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DISPUTE RESOLUTION AND ARBITRATION

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DISPUTE RESOLUTION AND ARBITRATION UPDATE

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RECENT JUDGEMENTS

National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.

MANU/SC/0382/2020

Background facts

- National Agricultural Cooperative Marketing Federation of India (**NAFED**), Appellant, and Alimenta S.A. (**Alimenta**), Respondent, a canalizing agency for Government of India, entered into a contract dated January 12, 1980 for supply of 5000 metric tonnes of Indian HPS groundnut (**Commodity**) for year 1979-80. The contract was a standard form Cost, Insurance and Freight contract of Federation of Oils, Seeds and Fats Associations Ltd (**FOSFA**).
- Clause 14 of contract provided that in case of prohibition of export by executive order or by law, contract would be treated as cancelled.
- Only 1900 metric tonnes could be shipped due to damage caused to crop by cyclone and other factors. Parties executed two addenda for NAFED to supply the balance amount in subsequent year, i.e. 1980-81.
- Being a canalizing agency for Government of India, NAFED required express permission from Government to carry forward any export to a subsequent year. NAFED applied for the permission but was refused. At the time of executing addenda, NAFED claimed it was unaware that permission to carry forward exports was required. Meanwhile, price of Commodity had increased threefold. Consequently, by a letter dated January 01, 1980, Ministry of Agriculture, Government of India, directed NAFED not to export quantities left over from previous years.
- On February 13, 1981, NAFED informed Alimenta that export of contracted quantity was not possible because of restriction imposed by Government of India. Alimenta invoked arbitration on the same day before FOSFA in London. NAFED was requested to appoint an arbitrator within 21 days. NAFED filed a petition before High Court of Delhi (**HC**) praying to restrict Alimenta from proceeding with arbitration before FOSFA on the ground that agreement did not contain any specific provision for arbitration. On March 20, 1981, HC stayed the arbitration proceedings till April 22, 1981. Despite that Alimenta appointed an arbitrator on behalf of NAFED and proceeded with arbitration.

- On December 11, 1981, HC decided that there was no arbitration agreement between the parties. Alimenta filed a special leave petition before Supreme Court of India (**SC**) against this order. The court passed an order on April 30, 1982, restraining Alimenta and FOSFA to proceed further in arbitration. On May 04, 1982, FOSFA stated that courts did not have power to stay arbitration and continued with arbitration proceedings.
- Arbitral tribunal passed an award by which NAFED was directed to pay a sum of USD 4,681,000 which was the difference between contract price and price actually paid by Alimenta because of NAFED's non-performance, along with interest. NAFED filed an appeal before Board of Appeal and requested it to allow NAFED to be represented by its lawyers. Board of Appeal rejected this request and upheld the award passed by tribunal while increasing interest payable.
- Alimenta sought to enforce the award in India under Sections 5 and 6 of Foreign Awards Act, 1961 (**Act**). NAFED filed its objections against enforcement on the ground that it is against public policy of India, among other grounds. After a series of proceedings and appeals, HC ultimately held that the award was enforceable. NAFED filed an appeal before SC on November 24, 2011.

Issues at hand

- Whether there was government restriction on NAFED due to which it was unable to perform its obligations under the contract?
- Whether the award is against the public policy of India?

Findings of the Court

- SC held that the restriction imposed on NAFED by Government of India fell within prohibition prescribed under Clause 14 of the contract, thereby making it a contingent contract. Therefore, the contract, at the time when Government imposed restriction on supply of Commodity, became unenforceable under Section 32 (enforcement of contingent contracts) of the Indian Contract Act, 1872. This rendered the contract to carry forward export obligation illegal.
- As regards award being against the public policy of India, SC referred to Section 7(1)(b)(ii) of Act which deals with public policy ground for refusing to enforce a foreign award. Court referenced its own earlier decisions in *Renusagar Power*[1], *Oil India*[2], *Associate Builders*[3] and opined that since the contract became unenforceable due to restriction on supply of Commodity by Government, it would be against fundamental policy of India to enforce it.
- Court also referenced Section 7(i)(a)(ii) of the Act which states that if proper notice of appointment of arbitrator is not given or a party was unable to present its case before the arbitrator, a foreign award in such a case is not enforceable. The Court noted that the arbitrator appointed on behalf of NAFED was in violation of stay order of high court. The Court relied on *Manohar Lal*[4] in this regard, which stated that *"… any order passed by any authority in spite of the knowledge of an order of the court is of no consequence as it remains a nullity*."
- In light of the above, Court held that enforcement of award would be against public policy of India.

Our view

Although the judgment does not add anything new to the definition of public policy, it is indeed a positive step. It is also noteworthy that, as opposed to the challenge to enforcement of a foreign award in Vijay Karia, challenge in this case was made on legitimate grounds and the court did not have to redefine its powers under Section 48 of the Arbitration and Conciliation Act, 1996.

South East Asia Marine Engineering and Constructions Ltd. v. Oil India Ltd.

MANU/SC/0441/2020

Background facts

- The Appellant, South East Asia Marine Engineering and Constructions Ltd. (**SEAMEC**), and the Respondent, Oil India Ltd (**OIL**), entered into a contract for drilling of oil wells and other ancillary activities. The contract was initially signed for a period of two years and was later extended for two additional years. During contract period price of high-speed diesel, which is one of the key materials used in the drilling operations, increased. SEAMEC made a claim to OIL stating that increase in price of high-speed diesel would attract Clause 23 of contract pertaining to 'Change in Law' and that OIL was liable to make good the difference in price to SEAMEC.
- OIL rejected this claim and SEAMEC invoked arbitration against OIL. The arbitral tribunal issued an award on December 19, 2003 in favour of SEAMEC allowing its claim along with payment of interest,

[1] 1994 Supp (1) SCC 644
[2] (2003)5 SCC 705
[3] (2015) 3 SCC 49
[4] (2010) 11 SCC 557

stating that a circular issued by government on increase of price of high speed diesel has force of law and, therefore, falls within ambit of 'Change in Law' clause of the contract.

- OIL challenged this award before District Judge who affirmed the award passed by the arbitral tribunal. Aggrieved by this decision, OIL filed an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (**Act**) before the Guwahati High Court (**HC**), which ruled that arbitral tribunal had wrongfully interpreted the contract and that award was against the public policy of India. Guwahati High Court also held that by powers under Section 37 of the Act, it was entitled to set aside the award since award was passed by arbitral tribunal overlooking terms of the contract.
- SEAMEC challenged this order by way of a special leave petition before Supreme Court of India (**SC**).

Issue at hand

- Whether the interpretation of the 'Change in Law' clause by the arbitral tribunal was correct?

Findings of the Court

- SC noted that the contract was based on a fixed rate and contained certain clauses that stated that the rates, terms and conditions were to be in force throughout the term of the contract. By this arrangement, Court interpreted the parties to have mitigated risk of increase in prices at the time of entering into the contract. Court relied on the item list of the contract which stated that SEAMEC would supply fuel at its own expense and, therefore, held that it was erroneous of arbitral tribunal to have given Clause 23 a wide interpretation and to have included a government circular on change in price of high-speed diesel within meaning of 'Change in Law'.
- On the above basis, Court set aside award of arbitral tribunal and restored order of HC.

Our view

It is interesting to note that the Court dismissed the issue surrounding the interpretation of the 'Change in Law' clause in the contract. It relied on other provisions of the contract to conclude that the contract was a fixed rate contract. The Court ought to have delved into the connotations of the wordings of the 'Change in Law' clause and examined whether price variation of an essential item of the contract could be included within the meaning of 'Change in Law'. The Court's reliance on the item list of the contract which states that SEAMEC agreed to supply fuel at its own expense may not be entirely correct. Although SEAMEC agreed to supply the fuel at its expense at the rate existing at the time of entering into the contract, the subsequent price variation ought to have been dealt with separately.

Pandurang Ganpati Chaugule v. Vishwasrao Patil Murgud Sahakari Bank Ltd.

2020 SCC ONLINE SC 431

Background facts

- On August 13, 2008 the Petitioner questioned the action of Respondent under the SARFAESI Act before the Civil Judge in Special Civil Suit No. 226 of 2007. The trial court while deciding the preliminary issue held that it does not have the jurisdiction to decide the suit. A first appeal was preferred, which was dismissed. An Appeal challenging the dismissal was preferred in the Hon'ble Supreme Court. A separate Writ Petition under Article 32 of the Constitution of India was also filed, questioning the invocation of the SARFAESI Act by issuing notice u/s 13 of the SARFAESI ACT by Co-operative banks.
- During the pendency of the litigation. the Central Government brought in force the Enforcement of Security Deposit and Debts Law (Amendment) Act, 2012(Act 1 of 2013), amending the definition of Section 2(1)(c) of the SARFAESI Act and vide notification issued in 2003 Section 2(1) (c) (iva) was inserted in SARFAESI Act, pursuant to which the co-operative bank and the multi Sate co-operative bank was brought within the class of banks for seeking recourse to the provisions of the SARFAESI Act.
- The writ petitions were filed questioning vires of the notification dated January 28, 2003 as well as the insertion of Section 2(1) (c) (iva) to the SARFAESI Act 2013 and amending the definition of Section 2(1)(c) of the SARFAESI Act.

Issues at hand

- Whether co-operative banks, which are co-operative societies also, are governed by Entry 45 of List I or by Entry 32 of List II of the Seventh Schedule of the Constitution of India, and to what extent?
- Whether 'banking company' as defined in Section 5(C) of the Banking Regulation Act, 1949 (**BR Act**) covers co-operative banks registered under State Co-operative laws and multi-state co-operative societies?
- Whether co-operative banks both at the State level and multi-state level are 'banks' for applicability of the SARFAESI Act?

- Whether provisions of Section 2(c) (iva) of the SARFAESI Act on account of inclusion of multi-state co-operative banks and notification dated January 28, 2003 notifying cooperative banks in the State are ultra vires?

Findings of the Court

- The Supreme Court rejected the contention that banking under Entry 45 of List I does not cover co-operative banks and held that the activity of the co-operative bank is covered under Section 5(1)(b). Banking itself has a wide meaning, and the activity of co-operative banks is definitely covered by Entry 45 of List I.
- The Supreme Court held that the co-operative banks involved in the activities related to banking are covered within the meaning of 'Banking Company' defined under Section 5(c) read with Section 56(a) of the BR Act, which is a legislation relatable to Entry 45 of List I. It governs the aspect of 'banking' of co-operative banks run by the co-operative societies.
- Further, it was held that the co-operative banks run by the co-operative societies registered under the State legislation with respect to the aspects of 'incorporation, regulation and winding up', in particular, with respect to the matters which are outside the purview of Entry 45 of List I of the Seventh Schedule of the Constitution of India, are governed by the said legislation relatable to Entry 32 of List II of the Seventh Schedule of the Constitution of India.
- The Court further stated that assuming for the time being the definition of 'bank' in Section 5(c) of the BR Act did not cover the co-operative banks; the expression 'bank' has been defined in the SARFAESI Act under Section 2(1)(c), and the provisions contained in Section 2(1)(c)(v) authorises the Central Government to specify 'such other bank' for that Act. Thus, the notification issued on January 28, 2003 notifying 'co-operative bank' as the 'bank' is covered by Entry 45 of List I as they are regulated by the BR Act, and the RBI Act. It was further held that co-operative societies/banks stand included by incorporation in Section 5(1)(c) of the BR Act and the notification was issued *ex abundanti cautela*. By virtue of Section 56(a), co-operative banks, as defined in Section 56(cci) of the BR Act, are included in Section 5(1)(c).
- In substance, the Court held that co-operative banks under the State legislation and multi-State co-operative banks are 'banks' under Section 2(1)(c) of SARFAESI Act. Recovery is an essential part of banking and as such, the recovery procedure prescribed under Section 13 of the SARFAESI Act is applicable.
- The Court held that recovery of dues would be an essential function of any banking institution and the Parliament can enact a law under Entry 45 of List I as the activity of banking done by co-operative banks is within the purview of the same. But it would of course be open to the Parliament to provide the remedy for recovery under Section 13 of the SARFAESI Act.
- The Court opined that the purpose of the SARFAESI Act, i.e., enforcement of security interest which is sought to be achieved by Section 13 without the intervention of the court, must not be overlooked. Since the activity of a co-operative bank is regulated by the law enacted within the relatable Entry 45 of List I, there is no reason as to why the Parliament lacked the competence to enact the SARFAESI Act and to provide a procedure for the speedy recovery of dues. The SARFAESI Act also covers the activities undertaken by the co-operative banks. The co-operative banks are doing banking business under Section 5(b) of the BR Act, and the exclusion of the co-operative societies from Entry 43 of List I, does not have any bearing regarding the interpretation of Entry 45 of List I.
- Accordingly, the Court held that the Parliament has legislative competence under Entry 45 of List I of the Seventh Schedule of the Constitution of India to provide additional procedures for recovery under Section 13 of the SARFAESI Act with respect to co¬ operative banks. The provisions of Section 2(1)(c)(iva) of the said Act, adding *ex abundanti cautela*, a multi-State co-operative bank is not ultra vires as well as the notification dated January 28, 2003 issued with respect to the co-operative banks registered under the State legislation.

Our view

The ambiguity in the interpretation of the SARFAESI Act by various Courts was something that defaulters were taking advantage of, failing to return the debt amounts to the concerned co-operative banks. The non-availability of the provisions of the SARFAESI Act proved to be a big handicap to such banks for years. With this judgment coming into force, the Hon'ble Supreme Court has remedied the 'malady of inordinate delay' in recovery of debts through civil courts and co-operative tribunals. The inclusion of co-operative banks into the purview of the SARFAESI Act, will definitely result in efficient and quick recovery of debts for such banks.

Raj Shipping Agencies v. Barge Madhwa & Anr

CHAMBER SUMMONS NO.66 OF 2018 IN ADMIRALTY SUIT NO. 6 OF 2015

Background facts

- In an Admiralty Suit (**Suit**) filed under Admiralty (Jurisdiction & Settlement of Maritime Claims) Act, 2017 (**Act**) before Bombay High Court (**HC**), Official Liquidator (**O/L**) raised an objection to suit proceeding without obtaining leave of Court u/s 446 of Companies Act, 1956 (**CA**).
- Thereafter, Principal Bench of NCLT admitted a Petition u/s 7 of Insolvency and Bankruptcy Code, 2016 (**IBC**) against owner of the vessel/Corporate Debtor (**CD**) who was coincidently a Defendant in the suit.
- The above issues being repetitive, HC tagged all such matters pertaining to the same.

Issues at hand

- Is there a conflict between action 'in rem' filed under the Act & the provisions of IBC and if so, how is the conflict to be resolved?
- Whether leave under Section 446(1) of the CA is required for the commencement or continuation of an Admiralty action 'in rem' where a winding up order has been made or the O/L has been appointed for the company that owned the vessel?

Findings of the Court

- As per the principles laid down in *Damji Valji Shah*[5], the Act is a special act which deals with Admiralty matters whilst IBC is a general act which deals with corporate insolvency. Thus, as per the principles of interpretation wherein a special act overrides a general act, the Act will prevail.
- The court observed that Section 33(5) of IBC does not operate as a bar to an action 'in rem' against a vessel but only applies to the CD.
- The Act operates in a separate/distinct field to confer Admiralty jurisdiction only on High Courts of coastal States for enforcement of maritime claims. The action 'in rem' is against a vessel which is treated as a distinct/separate entity. An action 'in rem' is an action against a juristic person, namely, the vessel.
- Section 238 of IBC does not override Act since an express provision is required to do so. Further, reliance was placed upon MFV Shilpa[6] wherein it was held that Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act doesn't override the provisions of Section 51 of Merchant Shipping Act in regard to the sale of a vessel by a financial institution to recover a debt due to it, which was secured by a mortgage of the vessel.
- Once the vessel is arrested and is in the custody of Court, company's interest in the vessel is limited to a right to receive the balance of proceeds of sale remaining after satisfaction of maritime claimants.[7]
- The Suit filed either against the vessel/owner or against both gets interdicted once an order under Section 14 of the IBC comes into force. Moratorium under Section 14 is wide in scope and puts a complete bar against the institution or continuation any legal proceedings against the CD.
- Arrest of a vessel prior to moratorium setting in would not create a lien in favour of the Claimant.
- Non-obstante clause in Section 238 of IBC only applies to existing enactment & not to future enactments. It has an overriding effect only on rules which were in existence at the time when the rule was brought into force & it cannot mean that all future rules/notifications will be subject to such a clause.[8]

Our view

This is one of a kind judgment which clears the dilemma/air in the IBC industry. Although the judgment harmoniously interprets the provisions and interplay of the two statutes, we don't agree with the Hon'ble Court's view on Section 14(1)(c) of the IBC since the word 'action' in the section includes suits as well, though not expressly mentioned therein. Nonetheless, the judgment will send a strong message across the board to protect the rights of crew members & not to leave them fending for themselves. The scenarios taken in the judgment have laid down the guidelines which one may follow at the time of overlap of the two statutes.

[5] AIR 1966 SC 135
[6] AIR 2002 Bom 371
[7] (1995) B.C.C. 666 (Chancery Division)
[8] (2002) 9 SCC 177

- An action 'in rem' operates only against the res, which is considered to be a legal person & having a personality independent from that of the owner. If a vessel is arrested in an action 'in rem' and no appearance is entered by the owner, the vessel is sold & the proceeds are paid out to the successful claimant after determination of priorities. If the owner enters appearance but no security is furnished, the action will proceed as an action 'in rem' against the vessel & an action 'in personam' against the owner.
- Further, with the assistance of Amicus Curiae, the HC analysed the provisions of the statutes in the following scenarios:
- **Scenario A: If a Plaintiff has commenced Admiralty proceedings 'in rem' and has obtained an order of arrest of a vessel from an Admiralty Court, subsequent to which insolvency proceedings are filed against the owner of the vessel & the adjudicating authority declares a moratorium under Section 14 of the IBC.**
  - If a security has been provided to the Admiralty Court for release of the vessel prior to moratorium, then the Suit will be an action in personam against the owner. Hence, the Suit will not proceed once moratorium is declared.
  - If security has not been furnished when the moratorium is declared, then the Admiralty Court will not proceed further with the Suit in rem, and the vessel will remain under arrest until CIRP ends & Plaintiff will be considered as a secured creditor of the CD.
  - If the CIRP is successful and a Resolution Plan (**Plan**) is approved, then the claim will be determined in accordance with the Plan. The Plaintiff should ordinarily be entitled to realise his claim to the full extent of the security provided.
  - If the CIRP is unsuccessful and an order for liquidation is passed, the Plaintiff would have sole recourse to the security provided and would be entitled to realize the same. It will be open to the O/L to defend the suit as per IBC.
  - If the company is liquidated then Plaintiff's action will proceed and the vessel will be sold by Admiralty Court, who will invite claims against the sale proceeds, as per the Rules. If the vessel is sold by the Court in exercise of its jurisdiction 'in rem', then the Act will apply and the sale proceeds will be distributed on the basis of priorities.
  - If a Plan is approved, then claims of all parties will be determined in accordance with it. The rights and claims of the secured creditors in respect of the vessel under arrest shall be considered by the COC / NCLT. All claimants who are unable to recover their claim under the Plan would be ranked as operational creditors and their recovery would be as per the IBC.
  - If security has not been furnished and the vessel remains under arrest, the Admiralty Court will not order the sale of the vessel during the moratorium period, unless an application for sale is made by the Resolution Professional (**RP**), or if the vessel is not being maintained by the RP during moratorium. If all charges for the same are not being paid by the RP, the Admiralty Court will have the discretion to sell the vessel at the instance of any party who has filed a Suit and has a maritime claim.
  - In all situations, notice is required to be given to the Owners who may be represented by the RP or the O/L. The sale proceeds would be retained by the court till the pendency of insolvency resolution process/liquidation of company.
- **Scenario B: If moratorium has been declared under Section 14 of the IBC before filing of an Admiralty Suit 'in rem'.**
  - There is no bar in filing a suit if moratorium is declared beforehand. The warrant of arrest would have to be affected on the Vessel and the Owners/RP. If the RP defends the suit, the same would be stayed in favour of proceedings under the IBC while the vessel may continue to trade with undertakings from the RP. Such a claimant would be considered a secured creditor & principles with respect to the Plan in Scenario A above would apply.
- **Scenario C: If the CD is in liquidation at the time of commencement of Admiralty proceedings 'in rem'.**
  - Once a Plaintiff obtains an order of arrest, the vessel can then be sold by the Court in order to realize maximum value and only a judicial sale by an Admiralty Court that is recognized, thereby giving a clear title to the buyer. The O/L will be entitled to defend the suit as per Section 35(1)(k) of the IBC.
- The court held that an action 'in rem' may be filed & the vessel be arrested before/ during moratorium is declared or even after an Order of liquidation is passed against the CD. The Court also held that the provisions of the IBC have to be read harmoniously with the provisions of the Act.

- Even if both the Act and CA are considered to be special enactments, the Act will prevail over the CA since it is a latter enactment.
- In the matter of *Indorama Synthetics*[9], it was held that the provisions of Section 446(1) of the CA are to be invoked judiciously only when there are concerns with either the winding-up proceedings or with the assets of the Company. The expression 'suit or other proceedings' has to be construed accordingly and not to be interpreted liberally to include every proceeding of whatsoever nature.
- In an action against the res, leave of the Court is required to be taken. Leave may be ordinarily granted by the Court. However, in case the Court refuses to grant such leave, then the Court under Section 446(2) would assume jurisdiction as laid down in the Act and accordingly adjudicate the lis.[10]
- In a situation where special legislation does not provide for a specific non-obstante clause, it would not be for the Court to read within the act any such provision only to provide for an overriding effect.[11]
- Since the suit is commenced as an action 'in rem' against the res alone, no leave under Section 446 is required.
- Obtaining leave under Section 446 of the CA is mandatory when legal proceedings are filed against the assets of the company.
- The court held that Act being a special statute will prevail over CA and no leave is required under Section 446(1) for instituting/continuing a suit under the Act or when a winding up order has been made or the O/L has been appointed as Provisional Liquidator.

In Rajasthan RERA, Jaipur – Ajit Verma v. MVL Ltd. and Ors

COMPLAINT NO. RAJ-RERA-C-2018-2134 & ORS.

Background facts

- The complainants are the allottees of the non-complainant's (promoter) projects. Complaints were filed against the promoter before the Hon'ble Rajasthan RERA (**Authority**) for various reliefs viz. possession, execution of sale deed, refund etc.
- A winding up petition also came to be filed against the non-complainant company and a provisional liquidator was appointed by the Delhi High Court.
- Thereafter, an application under Section 279 of the Companies Act, 2013 was filed before the Authority on behalf of the non-complainant company for inter alia stay of the said complaints, as a winding up petition was admitted against the non-complainant company and a provisional liquidator was appointed by the High Court of Delhi.
- The Authority rejected the said application on the grounds that Section 279 of the Companies Act, 2013 does not bar the Authority from proceeding to hear the said complaints.
- On the day fixed for hearing of the said complaints, the matter was intervened by the Official Liquidator mainly on the pretext that the Authority has erred in proceeding with the complaints, without the complainants first obtaining prior leave of the Hon'ble High Court and that the decision of the Authority was is in conflict with the ratio laid down by the Hon'ble Apex Court i.e. "It is now well settled that if any winding-up order is passed during the pendency of a suit against the company, and if the suit is continued without obtaining leave in spite of that bar contained in Section 446(1), the decree passed is only voidable at the instance of the liquidator, and not void ab initio"[12].

Issue at hand

- Whether the complainants are required to first obtain leave of the High Court to proceed in matter before the Authority?

[9] 2016 (4) Mh. L. J. 249
[10] 2018 SCC Online 957 (Praxis Energy Agents SA V/s. M.T. Pratibha Neera)
[11] R/Special Civil Application No. 9883 of 2019; Decided on October 10, 2019
[12] *Harihar Nath & Ors. v. State Bank of India & Ors.* Civil Appeal No. 5072 of 1998

Findings of the Court

- The Authority inter alia held that Section 279 of the Companies Act, 2013 or the corresponding Section 446 of the Companies Act, 1956, do not create a bar in proceeding ahead with the complaints pending before it for the following reasons:
  - That the said complaints were pending before the said order appointing provisional liquidator was passed by the Delhi High Court
  - That the proceedings under the said complaints could not be stayed, as there was no winding up order against the non-complainant company and provisional liquidator was appointed as an interim measure until the winding up of the non-complainant company was confirmed
  - The Authority categorically laid down that RERA Act is a special Act overriding the Companies Act, 2013

Our view

The Authority has rightly pointed out that the provisions of RERA Act, 2016 prevail over the provisions of the Companies Act, 2013, as the former was brought into effect subsequently as compared to the latter. The said decision has provided a ray of hope to homebuyers, who are often confronted with unnecessary litigation by the Companies by invoking different provision of law and are forced to engage in never ending litigation.

K. Rajalingam v. R. Suganthalakshmi

2020 SCC ONLINE MAD 1052

Background facts

- The Full Bench of Madras High Court (**HC**) was called upon to decide the controversy of whether remedy against an order of acquittal, passed by a Magistrate on a complaint, is under proviso to Section 372 of Criminal Procedure Code (**Cr.P.C**) or under Section 378(4) of Cr. P. C.
- **The 2016 S Ganapathy Judgment Controversy**
  - Single Judge of HC, |came across Judgement in S Ganapathy's case[13], pronounced by Full Bench of HC and observed that decision in S Ganapathy fails to consider ratio of a three-judge Bench ruling of Supreme Court (**SC**) in *Damodar S. Prabhu v. Sayed Babalal H*.[14]
  - Faced with conflicting and divergent views, Single Judge referred the issue for a larger Bench to rule on the correctness of *S. Ganapathy v. N. Senthilvel* judgment considering decision in Damodar's case.

Issues at hand

- On an acquittal of accused in a case instituted upon a private complaint, the remedy for unsuccessful complainant lies to Court of Session under proviso to Section 372 Cr.P.C or before High Court under Section 378(4) and (5) Cr.P.C. or are there concurrent remedies available, with the right to the complainant to elect forum of choice?
- If remedy is under proviso to Section 372 Cr.P.C, should complainant seek special leave from Court of Session and, if so, under what provision of law?
- What is limitation for filing an appeal against acquittal before Sessions court under proviso to Section 372 Cr.P.C in a private complaint case like Section 138 of NI Act?
- If the answer to the first issue is that appeal will have to be filed under proviso to Section 372 Cr.P.C, then, if such appeal filed by complainant before Court of Session is dismissed and order of acquittal passed by Magistrate is upheld, does the complainant have a remedy to file a revision under Section 397 read with Section 401 Cr.P.C before High Court or file another round of appeal against such acquittal by Court of Session before High Court under Section 378(4) & (5) Cr.P.C.?
- If complainant has revisional remedy before High Court under Section 397 read with Section 401 Cr.P.C, can High Court set aside only Appellate Court's order or Trial Court's order or orders of both the Courts?
- In the event of larger Bench holding that complainant who has lost before Trial Court and Court of Session has remedy to file a revision under Section 397 read with Section 401 Cr.P.C. before High Court, then, after setting aside orders, should High Court remand case to Court of Session or to Trial Court for re-trial?

[13] *S. Ganapathy v. N. Senthilvel | (2016) 4 CTC 119*
[14] *(2010) 5 Supreme Court Cases 663*

- In the event of the law laid down by Full Bench in *S. Ganapathy v. N. Senthilvel* being overruled, what impact would such overruling have on cases which have been decided by Courts of Session during interregnum?

Findings of the Court

- Drawing strength from the inherent powers vested unto it, the Hon'ble High Court did rule the decision in S. Ganapathy to be *per-incuriam* and, thereafter, went on to rectify the error caused on account of the events which followed the decision in S. Ganapathy's case:
  - Appeals remanded to the Sessions Court pursuant to S Ganapathi should be transferred back to the file of the High Court. The same effect will be given even for cases where the original appeal was filed before the Sessions Court and is pending.
  - Where the Sessions Court has confirmed an acquittal, order passed by the Magistrate and a revision petition by the complainant is before the High Court, the order of Sessions Court must be disregarded. The revision petition filed before the High Court must be treated as an appeal by virtue of Section 401(5) of the CrPC.
  - Where, an acquittal order has been confirmed by the Sessions Court and it has not become final or it has not been acted upon by the parties and the complainant wants to challenge the same, he shall file a criminal appeal before the High Court, disregarding the order passed by the Sessions Court. The limitation period to move the appeal shall be calculated from the date on which the Sessions Court order was made ready. In such cases, the complainant has to seek for a Special Leave under Section 378 (5) of CrPC.
  - Where the Sessions Court has reversed an acquittal order passed by the Magistrate and the same has been challenged by the accused before the High Court through a revision petition, the same should be treated as an appeal pending before the High Court against the order of acquittal. The order passed by the Sessions Court would be disregarded.
  - Where the Sessions Court has reversed the order of acquittal passed by the Magistrate and convicted the accused and this order has not become final or the same has not been acted upon, the accused person has to necessarily challenge the said order by filing a criminal revision petition before this Court by quoting this Full Bench judgement. After notice is served on the complainant and he enters an appearance, the same should be treated as an appeal pending before the High Court against the order of acquittal, by disregarding the Sessions Court order.
  - The Court further clarified that the following kinds of cases cannot be re-opened by virtue of this judgment:
    - In cases where, either after remand or by means of filing, an appeal has been finally decided by the Sessions Court and the same has not been challenged or it has been acted upon
    - In cases where the order of the Sessions Court was put to challenge before the High Court, either by and final orders have been passed by the High Court
- In these two scenarios, the Bench stated that the order passed by the Sessions Court will be final between the parties.

Our view

In all fairness, a stitch in time saves nine. This judgment is a classic example of how this is applicable to judiciary, which had taken about 4 years to declare a judgment *per incuriam*, and in the end resulting to hit reverse for thousands of matters. This entire oversight and resultant precedent had caused wastage of precious time and resources. By the above judgment there has finally been a clarity that the legal path, when it comes to challenging acquittal orders by the trial court for a private complainant (such as a complainant in a cheque bouncing case), is different from that of a victim in a police report.

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