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Dispute Resolution and Arbitration

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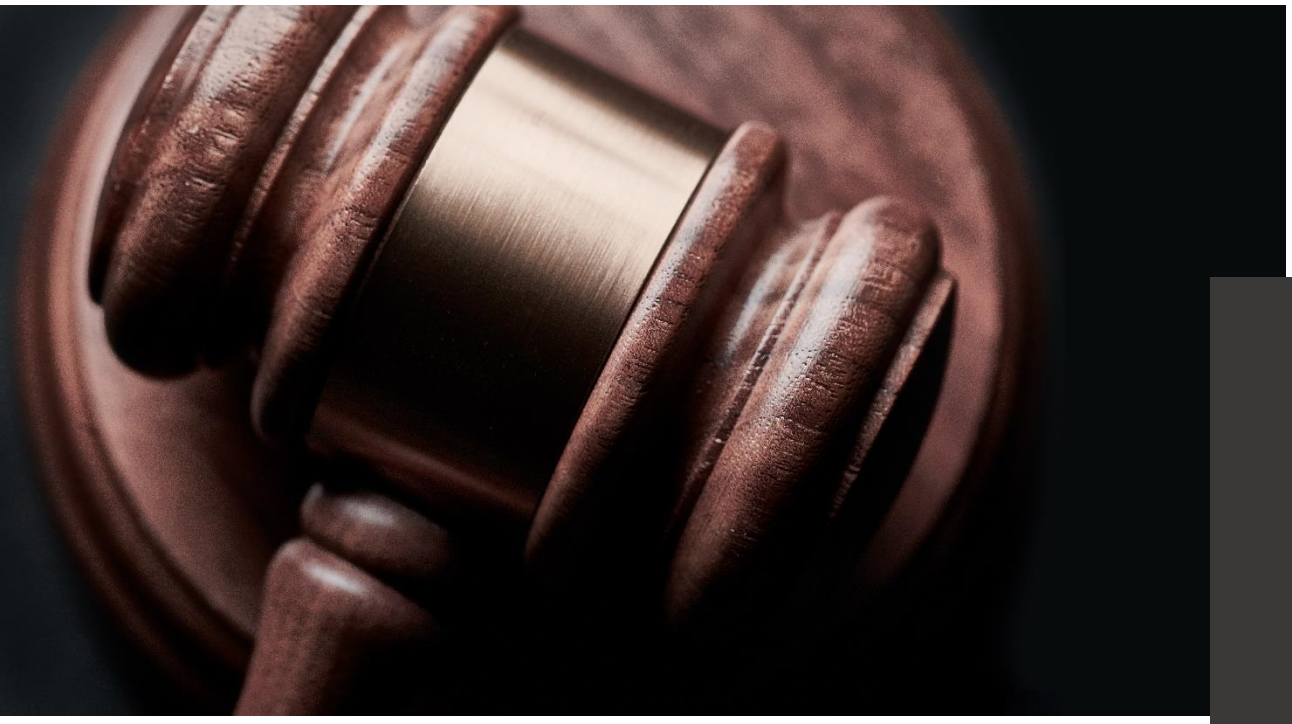
DISPUTE RESOLUTION AND ARBITRATION UPDATE



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DIT (International Tax) v. Samsung Heavy Industries Pvt Ltd

CA No. 12183 of 2016

Background facts

- On February 28, 2006, the Oil and Natural Gas Company (**ONGC**) awarded a contract to a consortium comprising of a South-Korean company (the Respondent/Assessee) and Larsen & Toubro Ltd. for carrying out the work of surveys, design, engineering, procurement, fabrication, installation and modification at existing facilities, and start-up and commissioning of entire facilities covered under the 'Vasai East Development Project' (**Project**)
- Thereafter, on May 24, 2006, the Respondent set up a Project Office in Mumbai (**PO**), which was supposed to act as a communication channel between the consortium and ONGC. The work commenced in the same year and was slated to be completed by July 26, 2009.
- The Respondent filed a return for AY 2007-08 income, showing nil profit and a loss of INR 23.5 Lakhs which had, according to him, already been incurred due to activities carried out by it in India. The revenue thereafter issued a show-cause notice to the Respondent, requiring it to show-cause as to why the return of income was filed at nil. Dissatisfied with the Respondents reply, a Draft Assessment Order (**DAO**) dated December 31, 2009 was issued by the Asst. Director of Income Tax, International Transactions (**AO**) at Dehradun whereby it was held that the work carried out by the Respondent in India and the profits resulting from it would arise only in India. The DAO attributed 25% of the revenues allegedly earned outside India as being the income of the Respondent eligible to tax, which came up to INR 28,35,94,740.
- The Dispute Resolution Panel (**DRP**), by its Order dated September 30, 2010, after considering objections to the DAO by Assessee, confirmed the finding contained in the DOA that the agreement was a single indivisible 'turnkey' project, as a result of which the entire profit earned from the Project would be earned in India. In view of the same, the DAO was finalized on October 25, 2010, which was challenged before Income Tax Appellate Tribunal (**ITAT**).

- The ITAT vide its Order dated August 30, 2011 confirmed the decisions of the AO and DRP that the contract was indivisible and also found that there was a lack of material on record to ascertain as to what extent activities of the business were carried on by the Respondent through the PO, and therefore it was considered just and proper to set aside the attribution of 25% of gross revenue earned outside India. The ITAT remanded the matter back to the AO to ascertain profits attributable to the PO after examining the necessary facts. This order was challenged by the Respondent before the High Court of Uttarakhand (**HC**).
- Vide Order dated December 27, 2013 the HC held that the PO cannot be said to be a permanent establishment as per Article 5 of the Double Taxation Avoidance Agreement. It was further held that neither the AO nor the ITAT made any effort to bring on record any evidence to justify the finding that 25% of the gross revenue of the Respondent outside India was attributable to the business carried out by the Respondent's PO. In view of the above, Respondent's Appeal was allowed (**Impugned Order**).
- The impugned order was challenged by the Revenue before Supreme Court (**SC**) by way of Civil Appeal and the ruling of the Apex Court is summarized hereunder.

Issue at hand?

- Taxability of income attributable to a permanent establishment (**PE**) set up in a fixed place in India, arising from 'Agreement for avoidance of double taxation of income and prevention of fiscal evasion' with South Korea (**DTAA**).

Decision of the Court

- SC examined Articles 5 and 7 of DTAA, which pertain to PE and business profits, respectively. Thereafter, SC placed its reliance on its decision in matters of *Morgan Stanley & Co. Inc*[1], *Hyundai Heavy Industries Co Ltd*[2], *Ishikawajima-Harima Heavy Industries Ltd*[3] and *E-Funds IT Solution Inc*[4] and held that a 'fixed place' PE (as under Article 5(1)) of a foreign enterprise in India exists only when the establishment is one through which the business of the enterprise is wholly or partly carried on. However, if an enterprise simply maintains a fixed place of business in India which is auxiliary or preparatory in nature in the business or trade of the enterprise, then it is not a PE as per Article 5(4)(e) of the DTAA. It was further held that the profits of the foreign enterprise will be taxable in India only when the enterprise does its core business through an India PE and only those profits which are attributable to the PE can be taxed in India.
- The SC noted that the ITAT's conclusion that the PO was established for the core activity of coordination and execution of the entire project, was based only on the first paragraph of the Board Resolution, which basically stated that the Assessee would open a PO in Mumbai for coordination and execution of the aforesaid project. Therefore, the same was deemed to be set aside as it was perverse. It was further noted that as per the second paragraph of the said Board Resolution, the purpose of the PO was to coordinate and execute delivery of certain documents only.
- The SC dismissed the Appeal on the grounds that the accounts of the Mumbai PO were not enough to determine the character of a PE. Further, the ITAT's finding that the onus lay on the Assessee to show that the Mumbai PO is a PE, was in the teeth of judgment laid down in *E-Funds IT Solutions*.
- The SC also noted that the ITAT had ignored a particular argument of the Assessee – that there were only two people working in the PO and both were not qualified to carry out any core activity of the Petitioner. Hence, the SC held that the PO is not a fixed place PE of Assessee, under Article 5(1) of the DTAA and would instead be covered by Article 5(4)(e) of DTAA because the PO was meant to be a liaison office between ONGC and the Assessee and, thus, was an auxiliary office.
- In view of the above, the impugned Order was dismissed, and the appeal was allowed.

Our View

The issue of PE has been a subject matter of debate before the Courts and Tribunals in most international transactions. This judgement of the SC brings forth more clarity on the existence of the PE or otherwise and will instil confidence of the multi-national companies to do business in India. This decision comes as a relief for the corporate taxpayers and is a firm reiteration of the fact that the initial burden lies on the revenue department, and not the assessee, to prove that there exists a PE of the foreign enterprise in India, before moving further to determine the Indian tax liability of that enterprise.

[1] (2007) 7 SCC 1
[2] (2007) 7 SCC 422
[3] (2007) 3 SCC 481
[4] (2018) 13 SCC 294

Avitel Post Studioz Ltd & Ors v. HSBC PI Holdings (Mauritius) Ltd and HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd & Ors

CA No. 5145 of 2020 along with CA No. 5158 of 2020 and CA No. 9820 of 2016

Background facts

- On April 21, 2011 a Share Subscription Agreement (**SSA**) was entered into between HSBC and Appellants, whereby HSBC made an investment in the equity capital of Avitel India for a consideration of USD 60 million in order to acquire 7.8% of its paid-up capital. The SSA contained a clause providing for arbitration at the Singapore International Arbitration Centre (**SIAC**) in case of any dispute.
- On May 6, 2011, accompanying Shareholders' Agreement (**SHA**) was also executed between the aforesaid parties which contained an identical arbitration clause.
- Thereafter, a dispute arose between the parties and HSBC alleged that the promoters of Avitel, namely, the Jain Family, had induced them to invest in Avitel on the basis of a representation that Avitel was on the verge of finalizing a lucrative contract with British Broadcasting Corporation. HSBC alleged that there was no such contract, and that around USD 51 million from the USD 60 million investment had in fact been siphoned away to other companies owned or controlled by the Jain Family.
- Thereafter on May 11, 2012 notices of arbitration were issued by HSBC to SIAC to commence arbitral proceedings, pursuant to which an emergency arbitrator was appointed on May 14, 2012. The appointment of the arbitrator was unsuccessfully challenged by Avitel.
- The emergency arbitrator passed two interim awards dated May 28 and 29, 2012 (**Interim Awards**) in SSA and SHA, respectively, in favor of HSBC, thereby inter alia directing Avitel to refrain from disposing of/dealing with its assets up to USD 50 million and request the financial institutions in India and UAE in which Avitel may hold accounts, to freeze the same.
- On July 27, 2012, the emergency arbitrator made an amendment to the Interim Awards, thereby directing Avitel to cease and desist from prohibiting or inhibiting Ernst & Young and KPMG, Dubai from conducting investigations into financial affairs of its Dubai and Mauritius subsidiaries.
- HSBC then filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (**Act**) before the Bombay High Court (**HC**), seeking an order compelling Avitel to deposit a security amount to the extent of HSBC's claim in the arbitration proceedings. HSBC also filed criminal complaints in India inter alia alleging cheating and criminal conspiracy under the India Penal Code, 1860. Meanwhile, the now-constituted Arbitral Tribunal in Singapore rejected Avitel's jurisdictional challenge, holding that issues relating to fraud are arbitrable under Singapore law.
- On January 22, 2014 the HC passed an Order against Avitel directing them to deposit any shortfall in their account so as to maintain a balance of USD 60 million. The HC also noted that the jurisdictional challenge had been rejected in Singapore and that the arbitration was governed by Singapore law where the fraud was arbitrable.
- The aforesaid Order was challenged before a Division Bench of the HC. Vide Order dated July 31, 2014 (**Impugned Order**) it was held that since Singapore law governs the arbitration agreement, there was no need to interfere with the Section 9 Order. Further, HC noted that the allegations of fraud and misrepresentation raised by HSBC were in terms of Section 17 and 18 of Indian Contract Act, 1872, and therefore, the dispute had a 'civil profile', which was squarely arbitrable. However, it held that even if HSBC succeeds in the arbitral proceedings, the damages awarded may not be the entire loss suffered but the difference between the price paid by HSBC in acquiring Avitel's shares and the price HSBC would have received had it resold the said shares in the market. Therefore, the total deposit to be maintained in the frozen account was reduced by half to USD 30 million.
- By an order dated September 27, 2014, passed in SSA, Arbitral Tribunal ruled in favor of HSBC (**Final Award**).
- The Final Award was upheld in an Appeal filed by Avitel before HC under section 34 of the Act. Thereafter, an Appeal under section 37 was also dismissed on May 05, 2017. In the meanwhile, HSBC had also moved the HC on April 15, 2015 to enforce the Final Award, proceedings under which were still pending.
- Challenging the Impugned Order, HSBC and Avitel had filed the present appeals before the Supreme Court (**SC**).

Our View

The judgment provides clarity to the courts and tribunals, which would enable them to ignore the submissions of a party who is trying to wriggle out of the arbitral agreement. Further, the two tests laid down in the present case form exceptions to the arbitrability of matters involving serious allegations of fraud. Also, the judgment fortifies the view of SC in which it has held that an arbitrator is competent to decide disputes involving any type of allegations of fraud in a dispute in foreign-seated international commercial arbitrations.

Therefore, this judgment would help in saving a lot of time of the courts/arbitral tribunals that may otherwise get wasted in deliberating on the question of arbitrability of a dispute involving allegations of fraud. Of course, as is stated above, a serious allegation of fraud, would only be non-arbitrable if the aforesaid two tests are satisfied.

Issues at hand?

- Whether HSBC has a strong prima facie case for enforcement of the Final Award?
- If yes, whether irreparable prejudice would be caused to HSBC if protective orders were not issued in its favor and, generally, whether the balance of convenience tilts in its favor and to what extent?

Decision of the Court

- At the outset, SC revisited a plethora of case laws which primarily held that although fraud ought to be tried in an open court, every other allegation of fraud cannot oust arbitral proceedings.
- The Apex Court observed that in the matter of *Russell*[5], it was held that an entity accused of fraud had the right to defend itself in an open court of law and, therefore, arbitration could not be permitted in cases where the person charged with the fraud desires the inquiry to be public. The Court also referred to the order in the case of *Charles Osenton & Co*[6] wherein it was held to mean that 'serious allegations of fraud' would not be arbitrable, but the rule in Russel could not be extended to every other 'allegation imputing some kind of dishonesty'.
- Under the erstwhile Arbitration and Conciliation Act, 1940, aforesaid English standard was reiterated in the matter of *Abdul Kadir*[7], noting that 'serious allegations' were not arbitrable, but mere allegations of wrongdoing between parties themselves do not reach that threshold.
- Under the Act, several cases establish sundry standards to identify 'serious allegations of fraud'. The SC, referring to the order in the matter of *Afcons Infrastructure*[8], held that 'cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.' were not normally considered to be suitable for Alternate Dispute Resolution. In the matter of *Booz Allen Hamilton v. SBI Home Finance Ltd*[9], the conclusion is based on distinguishing between *in rem* and *in personam* disputes. By way of the said judgment, SC has set down certain examples of non-arbitrable disputes which include disputes relating to rights and liabilities which give rise to or arise out of criminal offences.
- Reliance was placed on the SC's decision in the matter of *Ayyasamy*[10], that 'fraud simpliciter' could not be a hindrance to referring parties to arbitration. On the other hand, when a party alleges fraud to nullify an agreement, and the court is satisfied that the allegations are serious and complicated enough to warrant a strict and meticulous inquiry, then arbitration is not permissible.
- The SC held that serious allegations of fraud leading to non-arbitrability would arise only if either of following two tests were satisfied, and not otherwise.
  - Where the Court finds that the arbitration agreement itself cannot be said to exist being vitiated by fraud; or
  - Where allegations are made against the State or its instrumentalities, relating to arbitrary, fraudulent, or mala fide conduct, giving rise to question of public law as opposed to questions limited to the contractual relationship between the parties.
- This means that all other cases involving 'serious allegations of fraud' i.e. the cases which do not meet the above two tests laid down by the Supreme Court, would be arbitrable.
- Applying the aforesaid test to the facts before it, the SC found that the issues raised and answered in the Final Award were the subject matter of civil as opposed to criminal proceedings. The fact that a separate criminal proceeding was sought to be initiated by HSBC is of no consequence whatsoever.
- It was held that the impersonation, false representations and siphoning of funds found to have been committed were all inter parties and had no public flavor so as to become non-arbitrable on account of allegations of fraud. As such, the SC inter alia upheld the Impugned Order.

[5] 1880) 14 Ch D 471
[6] 1942 A.C. 130.
[7] [1962] 3 SCR 702
[8] (2010) 8 SCC 24
[9] (2011) 5 SCC 532
[10] (2016) 10 SCC 386

Magma Fincorp Ltd v. Rajesh Kumar Tiwari

Civil Appeal No 5622 of 2019 (Arising out of SLP (C) No. 33720 of 2018)

Background facts

- On or about August 2, 2002, the Complainant entered into a Hire-Purchase Agreement (**HPA**)with the Financier, then known as Magma Leasing Ltd. for hire-purchase of a Mahindra Marshal Economic Jeep bearing the Registration No. UP-42-T/1163, the cost whereof was INR 4,21,121, of which the complainant made an initial payment of INR 1,06,121. According to the Financier, an amount of INR 1,04,000 from out of the initial payment of INR 1,06,121 was paid by the complainant to the dealer directly. The balance amount of INR 3,15,000 was paid by the Financier.
- As per Agreement the Complainant was required to pay the first instalment by August 1, 2002 and the subsequent instalments by the 1st day of each succeeding month, the Complainant did not adhere to the schedule of repayments, which according to the Financier, was of essence to the HPA. Post-dated cheques deposited by the Complainant were, according to the Financier, dishonored.
- The District Forum allowed Complaint Case No. 105/2005 filed by the Respondent, Rajesh Kumar Tiwari, and directed the Financier to pay INR 2,23,335 to the Complainant, along with interest at 10% per annum, INR 10,000 towards physical and mental injury and INR 1000 as litigation expenses. The Financier challenged that order before State Consumer Disputes Redressal Commission, Uttar Pradesh, however the Order of District Forum was affirmed by the State Commission against which the Financier filed Revision Petition National Consumer Disputes Redressal Commission, which was also dismissed by the National Commission. Hence this Civil Appeal before Supreme Court (**SC**) of India arising out of SLP.

Issues at hand?

- Whether the Financier is the real owner of the vehicle which is the subject of an HPA, and if so, whether there can be any impediment to the Financier taking repossession of the vehicle, when the hirer does not make payment of instalments in terms of the hire purchase agreement ?
- Whether service of proper notice on the hirer is necessary for repossession of a vehicle which is the subject of a hire purchase agreement, and if so, what is the consequence of non-service of proper notice?

Decision of the Court

- SC observed that Consumer Protection Act, 1986 casts an obligation on District Forum to decide a complaint based on the evidence brought to its notice by Complainant and service provider. The onus of proof is on the Complainant making the allegation. In the present case, the Complainant produced a delivery receipt in respect of the vehicle, some payment receipts, insurance papers in respect of the vehicle, an FIR unconnected with the Financier and/or copies thereof and some documents relating to the filing of the Complaint and payment of Court Fees etc., none of which establish any deficiency of service or unfair trade practice on the part of the Financier.
- SC further noted that the District Forum drew adverse inference against the Financier for not producing the HPA and assumed that there was no provision in the HPA for taking the vehicle back or selling it to a third party.
- SC held that the Financier remains the owner of the vehicle taken by the complainant on hire, on condition of option to purchase, upon payment of all hire instalments. The hire instalments are charges for use of the vehicle as also for the exercise of option to purchase the vehicle in future. The Financier being the owner of the vehicle, there was no obligation on the part of the Financier to divulge details of the sale of that vehicle without being called upon to do so.
- SC placed its reliance upon on *Charanjit Singh Chadha & Ors v. Sudhir Mehra*[11] where it was held that HPA is an executory contract of sale, conferring no right *in rem* on the hirer until the conditions for transfer of the property to him have been fulfilled. The Financier continues to be the owner of the goods under an HPA. The hirer simply pays for use of the goods and for the option to purchase them. The finance charge, representing the difference between the price and the hire purchase price represents the sum which the hirer must pay for the privilege of being allowed to pay the purchase price in instalments. Where the hirer had defaulted in payment of instalments and the agreement specifically provided that the Financier was entitled to repossess the vehicle in case of default, no case was made out against the Financier.

Our View

The judgment furnishes a plausible interpretation of Hire-Purchase Agreement entered and executed by and between Hirer and Financer. It has also highlighted the settled position of Financer in Hire Purchase Agreement till the specific performance of the said agreement by the Hirer. It also reiterates the settled position of law by explicating the conditions to be complied by the Financer in case of default committed by the Hirer.

The Court categorically observed the effect of non-service/omission in service of notice by Financer upon the Hirer before taking re-possession of subject matter of Hire Purchase Agreement. It also assists the Hirer in case of forceful re-possession of vehicle by the Financer without following due process of law.

Overall, the Judgment is helpful to understand the remedy available to both the Financer and Hirer in case of breach of contract/agreement of Hire Purchase.

[11] (2001) 7 SCC 417

- Referring to the case of *Sundaram Finance Ltd v. The State of Kerala & Anr*[12] it was inferred that the law which emerges from the judgment is that goods are let out on hire under an HPA with an option to purchase in accordance with the terms and conditions of the HPA. The hirer simply pays for the use of the goods and for the option to purchase them. Until the option to purchase is exercised by the hirer, upon payment of all amounts agreed upon between the hirer and the Financier, the financier continues to be owner of the goods being the subject of hire purchase.
- SC, while setting aside the judgement of the National Commission, the State Commission and the District Forum held that the Financier being the owner of the vehicle which is the subject of an HPA, there can be no impediment to the Financier taking possession of the vehicle when the hirer does not make payment of instalments/hire charges in terms of the HPA. However, such repossession cannot be taken by recourse to physical violence, assault and/or criminal intimidation. Nor can such possession be taken by engaging gangsters, goons and musclemen as so-called Recovery Agents.

Alibaba Nabibasha v. Small Farmers Agri-Business Consortium & Ors

CRL. M.C. 1602/2020, CRL. M.A. 9935/2020

Background facts

- Respondent No. 1 (**Lender**) – a society registered under the Societies Registration Act, 1860 established by the Department of Agriculture & Cooperation, Ministry of Agriculture, Government of India, with the objective to facilitate agribusiness ventures in collaboration with private investment in close association with financial institution.
- Respondent No. 2 (**Borrower/Company**), a company involved in food processing, approached the lender for Venture Capital assistance for setting up a mango pulp processing unit and accordingly INR 45 lakhs was lent to the Company, in terms of an agreement dated March 03, 2011.
- The Petitioner Mr. Nabibasha was a director of Respondent No. 2 till October 27, 2010. The same was duly notified to the Registrar of Companies (**ROC**) and Ministry of Corporate Affairs (**MCA**) by the Company vide Form 32 on January 4, 2011.
- The borrower had issued 5 cheques dated December 31, 2018 in favor of the Respondent No. 1 for a total sum of INR 45 lakhs and the same were dishonored due to insufficient funds vide memo dated January 11, 2019.
- The proceedings under Section 138 of the Negotiable Instruments Act, 1881 (**Act**) were purportedly initiated against the Petitioner on the ground that the he was a Director of the company who had issued the cheques in order to discharge its liability towards the lender.

Issue at hand?

- Can the Director be held responsible post-retirement for daily affairs of company including cheques issued and dishonored?

Decision of the Court

- High Court (**HC**), while answering the above issue in negative, allowed the petition filed by the Petitioner for quashing the complaint filed under Section 138 of the Act.
- The HC observed that where a accused in a Section 138 matter has resigned from Borrower Company and Form 32 has also been submitted with the ROC, then in such cases if the cheques are subsequently issued and dishonored, it cannot be said that such an accused is in-charge and responsible for the day-today affairs of the company, as contemplated in Section 141 of the Act for being proceeded against. In the present case, the Petitioner was involved in the discussion and represented the Respondent No. 2 before the agreement was executed on March 3, 2011 but that does not mean even after his resignation he continues to be responsible for the actions of the company, including the issuance of cheques and dishonor of the same which then attract proceedings under Section 138 of the Act against him.

Our View

The present case was a clear example of abuse of process of law by the lender(s).It is welcome judgment and would assist the lower courts in deciding the pending cases expeditiously.

It is imperative for the party filing the proceedings under Section 138 of the Negotiable Instruments Act to check with the Registrar of Companies or Ministry of Corporate Affairs website to be informed and well aware about the status of the Directors of the company in order to avoid multiplicity of proceedings and waste of time and efforts.

[12] AIR 1966 SC 1178

- HC observed while entertaining a petition of such nature courts shall not consider the defence of the accused or conduct a roving inquiry in respect to the merits and accusations. It further observed that if the documents filed by the Accused/Petitioner are beyond suspicion or doubt and upon consideration, demolish the very foundation of the accusations levelled against the accused then in such a matter, it is incumbent for the Court to look into the said documents which are germane even at the initial stage and grant relief to the person concerned under Section 482 of Criminal Procedure Code to prevent injustice and abuse of process of law.
- The HC while placing reliance on the Judgements passed by the Apex Court in the case of *Harshendra Kumar*[13] and in the case of *Ashoke Mal Bafna*[14] held that mere repetition of the phraseology of Section 141 of the Act that the accused is in-charge and responsible for the conduct of the day-to-day affairs of the Company may not be sufficient and facts stating as to how the accused was so responsible must be averred in every complaint filed under the Act.

Nitin Thakker & Anr v. State of Maharashtra

LV-VC-GSP-Interim Application 1 of 2020 (Arising out of LV-VC-GSP 75 of 2020)

Background facts

- The Plaintiff is a Senior Advocate at the Bombay High Court and has been in practice for over 50 years and Second Plaintiff is a Solicitor and an advocate who used to work for Kirit Navnitlal Damania (**Mr. Damania**). Mr. Damania, a Solicitor, is 87 years old, unmarried and has no lineal descendants. He also formed a charitable trust called Shri Rang Avdhoot (Poojya Bapji Nareshwar) foundation along with two others as trustees.
- Mr. Damania was recently admitted to Intensive Care Unit and is completely bed ridden and became incapable of making any cogent decisions for himself as his cognitive abilities got impaired and failed to recognize anyone.
- Mr. Damania is also an executor of a Will of one Nagindas Vora along with some others. Under the said Will some amounts were payable to Amit Vora, son of deceased testator. Plaintiff No 1 had learnt that the executors had decided to keep the amount payable to Amit Vora in a fixed deposit in name of Mr. Damania jointly with second Plaintiff. When Amit Vora and the second Plaintiff went to the Defendant bank, Branch manager insisted on signatures of both holders including Mr. Damania as there would have to be a premature encashment.
- Mr. Damania's hospital bills are over INR 1 lakh per day and are being paid partly through his credit cards, partly by his friends and well-wishers as he is unable to operate his bank accounts. Also, in client account of M/s Kirit N Damania & Co there is an amount of INR 30 lakhs deposited. This amount, with accrued interest, would need to be returned.
- Mr. Damania never issued any Power of Attorney or appointed any Constituted Attorney to represent him or tend to his affairs, and the Plaintiff has filed the Suit to appoint him as a guardian in respect of all his personal & professional affairs to make decisions for & on behalf of Mr. Damania.
- The present action takes the form of a 'suit' only since in jurisprudence this is fundamental or most basic form of bringing a matter to court, since there is no 'lis' between Plaintiffs and any of the Defendants.

Issue at hand?

- Does HC have the authority to appoint a guardian for an individual who does not have any lineal descendants and is severely ill to make decisions for himself?

Decision of the Court

- HC held that the present case falls only partly within the provisions of Order 32-A(2)(C) since Mr. Damania is neither mentally challenged or of unsound mind nor he has any family or is incapacitated by an illness. Court observed that current laws of guardianship do not provide for any recourse in a situation like this.
- HC stated that even though there are no laws of guardianship, that does not mean Courts are helpless or that situation like this should go unattended and unaddressed. It therefore took support from provisions of Order 32-A of the CPC and power under Section 151 of CPC.

Our View

The Court has rightly decreed the suit, as was done in an almost similar matter of Pragnesh Podar by Bombay High Court in Suit(L) 120 of 2017, wherein the Plaintiff was appointed as the Guardian to manage the personal & professional affairs of one Mr. Narayan Podar who was critical & wasn't able to take decisions for his good-self. The court vide this judgment has widened the scope & applicability of Order 32-A of CPC. This case underlines the need for specific guardianship laws to be formulated for tackling such situations.

[13] (2011) 3 SCC 351
[14] (2018) 14 SCC 202

- HC held that present action is in a form of a suit as it cannot be a petition or miscellaneous application because those forms are always under dedicated statutes with special provisions to that effect. HC held that this 'suit' is a kind of suit that lies entirely outside usual frame of a regular suit as there is no 'lis'.
- HC decreed the suit and appointed Plaintiff No. 1 as lawful Guardian of Mr. Damania and manager of the movable and immovable assets, properties, affairs including but not limited to authorizing Plaintiff No. 1 to operate bank accounts of Mr. Damania and his firm Kirit. N. Damania & Co. It also directed Banks by a mandatory injunction to recognize Plaintiff No. 1 as legal guardian of Mr. Damania and to act on his behalf.

Uma Sharma & Anr v. Miniso Lifestyle Pvt Ltd and Puneet Prakash v. Miniso Lifestyle Pvt Ltd

OMP(I) Comm No 130 of 2020 and OMP(I) Comm No 131 of 2020

Background facts

- The Petitioners in respective Petitions have inter alia alleged that they are Lessors (each having 1/3rd Share) of property leased out to Respondent vide agreement dated January 18, 2018. The lease agreement was with respect to leased out property comprising basement, ground floor, first floor and second floor of property bearing no. M-56, M-block Market, Greater Kailash-I, New Delhi. The said lease agreement was entered into between Petitioners and Keikaku India Pvt Ltd and also with Respondent (Miniso Life Style Pvt Ltd).
- The monthly rent of the leased-out property was INR 9,75,000 plus GST. The leased rent was to be paid to Petitioners in equal proportions as per clause 6.1 of the agreement. On March 23, 2020 Nitin Bansal, Head of Business development of Respondent vide his email to Petitioners asked to consider the waiver of rent of the lockdown period w. e. f. April 2020 to May 2020. Petitioners informed Respondent vide email dated April 6, 2020 that as per clause 12 of Agreement, Force Majeure clause was not applicable to present situation and Respondent cannot take unjust and wrongful benefit of said clause. Petitioners however agreed to waive penal interest on delayed payment @ 18 % per annum, but Respondent continued to extend a threat of creating third party interest in demised premises. Accordingly, Petitioners sent a legal notice dated May 23, 2020 for recovery of rent and arrears.
- That vide email dated June 2,2020 Nitin Bansal sent a proposal that they would be paying 70% of arrears of rent for the month of April and 90% of the rent for month of June and July 2020. In response of said email, Petitioners conveyed 15% rebate from April to May 2020. Further vide email dated June 3, 2020 Nitin Bansal informed Petitioners that they will receive payment of April, May, June 2020 within 3-4 days. Accordingly, Petitioners in good faith and trust sent invoices of rent for those months and requested Respondent to pay payment after deducting 15% rebate for arrears of rent for April, May, along with rent of June and July. Despite sharing invoice Respondent did not clear arrears of rent and stopped taking calls from Petitioners. This led to the present petition claiming arrears of rent and restricting Respondent from creating third party rights.

Issue at hand?

- Whether as per Clause - 12 (Force Majeure Clause) of Lease Deed dated January 18,2018, Respondent can seek waiver of rent till such time as demised premises is once again rendered fit for use and occupation by Respondent?

Decision of the Court

- The Court held that Petitioner Uma Sharma was a senior citizen and the rent amount was the only source of income for her as well as for her son who was suffering from Covid-19 contagion.
- The Court also stated that Section 9 of Arbitration Act (**Act**) grants wide power to the court in fashioning an appropriate interim order. Furthermore, in view of the provision of order 39 Rule 10 of CPC and order XVA CPC, which are also available during the proceedings under the Act, the Court rejected the contention of Respondent that under Section 9 of the Act, the court is not empowered to order the payment of money, even when justified as an interim measure of protection.

- It was further held that Respondent cannot claim waiver of rent under clause 12 as there was only temporary non-use of the premises due to the Covid-19 lockdown. Clause 12 stated that "the lessee is entitled to suspension of the rent only if the property has been damaged or destroyed by any force Majeure event". Temporary non-use of premises did not fall under the said clause and thus there was no question of suspension of the rent.
- The court relied on observations in *Sona Corporation India (P) Ltd. v. Ingram Micro India (P) Ltd*[15]., and *Ramanand v. Dr Girish Soni, R. C*[16] , judgment and held that mere temporary non-use of tenanted premises in view of the temporary lockdown does not fall within the ambit of the Force Majeure clause of the lease agreement.
- In its Interim Order, the court held that no case was made out by Respondents for suspension of rent during the lockdown period and there is no justified reason with the Respondent for non-payment of the rent during the post lockdown period as they are using the premises and conducting their business from it. Thus, payment of rent for the period will be strictly as per lease agreement between the parties. Petitioners are even entitled to the penal interest for non-payment of rent.
- The court further held that there was no scarcity of money faced by Respondents, who were successfully running their business post lockdown from almost 10 similar premises on rent in Delhi, and directed the Respondents to pay the rent arrears for the lockdown as well as post lockdown period within seven days, failing which the Petitioners may take necessary action under law.

Our View

The observation made by the Court in respect of applicability of power under Section 9 of the Arbitration Act and to the Force Majeure clause, which was clearly defined and clarified, will stop the misuse and abuse of the law for taking undue advantage of the Covid-19 situation while seeking waiver of the rent.

While the lockdown has had an adverse impact on the economy, it is important for both the landlord and the tenant to understand each other's position and accordingly be flexible and explore a middle path rather than exploiting and pressurizing each other and indulging in avoidable litigation.

Chittaranjan Maity v Union of India

(2017) 9 SCC 611

Background facts

- The Respondent floated a tender for execution of balance of earth work for formation of banks for laying railway line, roads, platforms, and miscellaneous work at the South-Eastern Railway at Sankrail in Howrah District (**Project Work**). The Appellant won the bid and was awarded the project. An agreement dated August 22, 1991 was executed between the Respondent and the Appellant for the Project Work (**Agreement**). Clause 16 (2) of the GCC of the Agreement prohibited interest payable upon earnest money or the security deposit or amounts payable to the contractor under the Agreement.
- Disputes arose between the parties regarding execution of work which led to abandonment of the works by the Appellant. After failing to amicably resolve the matter, the dispute was ultimately referred to arbitration when the Appellant filed an application for appointment of arbitrator before Calcutta High Court (**HC**). HC directed the Respondent to appoint an arbitrator in accordance with the procedure laid out in the Agreement which stated that the arbitrator will be appointed from a panel of arbitrators.
- The Arbitral Tribunal passed an award on 20 September 2006 in favor of the Appellant. The amount awarded by the arbitrator included pendente lite interest at the rate of 12%. The Respondent challenged the award under Section 34 of Arbitration Act but the application was dismissed by a Single Bench of HC. The Respondent then appealed before the Division Bench on the grounds (among others) that in view of Clause 16 (2) of the GCC of the Agreement, no interest could have been awarded to the Appellant. The Division Bench held in favor of the Respondent that the arbitrator could not award pendent lite interest to the Appellant since the same was barred under the Agreement. The decision of the Division Bench was appealed by the Appellant.

Issue at hand?

- Whether an Arbitrator can award pre-reference and pendente lite interest when the same is barred by the Arbitration Agreement/Clause?

[15] O.M.P(COMM.) 249/2018
[16] Rev. No. 447 of 2017

Decision of the Court

- The Supreme Court (**SC**) compared the law regarding the award of interest under the Indian Arbitration and Conciliation Act, 1940 (**Arbitration Act 1940**) and the Arbitration Act, 1996 and observed that while the Arbitration Act 1940 was silent on the powers of the arbitrator to award interest, a specific provision, Section 31 (7), has been created under the Arbitration Act, 1996 which prohibits the arbitrator from awarding interest if so agreed between the parties. Therefore, it was observed that the intention of the legislature was to give parties the autonomy and ensure that the powers of the arbitrator are derived from the contract itself.
- The decision of SC upholding the contractual bar on the arbitrator to award pendente lite interest was reaffirmed in the case of *Jaiprakash Associates Ltd v. Tehri Hydro Development Corp India Ltd*[17]. In this case the arbitral tribunal while passing the award on the claims made in the said matter also granted interest @ 10% per annum from the date when the arbitration was invoked along with future interest @ 18% per annum till the date of payment. When the award was challenged, the award of interest on the amount due was quashed based on the clauses in the agreement which prohibited the award of interest payable to the contractor.

Our View

According to the decisions of SC, it is clear that the arbitrator does not have the power to award interest if the agreement between the parties prohibits such award. The Supreme Court while interpreting Section 31 (7) of the Arbitration Act has given due respect and recognition to the concept of party autonomy by ensuring that the contractual provisions between the parties remain binding on the parties.

Parties right to bar pre-reference or pendente-lite interest in an arbitration agreement

The award of interest under Indian law is primarily governed by Section 34 of the Code of Civil Procedure, 1908 (**CPC**), which stipulates that the grant of interest on a decree of money is not a matter of right but at the discretion of the Court. Therefore, if a decree is silent with respect to payment of interest on the principal sum, the Court shall be deemed to have refused such interest and, therefore, a separate suit shall not lie.

Where parties seek to resolve disputes through arbitration, the concept of interest (including pendente lite interest and future interest) is governed by Section 31 (7) of the Arbitration and Conciliation Act, 1996 (**Act**) which states that an arbitrator has jurisdiction to award pre-reference of pendente lite interest unless there is an agreement to the contrary. Thus, if the parties have expressly barred the award of interest, then the arbitrator would be bound by such terms contractually agreed between the parties.

[17] Civil Appeal No. 1539 of 2019

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