit their respective

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compliance reports to the Supreme Court upon the completion of such period of six months. The court also opined that all High Courts must make endeavor to decide and dispose all appointment applications preferably within a period of six months from the date that such applications are filed.

ANALYSIS

The Supreme Court's order promises a prompt disposal of such appointment applications which would in-turn ensure that arbitration proceedings commence and are disposed of expeditiously.⁵

This order is in sync with the present pro-arbitration landscape in India which primarily envisages expeditious disposal of commercial disputes. It is expected that this order would be intriguing for arbitration practitioners as well as parties willing to resolve commercial disputes through arbitration in India.

It may however be noted that the directions of the Supreme Court to the High Courts may be extraneous to international commercial arbitrations, in which case it is the Supreme Court which is requested for arbitral appointments.

The Supreme Court has been consistently taking a proactive role in furthering such pro-arbitration ecosystem in India. For example, in *BSNL v. Nortel Networks India*⁶ the Supreme Court had to adjudicate upon the issue of the limitation period for filing of an appointment application in the absence of a provision in the Arbitration Act prescribing the same. The Supreme Court ruled that the limitation period for the filing of appointment applications would be covered by Article 137 of the Limitation Act, 1963.⁷

However, in the absence of a specific timeline provided in the Arbitration Act, such directions issued by the Supreme Court or the basis for capping the time period for disposal at six months, may be subject to further review or need to be incorporated in the statute itself.

Further, certain amendments were proposed in 2019 to Section 11 of the Arbitration Act for appointment of arbitrators through arbitral institutions designated by the by the Supreme Court, in case of international commercial arbitrations, or by the High Court, in case of arbitrations other than international commercial arbitrations. The said amendments which were intended to avoid such delays in arbitral appointments await notification. This may be an opportune time to relook at the proposed amendments and implement them.

– Shweta Sahu & Vyapak Desai

(The authors would like to acknowledge and thank Shreyansh Jain for his assistance on this hotline.)

You can direct your queries or comments to the authors

¹ Special Leave Petition (C) No. 5306 of 2022 (Order dated 19 May 2022).

² See Section 11(5) of the Arbitration and Conciliation Act, 1996.

³ See Section 11(6) of the Arbitration and Conciliation Act, 1996.

⁴ ARBA No. 151/2016.

⁵ See Article 141 of the Constitution of India 1950:

"The law declared by the Supreme Court shall be binding on all courts within the territory of India."

⁶ AIR 2021 SC 2849.

⁷ *BSNL v. Nortel Networks India* AIR 2021 SC 2849:

"The limitation for invoking arbitration, and seeking appointment of an arbitrator is at par with a civil action, and would be covered by Article 137 of the Schedule to the Limitation Act, 1963. An action taken by a claimant must necessarily fall within the statutory period of 3 years from the date on which the right to apply accrues."

Limitation Act 1963, Schedule:

Type of Suit	Period of Limitation	Time from which period begins to run
137 Any other application for which no period of limitation is provided elsewhere in this division	Three Years	When the right to apply accrues

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