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DISPUTE RESOLUTION AND ARBITRATION

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DISPUTE RESOLUTION AND ARBITRATION UPDATE

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HOT TOPIC – INCLUSION OF UAE AS A RECIPROCATING TERRITORY

- The Ministry of Law and Justice, Government of India, vide its notification dated January 17, 2020 (**Notification**) declared United Arab Emirates (**UAE**) a 'reciprocating territory' for the purposes of enforcing foreign civil decrees in India. Pursuant to the Notification, UAE mainland, DIFC and ADGM decrees will be expressly recognized and shall be deemed enforceable under the Indian Civil Procedure Code (**CPC**) and will now be executed in India as if it has been passed by the District court.
- In India, the law governing recognition and enforcement of foreign decrees is provided in Section 44A of the CPC and provides that any decree passed by superior courts of any reciprocating territory may be executed in India, as if it has been passed by Indian courts. The decrees passed by foreign courts of reciprocating territories can be put into execution straightaway and may operate as res judicata subject to satisfaction of the conditions of its conclusiveness as mentioned in Section 13 of the CPC.
- UAE joins the likes of UK, Singapore, Bangladesh, Malaysia, New Zealand, Hong Kong, Trinidad & Tobago, Papua New Guinea, Fiji and Aden, which enjoy reciprocating territory status in India. This development opens up additional avenues for realizing debt, recoveries and claims, and is particularly significant given the substantial number of Indian-owned companies in the UAE. We expect the Notification to have a significant impact on litigation strategies of financial institutions and corporates in the UAE.

Key considerations

Foreign Decree vis-à-vis Insolvency and Bankruptcy Code, 2016

- NCLT and NCLAT – the tribunals empowered for discharging powers and functions conferred upon them under the IBC – may take cognizance of a foreign decree and treat it as a debt for the purposes of the code. However, these tribunals don't have jurisdiction to enforce the foreign decree. The position emerges from a judgement passed in matter of *M/s Stanic Bank Ghana Ltd v. Rajkumar Impex Pvt Ltd*.[1] The tribunal took note of Section 44A and Section 13 of CPC, observing that prima-facie case made out under the code and a debt is payable. The said decision was also upheld by NCLAT. Reciprocity between India and UAE for execution of decrees

[1] CP/670/IB/2017

under Section 44A of the CPC could give credence to foreign decree holders to invoke the mechanism under the IBC as a measure for debt realization.

- **Our viewpoint:** Under the IBC, there is a distinction between decrees from non-reciprocating and reciprocating territories from the standpoint of debt. Enforcement of decree passed in non-reciprocating territory will entail filing a suit, which may be construed as a cause of action for the said suit. This could provide an opportunity to the Corporate Debtor to wriggle out of IBC's purview on the ground of a disputed debt, as the decree will be treated as additional evidence against the defendant.

Enforcement of arbitral awards seated in UAE

- The Notification is restricted to enforcement mechanism under Section 44A of CPC and does not change the position on enforcement of arbitral awards passed by Arbitral Tribunals seated in UAE. As per Part II of the Indian Arbitration and Conciliation Act, 1996 (**Act**), a foreign award may be executed in India if it is a New York Convention Award and fulfils the conditions mentioned under Section 44 of the Act, which requires the award to be in pursuance of a written agreement to which the convention is applicable or has been passed in territories where the convention is applicable and notified.
- **Our viewpoint:** Where a UAE seated award is passed in favour of an award holder, they can now apply to court of relevant jurisdiction for getting the award declared as a Rule of Court. However, ambiguities with respect to application of Notification (whether it is applicable retrospectively or prospectively?) and enforcement of arbitral awards by getting the award declared as a Rule of Court for subsequent enforcement in India will have to be clarified.

RECENT JUDGEMENTS

USHA ANANTHASUBRAMANIAM V. UNION OF INDIA

2020 SCC ONLINE SC 221

Background facts

- Supreme Court of India was seized of an appeal by a former MD & CEO of the Punjab National Bank challenging the order of the National Company Law Tribunal (**NCLT**) under Section 241 of the Companies Act 2013 (**Act**) as upheld by the National Company Law Appellate Tribunal (**NCLAT**) by which certain named individuals, including the Appellant, were injuncted from disposing movable and immovable properties/assets which belong to them and whose assets were frozen with only a sum of INR 1,00,000 per month to be allowed to each of such persons for personal expenses.

Issue at hand

- Scope of Section 241, 337 and 339 of the Companies Act 2013 – Is the scope of these sections restricted to the entity where fraud or mismanagement has occurred, or can it be extended to persons or parties who were knowingly a party to the carrying on of the fraudulent conduct of business?

Findings of the Court

- While relying on the contents of the charge sheet filed by the CBI against several persons, including the Appellant, occupying positions in the Punjab National Bank as well as the Directors of Gitanjali Gems Ltd., the Appellant contended that the chargesheet itself cleared that the criminal case against the Appellant was, at most, only to the extent of her having omitted to take precautions or preventive steps to prevent the fraud perpetrated by Nirav Modi, thereby having committed mis-conduct and conspiracy with the other accused persons.

- The Appellant further contended that under Section 241 of the Act, powers may be exercised under various provisions of the Companies Act, including Section 337 and 339, only insofar as the mis-management of that very Company is concerned, and not relatable to any other corporate body, including the Punjab National Bank. Hence, the act of freezing of assets was without jurisdiction.
- The Respondent, on the other hand, while relying on Sections 337 and 339 of the Act, argued that the jurisdiction under Section 339 is very wide and would include freezing the assets of any person who was knowingly a party to the carrying on of the fraudulent conduct of business.
- The Supreme Court while interpreting the language of the concerned sections, i.e. Section 241, Section 337 and Section 339 of the Act, opined that Section 241 empowers the Central Government to apply to the NCLT for order under this Chapter which is headed '*prevention of oppression and mismanagement*' with Sections 337 and 339 of the Act being in aid of this power to apply mutatis mutandis.
- The Apex Court further opined that while Section 337 refers to '*penalty for frauds by an officer of the company in which mis-management has taken place*', Section 339 refers to any business of the company which has been carried on with intent to defraud creditors of that company. As such, the persons referred in Section 339(1) of the Act are persons who are parties 'to the carrying on of the business in the manner aforesaid' which refers to the business of the company being mismanaged and not to the business of any other company or other persons.
- The Apex Court, therefore, allowed the Appeal and dismissed the impugned orders of the NCLT and the NCLAT while it held that the powers under the aforesaid sections of the Act cannot be used against any person in any organization or entity other than the Company.

JAI SHANKAR AGRAHARI V. UNION OF INDIA AND ANR.

2020 SCC ONLINE ALL 24

Background facts

- Allahabad High Court, being seized of a batch of connected writ petitions with common issues and facts, was presented with a challenge to a declaration made by Registrar of Companies, UP, Kanpur (**ROC**) publishing notice of disqualification of petitioners under Section 164(2) of Companies Act, 2013 (**Act**) in all companies in which the Petitioners were directors though those Companies are/were not in default.

Issues at hand

- Provisions pertaining to 'automatic vacation of office' per the newly notified Section 164(2) of the Act
- Retrospective applicability of Section 164(2) of the Act when the cause of action arose under the previously existing Section 274(1)(g) of Companies Act, 1956 (**1956 Act**) whereunder there was no provision with regard to automatic vacation of office.

Findings of the Court

- The Petitioners argued that such disqualification is in violation of fundamental right of petitioner under Article 19(1)(g) of the Constitution and, therefore, Section 164(2)(a) of Act, 2013 is arbitrary and ultra vires of the Constitution having no nexus with the objective sought to be achieved and in effect penalizing the management of the companies which are active and have not committed any default rendering their functioning difficult by disqualifying Directors of those Companies holding similar office in defaulting companies.
- The Petitioners further argued that Section 164(2) of the Act was against the principles of natural justice and penal in nature, and contended that they were not provided with an opportunity of representation against the automatic vacation of their office in all companies in which they were directors.

Our view

The Apex Court has rightly interpreted the contents of Sections 241, 227 and 339 of the Act in light of the contents of the section applying to the conduct of business of the company under the head 'oppression and mismanagement' which pertains to the company.

However, the Apex Court could have walked an extra mile in the said judgment by objectively clarifying Section 339(1) of the Act, which may be interpreted the other way to include within its ambit any person who was knowingly a party to the carrying on of any business of the Company as afore-said, which business may be limited to a fraudulent instance (such as fraudulent placement or routing of a loan facility to another project or misappropriation of a loan facility for personal gain or approval and release of a loan facility without adequate security/overvalued security) at behest or within the knowledge of a bank official who knowingly becomes a party to such fraudulent business, despite not being an employee or official of the company. This leaves room for ambiguity and misplaced interpretation.

- The Respondent's arguments were based on its reliance on Companies (Appointment and Qualification of Directors) Rules, 2014 and on the judgments of the Calcutta High Court in *Nabendu Dutta v. Arindam Mukherjee*[2], and Bombay High Court in *Snowcem India Ltd. v. Union of India*[3], wherein it was held that Section 164(2) of the 2013 Act is pari materia to Section 274(1)(g) of 1956 Act.
- The Respondent further argues that principles of natural justice are not attracted at all in cases where Section 164(2) of the Act is attracted, as held by the Hon'ble Delhi High Court in *Bharat Bhushan v. H.B. Portfolio Leasing Ltd*.[4] Notices were issued to Companies and Directors in May and June, 2018 and also published in daily newspapers and thereafter those who failed to make compliance were identified and struck off on August 28, 2018 and, consequently, list of directors who were held disqualified was notified by the Respondents on December 07, 2018.
- On the issue of retrospectivity, the High Court held that Section 164(2) of the Act being penal in nature could only be prospective in nature operating from the FY ending March 31 post notification of the said section on April 01, 2014, as similarly held in the matters of *Gaurang Balvantlal Shah v. Union of India*[5], *Bhagavan Das Dhananjaya Das v. Union of India*[6], *Yashodhara Shroff v. Union of India*[7], *Venkata Ramana Tadiparthi v. Union of India*[8] and *Mohd. Tariq Siddiqui v. Union of India*[9].
- On the issue of Section 164(2) being violative of Article 19(1)(g) of the Constitution of India, the High Court held that it disagreed with the same since there is no embargo in carrying on business, profession, etc. with a limited prohibition on in respect of director in default having failed to comply with statutory obligatory provisions of Act. The High Court held that while the Company is a juristic person having no physical existence, disobedience on the part of Company or incapacity in payment of certain dues as described in Section 274(1)(g)(B) of Act, 1956 is bound to occur only when natural persons responsible for its management have failed to manage it effectively and properly. Therefore, the High Court did not find any per se illegality, irrationality, arbitrariness or lack of intelligible classification to declare Section 164(2) as ultra vires.
- On the question of applicability of the principles of natural justice before disqualifying a director under Section 164(2) or holding that Office of Director has become vacant under Section 167(1)(a), the High Court held that as soon as the disqualifications envisaged in the afore-said sections have been incurred, the disqualification or vacancy in the office of a director shall be by operation of law and, being automatic, cannot be said to attract the principles of natural justice to be applied at that stage. The Court opined that in terms of Section 167 of the 2013 Act, a director continuing to the office of directorship despite disqualification under the provisions of the 2013 Act shall be liable to further penalty.
- The declaration of such disqualification and vacancy in office is by the statute itself and by no other authority and the list of disqualified directors as issued by the Registrar of Companies is only a ministerial act. However, the act of the Respondents to deactivate the DINs of directors on disqualification envisaged in Section 164 of the 2013 Act is unsustainable in the absence of any provision in the Act for such de-activation.

Our view

We are of the humble opinion that though the essence of the principle of natural justice is not made available to an errant director, the same may create operational difficulties for non-defaulting companies on which such directors are on board despite such companies not being in any default. As such, some protection needs to be carved out by way of a statutory exception for such companies in respect of acts committed by the errant directors during discharge of their functions in regular course of their office during the interregnum.

[2] 2004 (55) SCL 146
[3] 2005 (60) SCL 50
[4] 1992 (74) Company Cases 20
[5] 2019 GLH (1) 444
[6] (2018) 6 MLJ 704
[7] (2019) 155 SCL 299
[8] Writ Petition No. 5422 of 2019
[9] Misc Bench No. 16173 of 2019

STATE OF WEST BENGAL V. BHARAT VANIJYA EASTERN PRIVATE LIMITED

2019 SCC ONLINE CAL 3605

Background facts

- The Division Bench of the Calcutta High Court was ceased of three appeals against the judgment and order dated January 04, 2017 of the Single Bench of the High Court wherein the State's challenge to the arbitral award granting reliefs under four heads of claim under Section 34 of the Arbitration and Conciliation Act, 1996 (**Act**) was upheld and the reliefs granted by the tribunal were set aside on the grounds that no reasons had been furnished in allowing such heads of claim whether in part of in full; two of such claims overlapped; and no reasons were furnished in making the award and the award betrays a complete non-application of mind and the total absence of any adjudication.

Issues at hand

- The Court was faced with the issue of absence of an independent reasoning in the award as the basis of challenge to the arbitral award, being a mere reproduction of the contractor's/ claimant's note of arguments with no independent evaluation of such claims on merits?

Findings of the Court

- The State argued that the arbitral award was a mere reproduction of the claimant's submissions in its notes of argument quoting the plaint or paraphrasing the allegations therein, and that the arbitrator failed to furnish any reasons to indicate how he was impelled to arrive at the conclusion in respect of the individual heads of claim. While allowing each claim in part, the arbitrator failed to justify the quantum of the claim allowed or even how the balance was rejected.
- The contractor contended that the State offered no effective defence to its claim with no effective cross-examination of the contractor's witnesses to discredit them and disprove the contractor's claims. Hence, the arbitrator's reproduction the contents of the contractor's note on arguments amounted to his acceptance of the contractor's case with reference to documents justifying the contractor's claims, since the contents of the documents exhibited by the contractor remained uncontroverted.
- The High Court examined the award from the point of view of whether the reasoning mentioned therein is plausible and held that while the element of subjectivity cannot be ruled out, such subjectivity has to stand on some objective footing. The Court also held as unsustainable the arbitrator's failure to refer to even a solitary ground of objection raised by the State on the ground of lack of understanding of the arbitrator of such defence (as evident from the arbitrator's use of the expression 'is beyond my understanding').
- The Court also noted that the arbitrator had made an estimation with regard to several claims raised by the contractor, without indicating how the arbitrator arrived at the 'fair estimate' thereof. It was held that the nature of reasons that the applicable statute mandates should be furnished in course of assessment, and the same is singularly lacking in the adjudication on the issue at hand.
- The Court further held that in a claim for damages where the factum has to be established before the quantum can be assessed, a claimant has to affirmatively establish the claim unless the same is admitted by the adversary. On such claim having been denied in its entirety by the State in its note of arguments, such claim could not have been allowed merely on the ground that no witness had been called by the State.

Our view

This judgment is laudable since the court has made a conscious effort to ascertain objectivity in the subjectivity of evaluative criteria adopted by an arbitrator, given the scrutiny of the award by a court only within the fixed and restrictive parameters laid down under Section 34 of the Arbitration and Conciliation Act 1996.

MR. AHMED NAWAZ ALLADIN AND NESTAWAY TECHNOLOGIES PRIVATE LIMITED V. SOUTHERN POWER DISTRIBUTION COMPANY OF TELANGANA STATE (TSSPDCL) AND OTHERS

W.P.No.1096/2020

Background facts

- Mr. Ahmed Nawaz Alladin (**Ahmed**), the absolute owner of certain premises at Hyderabad (**Property**), entered into separate service agreements for 23 units on the premises, all dated October 05, 2017, with Nestaway for assistance in rental process by listing, advertising and marketing his Property.
- The vigilance staff of TSSPDCL conducted an inspection of the Property on July 10,2019, following which the Divisional Engineer, Assessment, TSSPDCL passed 12 provisional orders dated July 22, 2019 in respect of 12 units in the Property. Ahmed filed objections on September 03, 2019 and gave a personal hearing on September 17, 2019 specifying the reasons as to why commercial charges ought not to be levied and produced contractual and documentary evidence. TSSPDCL subsequently proceeded to pass the Final Assessment Orders, all dated October 28, 2019 under Section 126 of The Electricity Act, 2003 for unauthorized use of electricity.
- Aggrieved by these orders, Ahmed and Nestaway filed the present petition before the Hon'ble Court of Telangana, claiming that TSSPDCL passed the orders without jurisdiction and in violation of Article 14 of the Constitution of India. It was contended that these orders infringe on the fundamental right of both petitioners guaranteed by Article 19 (1) (g) of the Constitution and also suffers from non-application of mind.

Issues on hand

- Whether Divisional Engineer, Assessment, TSSPDCL has the power to decide if the said property is being used for commercial or residential purpose?
- Whether the decision of TSSPDCL and officers is arbitrary, unfair and discriminatory?
- Whether the order passed by TSSPDCL and officers is in violation of the rights of Ahmed and Nestaway under Article 14 and Article 19 (1)(g) of the Constitution of India?

Grounds urged before the Court

- Divisional Engineer, Assessment, TSSPDCL, Respondent No. 2 has passed the order with a prejudiced mind and without appreciating the specific facts and circumstances. The entire decision in paragraph 5 is based on the phrases "not like traditional rental agreements" and "different from traditional rental agreement".
- The orders passed by TSSPDCL and its officer are arbitrary, unfair and discriminatory and in violation of Article 14 of the Constitution of India in as much as the treatment of the Schedule Property as commercial establishment is concerned when it is has merely been rented out to multiple tenants who share the common facilities of the house.
- TSSPDCL and its officers arbitrarily assumed that the Schedule Property is being used as paying guest accommodation. The ratio of determining factors constituting paying guest accommodation or any commercial accommodation has been laid down in catena of judgments. Merely because the Mr. Ahmed as employed the services of Nestaway for finding tenants and managing the tenancy, the same cannot be deemed to be "hostel / paying guest even though food is not being provided and owner is not residing in the premises". In fact, the services undertaken by Nestaway squarely come within the definition of a "property manager" which has been defined under Andhra Pradesh Residential and Non-Residential Premises, Tenancy Act, 2017 and merely because a property manager has been appointed, the tenancy cannot be deemed for commercial purpose.
- TSSPDCL and its officer in levying commercial tariff on the Schedule Property have acted beyond the powers conferred to them under the Act. The powers conferred under Section 126 of the Act are limited to the aforesaid purposes only which could be termed as unauthorised use. It is submitted that the powers conferred to the assessing officer under this section are only that of assessing whether the electricity is being used for the purpose it was authorized for. The

Our view

The High Court of Telangana was please to appreciate the pleadings of Nestaway and other Petitioners and held the order of Assessing officer was improper. This Judgement is relief to millions of landowners who use platforms like Nestaway to manage their properties as till now they were subjected to arbitrariness in hands of TSSDPCL.

Further the online property manager industry itself is saved. If TSSPDCL had charged landowners commercial rates instead of domestic rates, then no homeowner would be able to use service providers like Nestaway.

assessing officer does not have the power to sit in judgment on whether the premises in question are residential or commercial. Therefore, the issue of whether a commercial tariff or a residential tariff could not have been determined by the Assessing Officer.

- The actions and decisions of the Respondents are not only arbitrary but also violative of Article 19(1)(g) of the Constitution of India.
- The assessing officer in the present case has failed to follow the principles of natural justice

Findings of the Court

- The High Court has passed an order of interim suspension of the impugned orders. The Respondents are at liberty to calculate the electricity consumption charges based upon the domestic connection which was obtained by Mr. Ahmed Nawaz Alladin and Nestaway.

SRIDHAR AND ANR. V. N. REVANNA AND ORS.

CIVIL APPEAL NO.1209 OF 2020 (ARISING OUT OF SLP (C) NO. 7493 OF 2014)

Background facts

- The Supreme Court of India was ceased of an appeal against the judgment dated January 18, 2012 of the High Court of Karnataka wherein the issue involved was whether Defendant No.1 was entitled to sell property that devolved on him by virtue of a gift deed which stipulated that the donee shall not be entitled to alienate the property.
- Reversing the order of the trial court, the High Court partly decreed the suit and held the trial court to be in error when it held that restraint on the donee in the gift deed was void.

Issue at hand

- Whether the restrictive covenant in the gift deed was hit by Section 10 of the Transfer of Property Act 1882 and therefore void?
- Whether the gift deed was hit by Section 13 of the Transfer of Property Act 1882?

Findings of the Court

- Appellant's challenge was that the gift deed was not a valid gift deed being for the benefit of an unborn person and hence void under Section 13 of the Transfer of Property Act 1882. The Respondent countered this submission by stating that such a stipulation in the gift deed was void in light of Section 10 of the Transfer of Property Act 1882.
- The Supreme Court appreciated the Respondent's reliance on Section 10 of the Transfer of Property Act 1882 and the judgments of the Allahabad High Court in the matter *of Smt. Brij Devi v. Shiva Nanda Prasad and Ors*[10] and in the matter of *Smt. Prem Kali vs. Deputy Director of Consolidation, Sitapur and Ors*[11].
- The Apex Court, therefore, on the first issue, held that any condition or limitation in an instrument including a gift deed on the power of a donee to transfer property is hit by Section 10 of the Transfer of Property Act 1882 and Section 126 of the said Act does not come to rescue.
- The Apex Court further declined the second issue in respect of the bar created by Section 13 of the Transfer of Property Act 1882 as having no application on facts since the Defendant No.1, a minor and not an unborn child, reference being made to the his younger brothers or their male children was made while enumerating the conditions as contained in the gift deed.
- The Apex Court, therefore, set aside the judgment of the High Court and held the donee to be entitled to transfer the property which was received by gift deed dated May 05, 1957.

Our view

The Hon'ble Apex Court has ascertained the consequence of Section 13 by clarifying the rights of an unborn beneficiary, deriving benefit from a donee who happens to be a living person.

[10] AIR 1939 Allahabad 221
[11] 2016(116) ALR 794

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