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# DISPUTE RESOLUTION AND ARBITRATION

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# DISPUTE RESOLUTION AND ARBITRATION UPDATE


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## RECENT JUDGMENTS

### Gammon India Ltd & Anr v. National Highways Authority of India

**OMP 680/2011 (NEW NO. O.M.P. (COMM)392/2020) & I.A. 11671/2018**

#### Background facts

- A contract was executed between Gammon-Atlanta JV, a Joint Venture of Petitioner No. 1 and Atlanta Ltd. and National Highways Authority of India (**NHAI**) on December 23, 2000 (**Contract**) for carrying out road widening of NH-5 in Orissa from Khurda to Bhubaneswar (**Project**). The value of the Contract was approximately INR 118.9 crores. The date of commencement of the Contract was fixed as January 15, 2001 and the Project was to be executed till January 14, 2004.
- The work was not completed within the prescribed time and extensions for completing the Project were granted till December 31, 2006. Vehicular traffic was allowed on the main carriageway in March 2007 and according to the Petitioners, this amounted to a deemed 'taking over' of the carriageway by Respondent and hence completion.
- During the tenure of the Project, disputes had been raised by both parties. Subsequently, the Petitioner invoked arbitration under Sub-Clause 67.3 of the Conditions of Particular Application, vide Notice dated January 27, 2005. The parties appointed three different arbitral tribunals, adjudicating different claims arising out the contract.
- **Award dated October 5, 2007 (Award No. 1)**
  - **Claims raised:**
    - Compensation for losses incurred on account of overhead and expected profit
    - Compensation for reduced productivity of machinery and equipment deployed
    - Revision of rates to cover for increase of cost of materials and labor during extended period over and above the relief available under escalation (price adjustment) provision in the Contract (**Claim No. 3**)
  - **Findings of the Arbitral Tribunal:**
    - The first two claims were allowed
    - The last claim was rejected on the ground that it was outside the terms of reference
  - Award No. 1 was challenged before Single Bench of the Delhi High Court which upheld the first two claims and liberty was granted to raise Claim No. 3 before the second arbitral tribunal.

- Thereafter, the Award No. 1 was upheld by two Division Benches and eventually two SLP's were dismissed by the Supreme Court in August & September 2017, respectively. Therefore, Award No. 1 attained finality.

- **Award dated February 21, 2011 (Award No. 2)**
  - **Claims raised:**
    - In 2007, whilst proceedings challenging Award No. 1 were still ongoing, Petitioners invoked arbitration with regards to certain additional claims including Claim No. 3
  - **Findings of the Arbitral Tribunal:**
    - Claim No. 3 was rejected by a majority of 2 out of 3 members of the tribunal
    - The present Petition challenged Award No. 2
- **Award dated February 20, 2012 (Award No. 3)**
  - **Claims raised:**
    - Claims raised pertained to recovery of alleged Liquidated Damages, recovery of alleged penalty for not providing vehicles to the Engineer etc.
  - **Findings of the Arbitral Tribunal:**
    - The Petitioner's claim for recovery of amounts paid as liquidated damages to the Respondent, was allowed. Further the Petitioners were also awarded, interest @10% p.a. compounded monthly for the payments withheld against the liquidated damages.
    - Award No. 3 was upheld by a Single Judge and a Division Bench of Delhi High Court (**HC**)
    - The Respondent paid the awarded sum and therefore, Award No. 3 attained finality

## Issue at hand

- Whether it is permissible for the Petitioners to jettison the findings in Award No. 3 to argue that Award No. 2 ought to be set aside?

## Findings of the Court

- HC acknowledged the fact that even though filing of different claims at different stages of a contract/project is permissible in law, multiplicity ought to be avoided.
- It was further held that in civil litigation, it is the endeavor of Courts to always ensure that claims of parties are adjudicated together. It is with the intention of avoiding multiplicity that the principles enshrined in Order 2 Rule 2, Section 10 and res judicata are part of CPC. It further stated that arbitral proceedings are not strictly governed by CPC, however multiplicity of proceedings needs to be avoided as per principles of public policy applied to arbitral proceedings.
- It was clarified that notwithstanding contradictory decisions in Award Nos. 1 and 3, awards stand independently on their own and Award No. 2 is reasoned and passed in accordance with the terms of the contract.
- The Court further held that a subsequent award would not render the previous award illegal. To the contrary, Award No. 3 would have to be looked at on its own merits. Therefore, it was held that the findings in Award No. 3 cannot be used to argue that Award No. 2 ought to be set aside and the rejection of Claim No. 3 was upheld.
- In conclusion, Court issued practice directions with regards to Petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (**Section 34 Petition**):
  - At the time of filing, parties to a Section 34 Petition are to disclose whether, there are any other proceedings pending/adjudicated in respect of same contract and if so, what is the stage.
  - At the time of hearing, parties are to disclose whether any other Section 34 Petition in respect of same contract is pending and if so, seek disposal of said petitions together in order to avoid conflicting findings.
  - In Petitions for appointment of an arbitrator/arbitral tribunal, parties ought to disclose if any tribunal already stands constituted for adjudication of the claims of either party arising out of same contract. If a tribunal has already been constituted, an endeavor can be made by arbitral institution or HC under Section 11 of the Act, to refer the matter to same tribunal or a single tribunal in order to avoid conflicting and irreconcilable findings.
  - Appointing authorities under contracts consisting of arbitration clauses ought to avoid appointment or constitution of separate arbitrators/arbitral tribunals for different claims/disputes arising from same contract.

### Our view

Delhi HC proactively recognized the fact that even though arbitration, which in itself is supposed to be a path to speedy redressal of a dispute, multiple references/tribunals/awards arising out of the same arbitral clause is nothing but counter-productive to the entire process.

The new practice directions laid out by HC pertaining to Section 34 Petitions is yet another step in the direction which would lead to a drop in protracted proceedings, thereby resulting in efficacious dispute resolution.

## Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt Ltd & Anr

**CIVIL APPEAL NO.6347 OF 2019**

### Background facts

- SC dealt with an appeal filed by an ex-director of Corporate Debtor against judgment dated May 14, 2019 of NCLAT wherein the issue of limitation of Application filed under Section 7 of IBC in 2018 was decided in favor of financial creditor on following grounds:
  - Having been filed within 3 years of enforcement of IBC on December 01, 2016
  - The Corporate Debtor, having provided mortgage security, was entitled to the limitation period of 12 years as per Article 61(b) of Limitation Act 1963
- Prior to the impugned judgment dated May 14, 2019 of NCLAT, Corporate Debtor had availed various loans, advances and facilities from lender banks, including assignor of debt herein with various security documents executed in favor of lender banks in years 2008 and 2009, including those of equitable mortgage against facilities so obtained apart from additional security documents. A deed of modification of charge over the assets of Corporate Debtor was executed on April 26, 2013. Having defaulted in repayment of amounts due against the loans, advances and facilities from lender banks, account of Corporate Debtor was classified by the Assignor Bank as NPA on July 08, 2011. While proceedings under SARFAESI Act 2002 and RDDBFI Act 1993 had been initiated and pending against Corporate Debtor, Respondent No.2 (being one of the financial creditors) filed an application under Section 7 of IBC before Adjudicating Authority on March 21, 2018 which was admitted by NCLT vide its order dated August 09, 2018 had admitted the Application filed on behalf of the financial creditor under Section 7 of IBC.
- The said order was challenged by ex-director of Corporate Debtor before NCLAT on grounds of being barred by limitation, which was not dealt with by NCLAT while dismissing the appeal vide its judgment dated September 17, 2018. On further appeal by Corporate Debtor against said dismissal, SC vide its judgment dated February 26, 2019 remanded the matter back to NCLAT to specifically deal with issue of limitation. NCLAT vide its judgment dated May 14, 2019 dismissed the appeal of ex-director of Corporate Debtor on the ground that Application filed by financial creditor was within the period of limitation, which is challenged in the present appeal.

### Issues at hand

- Whether Limitation Act as applicable by virtue of Section 238-A of IBC was to be construed from date of default or from date of enforcement of IBC?
- Whether a Corporate Debtor, having provided mortgage security, was entitled to the limitation period of 12 years as per Article 61(b) of Limitation Act, 1963?
- Whether acknowledgement of debt in books of Corporate Debtor extends the period of limitation for filing an application under Section 7 of IBC from date of such acknowledgement?

### Findings of the Court

- While reviewing the various provisions of IBC, SC held that the cause of action for filing a Section 7 application under IBC arises only when a default takes place after which debt remains outstanding. The cause of action in proceedings such as a suit for recovery and a winding up petition against a debtor are of an altogether different nature so as to impact the limitation within a winding up petition.
- Article 62 of Limitation Act 1963 was applicable only to suits and not to applications like under Section 7 of IBC which fell only under residuary Article 137. The Apex Court held that an application under Section 7 of IBC does not purport to be an application to enforce any mortgage liability as per the reasoning of NCLAT.
- Apex Court rejected the finding of NCLAT that the date of enforcement of the Code was the starting point of limitation. SC considered Section 238-A of IBC and held that the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of Limitation Act and is, therefore, three years from the date when right to apply accrues.
- Apex Court held that Section 18 of Limitation Act 1963 is not applicable for purpose of period of limitation for Section 7 Application under IBC but applied only to suits or other proceedings for recovery wherein acknowledgment of liability could extend period of limitation unlike winding up petitions.

### Our view

The Apex Court has put to rest the issues already decided by it in terms of the Limitation Act with further clarity on applicability of Article 137 and non-applicability of Section 18 and Article 62 of Indian Limitation Act for the purpose of an Application filed under Section 7 of IBC.

The Court categorically held that an application under Section 7 of IBC was to be considered for the period of limitation of 3 years from date of default (as per Section 238-A of the IBC) and not from the date of the IBC coming into force.

## Vinay Vats v Fox Star Studios India Pvt Ltd

**FAO (OS) (COMM) 61/ 2020 I.A. 6351/2020 IN CS (COMM) 291/2020**

### Background facts

- The Plaintiff is author and first copyright owner of a film script titled 'Tukka Fit' (**Script**) which was written by him and registered with Film Writer's Association, Mumbai (**FWA**) in 2011. Thereafter, Plaintiff was approached by Director of M/s AAP Entertainment Ltd to permit them to use the Script to make a motion picture of the same name. Permission was granted to M/s AAP Entertainment Ltd and they took over as producers of the proposed film.
- Subsequently, dispute arose between the parties, which came to be settled by Disputes Settlement Committee of the FWA on September 21, 2011. Even though production of the said film was completed in November 2012, release of the film was indefinitely halted.
- The Plaintiff allegedly came to know only on July 18, 2020 about the imminent release of the movie 'Lootcase' on July 31, 2020. Upon viewing the trailer of 'Lootcase', he was shocked to find similarities between the plot of the same and his script of 'Tukka Fit'.
- Based on the above, the Plaintiff sought an interim injunction against the Defendants from releasing the film 'Lootcase'. It is to be noted that the Plaintiff only moved the Application seeking interim injunction one day before the release of 'Lootcase'.

### Issue at hand

- Whether the Plaintiff had made out a sufficient case for grant of interim injunction, in light of the above circumstances?

### Findings of the Court

- The Court placed its reliance on Supreme Court's (**SC**) judgment in the matter of *R.G. Anand v. M/s Delux Films*[1], which is regarded as locus classicus in copyright claims pertaining to films. SC had laid down that there is no copyright in any idea, subject matter, theme or plot and violation of copyright is confined to form, manner, arrangement and expression of idea by the author of copyright at work. The cause of action, on which Plaintiff had based his case, is a Script that never came in public domain and the film made thereof never saw light of day.
- It was further held that the plot of the film 'Lootcase' is somewhat stereotypical in context of Indian cinema and that prima facie it cannot be said that Plaintiff's screenplay can lay claim to any such novelty as could be said to have been filched by Defendant. Upon comparing the trailer of 'Lootcase' as well as the Script, Court observed that there are certain aspects/features which are a part of Script but are missing in the trailer and there are certain elements in the trailer which are not there in the Script at all. Mere resemblance of certain plot points between Script and trailer does not mean that Plaintiff can lay a claim to copyright. These common plot points may figure in more than one film and therefore cannot be exclusive rights of Plaintiff.
- The Court remarked that the trailer of 'Lootcase' was released on July 16, 2020 and also took into consideration Defendants submission that promos of the said film have been in public domain since June 2019. It was held that either way, same does not justify Plaintiff approaching the Court for an injunction on the eve of release of the film. With regards to the same, Court relied upon Bombay High Court's decision in matter of *Dashrath D. Rathore v. Fox Star Studios India*[2], in which misuse of the judicial process in a bid to arm-twist the defendant at the last minute to secure gains for the plaintiff himself, has been highlighted.
- In view of the above, it was held that there was no case made out by Plaintiff for grant of any interim injunction to stay the release of the film.

### Our view

Abuse of the process of law is something that has sadly become far too common and filing/moving an application for interim injunction on the eve of the release of a movie, may be its posterchild. As penned down in Dashrath Rathore (supra), such cases are not only an attempt to arm-twist the defendant but they also put undue stress on an already overburdened Court to pass a hurried Order for want of time with little or no assessment on merits. In this case, even though the existence of the film was known publicly well beforehand, the Plaintiff chose to wait until the last minute to pressurize the Defendant into settling the matter. But of course, the fact of the matter is that action against copyright violation cannot lie against a theme or an idea and this principle is well laid down in R.G. Anand (supra).

[1] 1978 (4) SCC 118
[2] 2017 SCC OnLine Bom 345

# Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors

**2020 SCC ONLINE SC 571**

## Background facts

- The Civil Appeals have been referred to a Bench of three Judges of SC by a Division Bench reference order dated July 26, 2019, dealing with interpretation of Section 65B of Indian Evidence Act, 1872 (**Evidence Act**) by two judgments SC. In reference order, after quoting from *Anvar P.V. v. P.K. Basheer & Ors*[3] (a three Judge Bench decision of SC), it was found that Division Bench judgment in SLP (Crl.) No. 9431 of 2011 reported as *Shafhi Mohammad v. State of Himachal Pradesh*[4] may need reconsideration by a Bench of a larger strength.
  - Two election petitions were filed before Bombay HC challenging election of Arjun Panditrao Khotkar, who was Returned Candidate (**RC**). The margin of victory for the RC was extremely narrow, only 296 votes – RC having secured 45,078 votes, whereas Shri Kailash Kishanrao Gorantyal secured 44,782 votes.
  - It was case of Kailash Kishanrao Gorantyal that each set of nomination papers suffered from defects of a substantial nature and therefore, all four sets of nomination papers, having been improperly accepted by Returning Officer of Election Commission (**RO**), election of RC be declared void. In particular, the contention was that late presentation of Nomination Forms by RC as they were filed after stipulated time of 3.00 p.m. on September 27, 2014 rendered such nomination forms not filed in accordance with law and ought to have been rejected. It was further stated that to prove allegation Videography was available and HC directed Election Commission and concerned officers to produce entire record of election of this Constituency, including original video recordings. A specific order was made that this electronic record needs to be produced along with necessary certificates.
  - In compliance with this order, such video recordings were produced by Election Commission, together with a certificate issued with regard to CDs/VCDs and entire issue revolved around admissibility of electronic evidence that was produced.

## Issue at hand

- Whether Certificate under Section 65B of Indian Evidence Act is mandatory?

## Findings of the Court

- SC took note of the fact that Section 65B does not speak of the stage at which such certificate must be furnished to the Court and said that in cases where such certificate could be procured by the person seeking to rely upon an electronic record, such certificate must accompany the electronic record when the same is produced in evidence. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the concerned person, the Judge conducting the trial must summon the persons referred to in Section 65B (4) of Evidence Act, and require that such certificate be given by such persons. The Trial Judge ought to do this when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned.
- SC further held that in criminal cases, it is the general principle that under relevant sections of CRPC, all relevant documents must be provided to the accused by the prosecutor, which the prosecutor relies upon before the commencement of trial.
- The Court stated that the certificate required under Section 65B (4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in *Anvar P.V.*[5], and incorrectly 'clarified' in *Shafhi Mohammed*[6]. It was held that oral evidence in the place of such certificate cannot possibly suffice as Section 65B (4) is a mandatory requirement of the law. It was held that Section 65B (4) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65B (4) otiose.
- SC held that the required certificate under Section 65B (4) is unnecessary if the original document itself is produced. This can be done by owner of a laptop computer, computer tablet or even a mobile phone, by stepping into witness box and proving that concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the computer happens to be a part of a 'computer system' or 'computer network' and it becomes impossible to physically bring such system or network to Court, then the only means of providing information

### Our view

The judgment solves many controversies regarding presentation, relevancy, and admissibility of electronics evidence in Court room. By way of this judgement, it was observed that not permitting a person to produce authentic evidence/witness, despite being in possession of it, and keeping it out of court's consideration only due to non-availability of certificate, will amount to denial of justice. Therefore, the courts cannot afford to deny the acceptance of such evidence for want of certificate under Section 65B (4) of Evidence Act.

[3] (2014) 10 SCC 473
[4] (2018) 2 SCC 801
[5] Supra Note 6
[6] Supra Note 7

contained in such electronic record can be in accordance with Section 65B (1), together with the requisite certificate under Section 65B (4).

- The reference was thus answered by stating that:
  - *Anvar P.V. v. P.K. Basheer*, as clarified by Court was the law declared by Court on Section 65B of Evidence Act.
  - The judgment in *Shafhi Mohammad v. State of Himachal Pradesh* do not lay down the law correctly and were therefore overruled.

## Shiv Raj Gupta v. CIT

**CA No. 12044 of 2016**

### Background facts

- Shiv Kumar (**Appellant**) was Ex-Chairman and Managing Director of Central Distillery and Breweries Ltd (**CDBL**) and held 12% paid-up equity share capital in CDBL. Appellant along with his family members held 1,86,019 shares, constituting 57.29% of the paid-up equity share capital of CDBL.
- M/s Shaw Wallace Company Group (**SWC Group**) through its subsidiaries purchased the shares held by Appellant and his family members in CDBL at rate of INR 30/- per share for a total sum of INR 55,83,270/-. The deal for the sale of 1,86,019 shares was formalized by a Memorandum of Understanding (**MoU**) dated April 13, 1994.
- On the same date, Deed of Covenant was also executed between SWC Group and Appellant, as an individual, with a restrictive covenant that he shall not either directly or indirectly carry on any manufacturing or marketing activities relating to Indian Manufactured Foreign Liquor for a period of 10 years. As per Deed of Covenant, Appellant had received a non-compete fee of INR 6.60 crores out of which INR 6 crores were paid upfront and balance was to be paid on October 30, 1994.
- Thereafter, Appellant filed ITRs for AY 1995-96 and treated receipt of INR 6.60 crores as a capital receipt and hence, not eligible to tax. Assessing Officer (**AO**), as per Section 28(ii) of Income Tax Act (**ITA**) held that INR 6.60 crores were ostensibly paid as non-compete fee and was nothing but a colorable device to evade tax and ultimately taxed it.
- AO's order was appealed before the CIT(A) which also came to be dismissed.
- In the Appeal before ITAT, Accountant Member and Judicial Member of Tribunal differed on taxability of INR 6.60 crores. In view of divergence, matter was referred to a third member of the Tribunal who by his order dated May 30, 2001, decided the issue in favor of Appellant, as a result of which ITAT Appeal stood allowed by a majority of 2:1.
- Against the said order, Revenue preferred an appeal under Section 260-A of ITA before Delhi High Court (**HC**).
- Vide its Order dated December 22, 2014, (**Impugned order**), HC held that the said sum of INR 6.60 crores could not be brought to tax under Section 28 (ii), but has to be treated as a taxable capital gain in the hands of Appellant, being capital gains from sale/transfer of shares.
- HC held that INR 6.60 crores which were received by Appellant were for transfer of shares and not for handing over the management and control of CDBL and hence cannot be made taxable under Section 28 (ii) (a) of ITA.
- The impugned order was challenged by the Appellant before SC by way of Civil Appeal.

### Issue at hand

- Whether INR 6.60 crores received by the Appellant is taxable under Section 28 (ii) (a) of ITA or if the same is exempted being a capital receipt?

### Findings of the Court

- SC held that substantial question of law framed by HC under Section 260-A did not contain any question as to whether a non-compete fee could be taxed under any provision other than Section 28 (ii) (a) of ITA. Court also observed that HC failed to record reasons and did not frame any substantial question of law on whether the said amount could be taxed under the ITA. Therefore, Apex Court concluded that HC failed to satisfy the ingredients of Section 260-A (4).
- SC further stated that it has been made clear on the basis of multiple judgments that commercial expediency has to be adjudged from point of view of assessee and that Income Tax Department cannot enter into the thicket of reasonableness of amounts paid by assessee.

**Our view**

With this judgement, much clarity has been achieved with respect to receipt of non-compete fee; however, taxability of non-compete fee by the payer of such fees is yet to be seen and decided by the courts.

- SC noted that in its decision in matter of *Guffic Chem (P) Ltd*[7], it had dealt with a question as to whether payment under a non-compete agreement is a capital receipt or a revenue. Court negated the applicability of Section 28 (ii)(a) to such receipts and held that there is a dichotomy between receipt of compensation for loss of agency and receipt of compensation attributable to a negative/restrictive covenant. The compensation received for loss of agency is a revenue receipt whereas compensation attributable to a negative/restrictive covenant is a capital receipt.
- Court also clarified that all receipts, made before April 1, 2003, for non-competing were exempt as they were regarded capital in nature, since after addition of amendatory clause v-a to Section 28 by Finance Act, 2002 they are made chargeable to tax as 'Profits and Gains of Business or Profession'.
- The proviso to Section 28 (va) (a) provides for an exception to cases where such receipts are taxable as capital gain.
- Accordingly, since non-compete fee was received prior to 2003, same was held to be a capital receipt being exempt from tax, appeal was allowed, and the impugned order was set aside.

## Ravinder Kaur Grewal & Ors v. Manjit Kaur & Ors

**CIVIL APPEAL NO. 7764 OF 2014**

### Background facts

- A suit was filed by the predecessor of the appellants (**Original Plaintiff**) against his brothers, for a declaration that he was the exclusive owner in respect of suit premises. A family settlement was arrived at wherein the possession and ownership in the said premises of original plaintiff was accepted and that there will be no objection from original plaintiff as to names of defendants continuing to exist in revenue record as owners to extent of half share.
- Despite the said family settlement, dispute arose between the brothers claiming their share with respect to the suit premises. Consequently, they decided to prepare a memorandum of family settlement incorporating the terms already settled.
- Even after execution of memorandum of family settlement, new issues were raised by defendants. A new suit was filed by original plaintiff for inter alia declaring himself as the owner of the suit premises. During the pendency of suit original plaintiff expired and appellants being legal heirs were brought on record.
- The suit was partly decreed inter alia declaring Appellants as owners with respect to half share for a part of suit premises.
- Appellants filed an appeal before District Judge wherein decree of trial court was modified declaring original plaintiff as the owner of entire suit premises basis memorandum of family settlement.
- Respondents being heirs and legal representative of original defendant No. 1, preferred a second appeal before Punjab & Haryana High Court (**HC**). HC set aside the order of District Judge and opined that a document (viz. memorandum of family settlement) which creates a right in an immovable property in favor of plaintiff, in which he has no pre-existing right, would require registration.
- The view taken by HC has come under challenge by way of this civil appeal before SC.

### Issue at hand

- Whether a memorandum of family settlement is required to be registered as interest in immovable property worth more than INR 100/- is transferred in favor of plaintiff?

### Findings of the Court

- SC held that the settled position of law is that when members of a family settle and resolve their conflicting claims or disputed titles once and for all by way of a family settlement or arrangement, such arrangement ought to be governed by a special equity peculiar to them and would be enforceable.
- SC while setting aside the judgment of HC has held that HC has not considered that the document in question was a memorandum of family settlement and not a document containing terms and recitals of a family settlement and thus, no registration was required by virtue of Section 17 (2) (v) of Registration Act, 1908 (prior to 2001 amendment) which reads as '*any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest….*'

**Our view**

SC has rightly upheld its dictum in *Kale & Ors v. Deputy Director of Consolidation & Ors*, which lays down that when a family settlement is bona fide, to resolve family disputes and is voluntary i.e. it is not induced by fraud, coercion or undue influence and may be even oral, then in that case registration is not necessary.

[7] (2011) 4 SCC 254

## Aruna Oswal v. Pankaj Oswal & Ors

**2020 SCC ONLINE SC 557**

### Background facts

- Late Mr. Abhay Oswal during his lifetime held 53,53,960 shares in M/s Oswal Agro Mills Ltd, a listed company. Mr. Abhay had filed a nomination in terms of Section 72 of Companies Act, 2013 (**Act**) witnessed by two witnesses which specifically provided that this nomination shall supersede any prior nomination made and also any testamentary document executed.
- Mr. Abhay Oswal died intestate on March 29, 2016, leaving behind four legal heirs. Following the death, Appellant who is the Nominee, on April 04, 2016, made a request to be registered as holder of the shares, which was approved by the Company. On April 16, 2016 Appellant was registered as holder of the shares.
- Respondent No. 1 filed a partition suit in 2018 before Delhi High Court (**HC**) claiming 1/4th share in the estate of the deceased in his capacity as one of the four legal heirs. He also claimed one fourth of deceased's shareholdings, who was holding shares to the extent of 39.88% in Oswal Agro Mills Ltd. HC vide order dated February 08, 2018 directed parties to maintain status quo concerning shares and other immoveable property of the deceased.
- After filling of the Partition Suit, Respondent No. 1 filed a company petition alleging oppression and mismanagement in the affairs of M/s Oswal Agro Mills Ltd and M/s Oswal Greentech Ltd. Appellant challenged the maintainability of the petition, as Respondent No. 1 did not hold 10% of issued and paid-up capital of the Company and also such a dispute could not be adjudicated in a company petition filed during civil suit's pendency.
- Respondent No. 1 contended that by virtue of him being one of the legal heirs of the deceased and thereby being entitled to 1/4th of his estate including Shares, he effectively held more than 10% of shareholding in the Company. NCLT appreciated the contention of Respondent No. 1 and held that the Petition was maintainable.
- The order passed by NCLT was challenged before NCLAT. NCLAT referred to the ruling of SC in case of *M/s World Wide Agencies Pvt Ltd* and upheld order of NCLT and ruled that on death of a shareholder, shares vest with legal heirs and not with the nominee. A nomination does not mean that the amount or share belongs to nominee. Aggrieved by the order of NCLAT current Appeal was filed before Apex court.

### Issue at hand

- Whether the Company Petition filed under Sections 241 and 242 of the Companies Act, 2013 was maintainable?

### Findings of the Court

- SC relied upon the judgment of *Sangramsinh P. Gaekwad & Ors. v. Shantadevi P. Gaekwad (Dead) through LRs. & Ors* and held that the question as to the right of Respondent No. 1 is required to be adjudicated finally in the civil suit, including what is the effect of nomination i.e. whether absolute right, title and vested interest is in the nominee or not. The decision in a civil suit would be binding between the parties and it is domain of a civil court to determine the right, title, and interest in an estate in a suit for partition. SC refused to decide the question finally in these proceedings concerning effect of nomination, as it being a civil dispute, cannot be decided in these proceedings and the decision may jeopardise parties' rights and interest in the civil suit.
- As to the dispute of right, title, and interest in the securities, SC held that finding of civil court is going to be final and conclusive and binding on parties. The decision of such a question has to be eschewed in instant proceedings.
- SC further held that proceedings before NCLT filed under Sections 241 and 242 of the Act should not be entertained because of pending civil dispute and considering the minuscule extent of shareholding of 0.03%, that too, acquired after filing a civil suit in company securities, of Respondent No. 1.
- It further held that, to maintain the proceedings before NCLT, Respondent No. 1 should have waited for decision in the civil suit concerning shares in question.
- SC stated that it would not be appropriate to entertain these parallel proceedings and give waiver as claimed under Section 244 before the civil suit's decision.
- SC allowed the appeal and orders passed by NCLT and NCLAT were set aside.

#### Our view

SC has rightly analyzed and set aside the orders passed by NCLT and NCLAT, to avoid multiplicity of proceedings, wastage of judicial time and sheer abuse of process of law to file successive petitions concerning the same relief. The locus and jurisdiction of courts is rightly set under law of land and courts should strictly adhere and stay within the ambit of their jurisdiction and not entertain such proceedings which will be a jeopardy to each other.

## Addissery Ragahavan v. Cheruvalath Krishnadasan

**(2020) SCC ONLINE SC 484**

## Background facts

- Appellant had taken two shops (on ground and first floor) on rent from Respondent Landlord (**Premises**). The ground floor room was let out to Appellant on October 10, 1991 and room on first floor was let out on July 10, 1998.
- Thereafter, Respondent filed eviction petitions with respect to these premises under Section 11(2)(b), 11(4)(ii) and 11(8) Kerala Building (Lease and Rent Control) Act, 1965 (**Act**) on following grounds of
  - Arrears of rent
  - Bona fide requirement for additional accommodation for landlord's business
  - Material damage to the premises
- Trial court vide its Order dated February 28, 2015, held for the Respondent Landlord on 1st and 3rd ground as stated above. It was further noted that Respondent Landlord who is Managing Partner of a construction firm and would therefore require the premises for his business. It was also held that reasonable inference could be drawn that Appellant was in possession of a room owned by his mother in law, situated in neighboring building and he was also not able to prove any hardship caused to him. Therefore, eviction petitions were decreed under the said Act.
- Rent Control Appellate Authority (**Appellate Authority**) by its Order dated January 30, 2016 set aside Trial Court's Order.
- Thereafter, in a Revision Petition filed by Respondent Landlord, High Court of Kerala (**HC**) interfered with the fact finding by the Appellate Authority itself and set aside Order passed by Appellate Authority. (**Impugned Order**).
- The impugned Order was challenged by way of the present Civil Appeal before SC.

## Issue at hand

- Has the HC exceeded its revisional jurisdiction in wrongly substituting the findings of the trial court for those of the Appellate Authority?

## Findings of the Court

- SC stated that parameters of revisional jurisdiction of HC should be kept in mind and that as per revisional jurisdiction conferred by Section 20 of the Act, HC cannot interfere with the findings of the facts by Appellant Authority unless and until there is any perversity or mis-appreciation of evidence by it.
- SC held that the reliance placed upon Building Tax Assessment Register by Appellate Authority, showing that some of the rooms belonging to the landlord were lying vacant, would be a finding of fact, which cannot be interfered by it.
- SC further held that, mere storing of goods on temporary basis by Appellant in the room that was leased by his mother in law in another building cannot be held as tenant in possession of that room, which was rightly held by Appellant Authority. Thus, interference with this finding of fact, without any perversity or mis-appreciation of evidence by Appellate Authority would be outside HC's jurisdiction. Equally, finding of comparative hardship, which is a finding of fact, not otherwise found to be perverse, cannot be upset in manner done in the present case by the HC.
- The vague finding of Trial Court that landlord will be able to run his establishment in a better manner if he gets the schedule petition rooms, which will help to lead his establishment to prosperity, as compared with tenant, who is not able to 'establish much hardship to him', was rightly set aside by Appellate Authority and without finding this to be perverse, SC held that HC acted outside its revisional jurisdiction.
- SC allowed present Civil Appeal, thereby setting aside the Impugned Order and upholding the Appellant Authority's Order.

### Our view

The revisional court cannot have jurisdiction to reappreciate the evidence and substitute its own finding by upsetting the finding by the Appellate Authority. Thus, the impugned order of the High Court is unsustainable in law. A High Court, in its revisional jurisdiction, is limited only to look if there is any illegality or procedural defect in the impugned order and not get in the merits of the matter.

## Quick Heal Technologies Ltd v. NCS Computech Pvt Ltd & Anr

**WRIT PETITION NO. 2796 OF 2019**

### Background facts

- Quick Heal Technologies Ltd (**Petitioner**) is engaged in business of development of anti-virus software, whose products are known as 'Quick Heal Range of Products'. Respondent No. 1 is in business of distribution of software products and Respondent No. 2, a partnership firm, is a sister-concern of Respondent No. 1.
- On April 2, 2011, Petitioner entered into a Software Distribution Agreement (**Agreement**) for sale and distribution of Petitioner's product in regions mentioned therein. It is pertinent to note that the arbitration clause was not clear as to whether disputes arising under said Agreement would be mandatorily referred to arbitration or not.
- Pursuant to the said Agreement, Respondents from time to time placed orders with Petitioner for Quick Heal Range of Products and Petitioner supplied the same to Respondents.
- Due to failure of payment of outstanding dues amounting to INR 32.78 lakhs, which was acknowledged by Respondents, dispute arose between the parties. Pursuant to the same Petitioner addressed a notice dated January 2, 2018, invoking arbitration as per Clause 17 of the Agreement.
- As per Clause 17 (a) of the Agreement, parties were under an obligation to refer their dispute to designated personnel and only after 30 days of such reference, if such reference fails, parties may refer their dispute to arbitration.
- Petitioner did not exhaust the said pre-condition and instead filed a petition before High Court (**HC**) under Section 11 of Arbitration and Conciliation Act, 1996 (**Act**) for appointment of an Arbitrator.

### Issue at hand

- Whether dispute between the parties could be referred to Arbitration in view of Clause 17 of the Agreement?

### Findings of the Court

- According the Petitioner, Clause 17 had to be read in its entirety. Clause 17 (a) states that at the outset, disputes between the parties shall be amicably discussed for resolution and if same cannot be resolved within 30 days, the dispute may be referred to Arbitration as set out in sub-clause (b). As per sub-clause (b), disputes arising out of the Agreement shall be referred to Arbitration; this makes the reference of the dispute to arbitration mandatory.
- The Respondent alleged non-compliance of Clause 17 (a) of the Agreement by the Petitioner and further stated that Clause 17 (b) is dependent of Clause 17 (a).
- HC observed that the dispute was not referred to designated personnel and an amicable discussion for resolution of the dispute has not taken place at all as per Clause 17 (a) of the Agreement.
- It was held that under Clause 17 (a), parties have agreed that first all disputes under the Agreement 'shall' be amicably discussed for resolution and if such dispute/s cannot be resolved by parties within 30 days, same 'may' be referred to Arbitration, thereby clearly making it optional to refer the disputes to Arbitration. Therefore, the words 'shall' and 'may' used in sub-clauses (a) and (b) of Clause 17 are used after proper application of mind and same cannot be read otherwise.
- HC while dismissing the petition held that Clause 17 (b) of the said agreement cannot operate independently and be used to initiate an arbitration process.

### Our view

The court in present case has rightly dismissed the petition since the pre-condition of referring the dispute was not complied with and the Petitioner tried to by-pass the same by approaching the HC for appointment of an Arbitrator.

An agreement must clearly depict what parties seek from the same. In the current judgment, the biggest fallacy in the Agreement between the parties was the lack of good drafting and high ambiguity. An arbitration agreement must be firm and mandatory in nature.

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