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Dispute Resolution and Arbitration

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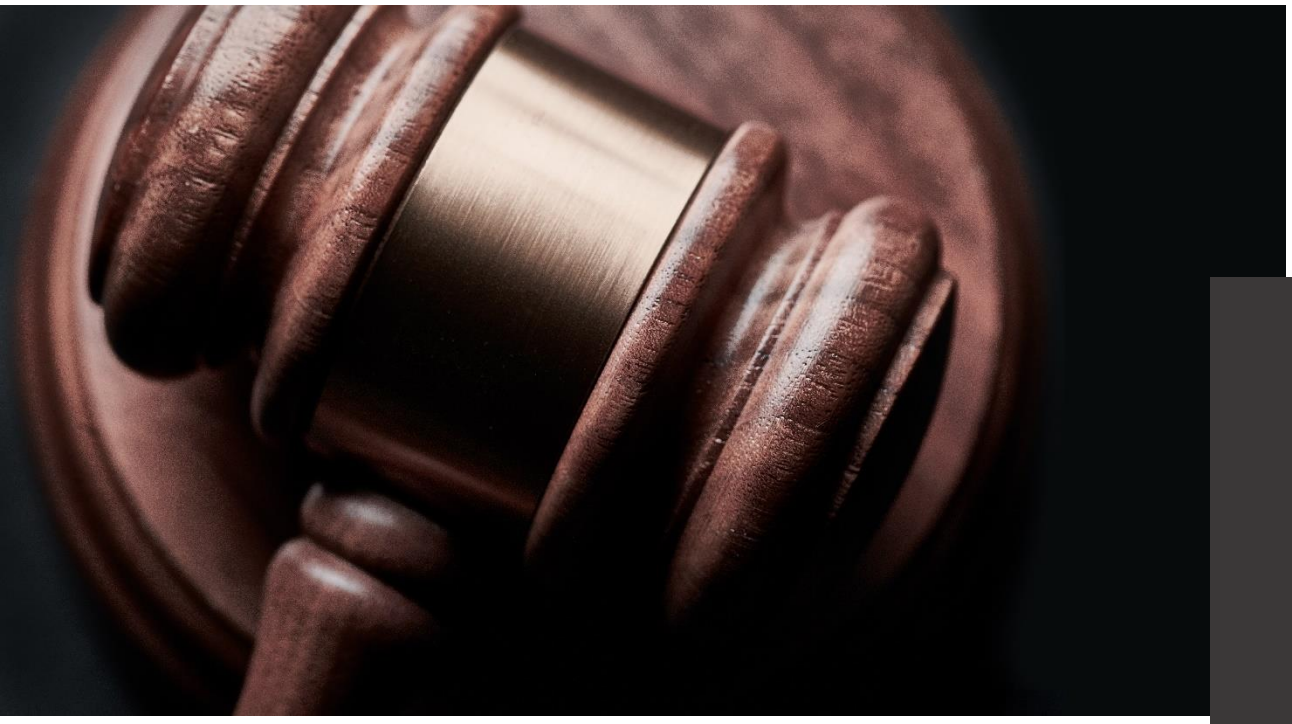
DISPUTE RESOLUTION AND ARBITRATION UPDATE



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Big Charter Pvt Ltd v. Ezen Aviation Pty Ltd

OMP (I) Commercial No. 112 of year 2020

Background facts

- Big Charter Pvt Ltd (**Petitioner**) was engaged in the business of providing air operator services by the name 'FlyBig', while the Respondents were engaged in the business and lease of aircrafts.
- The Petitioner proposed to lease an aircraft from the Respondent, for a term of 36 months commencing from date of delivery. Petitioner was then advised to obtain necessary clearances from the Directorate General of Civil Aviation (**DGCA**).
- Upon an exchange of numerous correspondences, on September 2, 2019, a Letter of Intent (**LoI**) was issued by Respondents to Petitioner. While the Governing Law of the LoI was India, the parties had agreed to exclusively submit to the jurisdiction of courts in Singapore.
- In March 2020, a dispute occurred, and allegations were levelled by both parties.
- Since Respondents were not willing to amicably settling the dispute and had stopped replying to any correspondence, Petitioner had filed a Section 9 application under the Arbitration and Conciliation Act, 1996 (**Act**) before Delhi High Court (**HC**).

Issue at hand?

- Whether Indian Courts have jurisdiction even when parties have contractually agreed to the exclusive jurisdiction of a foreign court?

Decision of the Court

- At the outset, the Court stated that since arbitration law in India was codified in the form of the Act, the issue of jurisdiction of a petition under Section 9 must emanate from the Act itself. The Court remarked that any reference to the UNCITRAL Model or to any textual commentaries may be justified only if there is any ambiguity in any of the provisions of the Act, which requires resolution.
- Court noted that there was little doubt that once the 'seat of arbitration' was fixed as Singapore, courts in Singapore would have exclusive jurisdiction to supervise the arbitral proceedings.
- It was also stated that the jurisdiction exercised by a Court under Section 9 of the Act, had to be differentiated and that since the 2015 amendment, Section 9 of the Act will apply to International Commercial Arbitrations as well.
- The contention could not be accepted on the ground that the Courts at Singapore had no power to grant the relief under Section 9, the Court said. The Court further noted that the lease in question was executed much after the introduction of the proviso in Section 2(2) in 2019.
- With regards to the merit of the application for grant of interim relief was concerned, HC stated that apart from the three criteria of prima facie case, balance of convenience and irreparable loss, the Petitioner in Section 9 Petition was also required to establish that if urgent interim relief was not granted, there was a chance of the arbitral proceedings being frustrated.
- The Petition was accordingly disposed of with a direction that the amount of INR 4,30,00,000 shall remain deposited by the Respondent with the Registry of the High Court, pending further orders.

Our View

The judgment is a step in the right direction to bring Indian arbitration law in conformity with international jurisprudence. The Court has clarified that since arbitration law in India was codified in the form of Act, the issue of jurisdiction of a Section 9 Petition must emanate from the Act itself, and any reference to UNCITRAL Model would only be required if there is an ambiguity in the provisions of the Act. .

GE Power Conversion Pvt Ltd v. PASL Wind Solutions Pvt Ltd

R/Petition under Arbitration Act no. 131 of 2019 and 134 of 2019

Background facts

- Two Indian companies, GE Power Conversion Pvt Ltd (**Applicants**) and PASL (**Respondents**) entered into a contract for sale-purchase of converters to the Respondent. Certain disputes and differences arose between the parties in respect of the purchase orders and warranty offered by Applicants on the convertors. In order to resolve the dispute, the parties entered into a settlement agreement dated December 23, 2014.
- The parties had agreed that any disputes between them would be settled by an arbitration under the Swiss Law, with Zurich being the seat of arbitration. The arbitration proceedings will be conducted in accordance with the Rules of ICC. The substantive law governing the settlement agreement was Indian law. Upon the request of the parties, ICC appointed a sole arbitrator Mr. Ian Meakin in Geneva under ICC Rules. The central issue of dispute between the parties was interpretation of clause 5.2 of the Settlement Agreement.
- A foreign award dated April 18, 2019 was passed by Arbitral Tribunal seated in Zurich, Switzerland in favor of Applicants. The arbitrator rejected the contentions of the Respondent and granted he Applicants INR 25,976,330 and USD 40,000 in legal costs and expenses with accumulated interest in accordance with Indian Interest Act, 1978.
- Applicants filed an application for execution of award under Order-XXI, Rule 11 of Code of Civil Procedure before the Gujarat High Court (**HC**) for enforcement of arbitral award in terms of Part-II of Arbitration and Conciliation Act, 1996 (**Act**), which deals with enforcement of certain foreign awards. Further, Section 9 application was also filed along with execution petition in order to seek an injunction from disposal of assets of Respondents in order to secure the foreign award.
- Respondents disputed the applicability of Part-II of the Act and opposed the enforcement of foreign awards on the basis that it was a domestic award, being one between two Indian parties established in Indian territory. Therefore, according to them, Part-I of the Act was claimed to be the proper law.
- Respondents placed their reliance on Section 44 of the Act and submitted that the said section is not applicable to resident parties. Further, they submitted that any interpretation to the contrary would defeat the purpose of the legislation and allow domestic parties to take advantage of relatively more lenient criteria for scrutiny before enforcing an award.
- Counsel for Respondents submitted that since the Act defines an International Commercial Arbitration as one where at least one of the parties is located outside India, arbitration in question could not be characterized as an International Commercial Arbitration. Therefore, arbitration was domestic and the award a domestic award.
- The Counsel for the Respondents disputed the seat of arbitration being outside India, stating that Mumbai being most closely connected to the transaction, should be deemed to be the seat of

arbitration. While making the claim that the seat of arbitration was outside India, Applicants had restricted the legal recourse available to the parties, which voided the contract, while relying on Section 28 and Section 23 of the Indian Contract Act, 1872. They also opposed the enforcement on the ground that award was against the public policy of India as envisaged in Section 34 read with Section 48 of the Act.

- On the other hand, the Applicants submitted that it was neither the nationality of the parties nor the venue of the arbitration which affected the nature of the award and made it a foreign award – it was a foreign award since the parties had decided the seat of arbitration to be in Zurich.
- The Applicants further submitted that whether the arbitration was a domestic or international commercial arbitration was irrelevant since the award was covered by Part-II of the Act. Also, nothing in law prevents two Indian parties from having a foreign seat of arbitration.
- Further, the Applicants while relying on *BALCO*[1] submitted that the assets of the Respondent against which enforcement was sought were located with the jurisdiction of HC.

Issues at hand?

- Is the award in question a foreign award?
- Whether the award in question, if a foreign award, is enforceable in India?
  - Whether conditions of enforceability are fulfilled?
  - Whether the award can be said to be against the public policy of India?
- Whether an application under Section 9 in the context of the agreement in question is maintainable?

Decision of the Court

- HC while analyzing Sections 2(1)(e), 2(2)(7), 28 and 31 of Part I, and pertinently, Section 44 of Part II of the Act observed that there is a distinct line between Part- I and Part-II of the Act and its applicability.
- HC held that definition of a foreign award as available under Section 44 can be held to be the sole repository for determining an award to be a foreign award and laid down that neither inferences nor intentions to presume any other ingredients than those provided under Section 44 should be regarded as permissible for determining an award as a foreign award. Applicability of Part-II is determined solely based on what is the seat of arbitration, whether it is in a country which is signatory to the New York Convention. If this requirement is fulfilled, Part-II will apply.
- HC observed that the parties did not dispute the fact that the award was an arbitral award or that their relationship was commercial. Since the parties had intended for Zurich to be the seat of arbitration, which was also greed by the arbitrator, no ground other than that provided for under Section 48 is available to resist enforcement of a foreign award.
- HC held that since the subject matter was within its jurisdiction, it could enforce the award under Section 47 of the Act. Regarding the challenge on the 'public policy' front, the Court explained that a reference to arbitration could not be construed as a restriction on legal recourse available under Section 28 of Indian Contract Act. It further noted that according to Section 28(a), two Indian parties are not per se prohibited from designating a foreign court and vesting in it exclusive jurisdiction to supervise their arbitration proceedings.
- HC took a divergent view from *Trammo DMCC*[2] and held that that ratios of judgments are to be viewed in the context of facts of each case and rejected Section 9 application of Judgment-Creditor.

Imperia Structures Ltd. v. Anil Patni & Anr

Civil Appeal No. 3581-3590 of 2020 along with Civil Appeal No.3591 of 2020

Background facts

- The Appellant is developer who was developing a project under the scheme name 'The ESFERA'. The Respondents are the flat purchasers who had paid the necessary purchase price.
- During the period after the RERA (Real Estate Regulation and Development) Act, 2016 came in force, the Appellant, in compliance with the law, registered the project under RERA. When even after 4 years there was no hope for completion of the project, the Respondents filed a complaint with the Consumer Commission.

[1] (2012) 9 SCC 552
[2] 2017 SCC Online Bom 8676

Our View

The judgment would help in deciding the issue of enforcement of future arbitration awards where there is an issue with regards to the venue and seat of arbitration. A seat may be read as that the seat of arbitration which determines the court having jurisdiction over the nullity and claim of an award, while the venue is the physical location where the arbitration hearing or deliberations are held.

It was rightly held in the above case that the arbitration award was a foreign award and could be enforced in India since the assets were situated in India. The judgment will open doors to domestic parties to choose a foreign seat, as also laid down in GMR Energy Ltd, in order to expeditiously resolve their dispute in foreign jurisdictions. Moreover, a foreign seated arbitration exempts the award from the added scrutiny of patent illegality as is available under Section 34(2A) to a domestic award.

- The Consumer Commission gave a ruling in favor of the Complainants and Respondents challenged the same in Appeal before the Supreme Court (**SC**). At the stage of Appeal, the Appellant for the first time sought to take up the point that in view of the RERA Act being enacted, the Consumer Commission does not have jurisdiction over the disputes raised in the Consumer Complaint. In the background of these facts, the SC gave a ruling on the issues mentioned hereinbelow.

Issues at hand?

- Whether the bar specified under Section 79 of the RERA Act, 2016 would apply to proceedings initiated under the provisions of the Consumer Protection Act?
- Whether there is anything inconsistent in the provisions of the Consumer Protection Act?

Decision of the Court

- SC held that Section 79 of the RERA Act does not in any way bar the Commission or Forum under the provisions of the Consumer Protection Act from entertaining any complaint – the absence of bar under Section 79 to the initiation of proceedings before a forum which cannot be called a Civil Court and express saving under Section 88 of the RERA Act, make the position quite clear. Further, Section 18 itself specifies that the remedy under said Section is 'without prejudice to any other remedy available'. Thus, the parliamentary intent is clear that a choice or discretion is given to the allottee whether he wishes to initiate appropriate proceedings under the Consumer Protection Act or file an application under the RERA Act.
- SC observed that the proviso under section 71(1) of RERA Act entitles the complainant who has initiated proceedings under the Consumer Protection Act before the RERA Act came into the force, to withdraw the proceedings filed under the Consumer Protection Act with the permission of the forum or National Consumer Dispute Resolution Commission and file an appropriate application before the adjudicating officer under the RERA Act. The proviso does not statutorily force or compel the complainant to withdraw any complaint nor creates any mechanism for transfer of such pending proceedings to authorities under the RERA Act.
- SC further held that Section 100 of the new Consumer Protection Act, 2019 was enacted with an intent to secure the remedies under the Act and protecting the interest of the consumer even after RERA was brought in force.
- Considering the above, SC dismissed the appeals and imposed a fine of INR 50,000, which was to be paid by the Appellant which respect of each consumer case.

Sanjiv Prakash v. Seema Kukreja & Ors

ARB.P. 4/2020

Background facts

- A company was incorporated on December 09, 1971 by father of the Petitioner under the name of Asian Films Laboratories Pvt Ltd and the entire amount of paid-up capital was paid by Petitioner. The shares of the Company were then distributed between his family members. Subsequently, the name of the Company was altered to ANI Media Pvt Ltd (**ANI**) on March 06, 1997.
- Due to extensive efforts of the Petitioner at global level, Thomson Reuters Corp Pvt Ltd (**Reuters**), in 1996, approached Petitioner for a long-term equity investment and collaboration in respect of ANI. Prior to execution of the agreements with Reuters in 1996, a Memorandum of Understanding (**MoU**) was entered into between Petitioner and Respondents which constituted a special arrangement between family shareholding of Company constituting a succession plan and management scheme for ANI.
- Thereafter, on April 12, 1996 the Petitioner and Respondents entered into a Shareholders Agreement (**SHA**) and a Share Purchase Agreement (**SPA**) with Reuters, by which Reuters acquired 49% shares in the Company from the Petitioner and Respondents.
- In 2019, dispute arose between the parties because father of the Petitioner was desirous of transferring his shares in the Company to joint shareholding by himself and Petitioner. This was objected to by Seema Kukreja along with others in Board Meeting of company held on September 17, 2019.
- Petitioner, thereafter, invoked arbitration clause in MoU to resolve disputes between parties. According to the arbitration clause in the MoU, arbitration was to be adjudicated upon by a sole arbitrator. In response to the invocation of arbitration by Petitioner, Respondents alleged that MoU had been superseded and invalidated by SHA.

Our View

The judgment has helped in clarifying that it is the choice and discretion of the allottee to choose which forum they wish to file appropriate proceedings before. The correct interpretation of the relevant sections of the Consumer Protection Act and RERA Act have cleared the perception that allottee also falls under the purview of 'consumer' even after the enactment of RERA Act.

- Petitioner thus moved to Delhi High Court (**HC**) for appointment of a sole arbitrator in the matter.

Issue at hand?

- Whether an arbitration clause can be invoked in the case of a dispute under a superseded contract?

Decision of the Court

- HC stated that in order to attract theory of Novation under Section 62 of Contract Act, there should be a total substitution of the earlier contract and its terms and conditions, and all terms of the earlier contract would perish with the substitution of the new contract.
- HC perused the provisions of SHA, in the present case, specifically Clause 28.2 which explicitly states that any or all prior agreements, understandings, arrangements, promises, representations, warranties and/or contracts of any form or nature whatsoever stand superseded. Accordingly, the Court observed that although an arbitration clause in a contract constitutes a separate agreement between the parties and survives the termination or rescission of contract, however, in view of Clause 28.2 of the SHA, the terms and conditions of the MoU along with the arbitration clause stand superseded.
- This view of the Court was based on the decision of the Apex Court in *Union of India vs Kishorilal Gupta*[3] wherein owing to execution of settlement contracts, respondents failed to adhere to the terms and it was held that appellants could not refer the dispute to arbitration on the basis of arbitration clause under original contracts entered into between the parties due to novation.
- Thus, the Court observed that where dispute is whether original contract is wholly superseded or not by a new contract between parties, such a dispute must fall outside arbitration clause, for if it is superseded, the arbitration clause falls with it.
- Therefore, HC held that, *'An arbitration agreement being a creation of an agreement may be destroyed by agreement… Hence, the arbitration clause of the MoU, being Clause 12, having perished with the MoU, owing to novation, the invocation of arbitration under the MoU is belied/not justified.'*
- Accordingly, HC held that the petition invoking MoU for appointment of an arbitration was not maintainable.

Our View

The Court vide this judgment has upheld that since a contract is an outcome of agreement between the parties, it is equally open to the parties thereto to agree to bring it to an end. The Court has further upheld party autonomy by keeping it open to the parties to terminate the previous contract and substitute in its place a new contract or alter the original contract is such a way that it cannot subsist.

Sanjay Lalwani v. Jyostar Enterprises & Ors

2020 SCC OnLine Mad 2003

Background facts

- Original Application was filed under Order XIV Rule 8 of the Original Side Rules read with Section 9 of the Arbitration and Conciliation Act, 1996 (**Act**) read with Section 151 of Code of Civil Procedure 1908 (**CPC**), with a prayer to grant interim injunction restraining respondents from alienating/selling Copyright of Satellite Rights and theatrical rights for Hindi and All North Indian Languages Dubbing Rights and Other Rights of Telugu Talkie picture 'PSV GARUDA VEGA' to any third parties/T.V. Channels. Interim injunction was further sought restraining respondents from telecasting the picture.
- The Parties had entered into a Deed of Assignment with the Respondents 1 to 3 on October 21, 2017 and fulfilled the payment of consideration on November 16, 2017, thereafter, having executed another Deed of Assignment dated November 09, 2017.
- Pursuant to the Applicant's legal notice on November 20, 2017 to Respondents 1 to 3, the Respondent No. 1 agreed to cancel the Deed of Assignment executed in favor of Respondent No. 4 vide its letter dated November 23, 2017, where after the Respondent No. 4 continued to violate the rights conferred in his favor and alienated the Satellite rights of the said film to the Respondent No. 5 who was attempting to telecast the film. As per Clause 9 of the Deed of Assignment dated October 21, 2017, the matter is referable to arbitration.
- The Respondent inter alia contended that the injunction application under Section 9 of the Arbitration and Act is not maintainable against the third Respondent No. 4, not being a party to the arbitration agreement.

[3] AIR 1959 SC 1362

Issue at hand?

- Whether proceedings in respect of trademark and copyright infringement are issues in rem and non-arbitrable?

Decision of the Court

- Relying on the judgments of Supreme Court in the matters of *Booz Allen And Hamilton Inc v. SBI Home Finance Ltd*[4] and *The Indian Performing Right Society Ltd v. Entertainment Network (India) Ltd*[5], the Court followed the observation that 'patents, copyrights and other rights in rem which are not rights over land are also included within the meaning of movable property'. The Court further held that institution of every suit or civil proceeding arising under Chapter XII in respect of infringement of the copyright in any work or infringement of any other right conferred by the Copyright Act 1957 is mandatory under Section 62(1) of the said Act.
- Reliefs against infringement and passing off, by their very nature, do not fall within the jurisdiction of the arbitrator. Rights to a trademark and remedies in connection therewith are matters in rem and by their very nature not amenable to the jurisdiction of a private forum chosen by the parties such as an arbitral tribunal.
- From the lack of inherent jurisdiction of an arbitrator to decide issues in rem under the Copyright Act 1957 and an analysis of challenge on the said ground under Section 34 of the Act, it has been held that if the arbitral tribunal lacks inherent jurisdiction which cannot be cured or waived, the arbitral award would also be in conflict with the public policy of India. It was further held that inherent lack of jurisdiction of an arbitrator to decide an action in rem will not be affected by a waiver of right to challenge the same before the arbitrator under Section 16 or otherwise since such challenge, in any event, would not confer jurisdiction on the arbitrator.
- While the Act is silent on the categories of disputes to be treated as non-arbitrable, the Court relied on the matter of *Emaar MGF Land Ltd v. Aftab Singh*[6] to hold that patent, trademarks and copyright are excluded from the purview of the Act as non-arbitrable.
- Based on the above findings, Court dismissed the Original Application under Section of the Act.

Our View

The Court has re-iterated the aspect of trademark and copyright violations as non-arbitrable. However, in this matter, the Court further settled the issue of the same being a basis of challenge under Section 34 of the Award unaffected by such challenge before the Arbitrator under Section 16 of the Act, being in any event lacking jurisdiction to decide the issue. This judgment is another addition to the legal precedents in the same direction, thereby adding certainty to the issue.

Deccan Paper Mills Co. Ltd. v. Regency Mahavir Properties and Ors

2020 SCC OnLine SC 655

Background facts

- The Deccan Paper Mills Co Ltd (**Appellant**) and Ashray Premises Pvt Ltd (**Respondent No. 2**) entered into an agreement dated July 22, 2004 for developing a portion of land owned by the Appellant. The agreement did not contain any arbitration clause. Also, the agreement contained a clause which provided that the respondent can assign, delegate the rights to any other firm and the appellant would have no objection to it. Consequently, the Respondent No. 2 entered into an agreement with Regency Mahavir Properties (**Respondent No. 1**) on May 20, 2006 by which Respondent No. 2 assigned the execution of the agreement with appellants to Respondent No. 1. This agreement contained an arbitration clause. A deed of confirmation dated July 13, 2006 followed and was to be treated as part of the May 20, 2006 agreement, in which the assignment was reaffirmed.
- Thereafter, Mr. Atul (**Respondent No. 3**) made a representation to the Appellant that he was the leading partner of the Respondent No. 1 and was to develop the Appellant's property. Based on this representation, Appellants agreed to be joined as a consenting party to the agreement signed between Respondent No. 1 & 2. Later, when the Appellants made an enquiry into the delay in progress, they came to know that Respondent No. 3 was no more responsible for development of the land and had retired from the business of Respondent No. 1 on May 30, 2006.
- The Appellant then filed a civil suit and alleged that Respondent No.1 & 2 have obtained their consent by fraud and, accordingly, argued that agreement dated July 22, 2004 and July 13, 2006 to be declared null and void.
- The Respondent No. 1 had filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 (the Act) to which the appellants replied on the basis of *N. Radhakrishnan*[7] that when it comes to serious allegations of fraud, an arbitrator's jurisdiction gets ousted and the dispute is thus

[4] (2011) 5 SCC 532
[5] 2016 SCC OnLine Bom 5893
[6] 2018 SCC Online Sc 2771
[7] Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72

rendered non-arbitrable. Further, the appellants referred to the case of *Alien Developers*[8] and argued that since the suit is for cancellation of written instruments, the matter comes under Section 31 of the Specific Relief Act, 1963 (**SRA**), which is a proceeding in rem and thus not arbitrable. The civil court upheld the application under Section 8. Thereafter, an appeal was made to the Bombay High Court which was dismissed and hence an appeal to the Supreme Court.

Issues at hand?

- Whether the dispute is non-arbitrable because a serious allegation of fraud has been made?
- Whether an arbitral tribunal is able to grant the relief of cancellation of a written instrument under Section 31 of the SRA?

Decision of the Court

- The court made reference to *Avitel Post*[9] where the court dealt with the issue of fraud and stated that if the subject matter of an agreement between parties falls within Section 17 of the Indian Contract Act, 1872, or involves fraud in the performance of the contract, the subject matter of such agreement would certainly be arbitrable. Further, the court held that merely because a particular transaction may have criminal overtones it does not mean that its subject matter becomes non-arbitrable.
- The court, while dealing with the second issue, interpreted the words, 'any person', which are used in Section 31(1) and said that the expression 'any person' does not include a third party but is restricted to a party to the written instrument or any person who can bind such party. It was held the action under Section 31(1) is strictly an action inter parties or by persons who obtained derivative title from the parties and is thus in personam.
- To determine whether the proceedings under Section 31 of the SRA, 1963 is one in rem or in personam, the Supreme Court set out to examine the correctness of the law laid down by a division bench of the High Court of Delhi in the case of *Alien Developers Pvt Ltd v. M. Janardhan Reddy*[10], which held that the action under Section 31 of the SRA, 1963 is an action in rem and therefore not arbitrable. After detailed analysis of law, the Court held that the judgement in the case of Alien Developers is not a good law and overruled the same.

Our View

Through this judgment, the Supreme Court has clarified many issues surrounding arbitrability of the disputes seeking specific performance of contract. It is now abundantly clear that in light of Section 4 of the Specific Relief Act, specific relief is granted only for the purpose of enforcing individual civil rights and hence, all actions under the SRA are actions in personam.

Avantha Holdings Ltd v. Vistra Itcl India Ltd

MANU/DE/1548/2020

Background facts

- The Petitioners Avantha Holdings Ltd (**Avantha**) borrowed INR 1265 crores from a consortium of lenders (**KKR, L&T and BOI**). Against the borrowing, the lenders issued non-convertible debentures. The Respondents, Vistra ITCL (India) Ltd. was appointed as Debenture Trustee, vide Debenture Trust Deeds dated January 5, 2017. To secure certain debentures, Avantha had pledged equity shares held by it in companies called M/s Crompton Greaves Power and Industrial Solutions Ltd (**CGP**) and M/s Ballarpur Industries Ltd (**BILT**). They were meant to provide security cover until all outstanding amounts have been paid. Clauses as to what to be done in case security cover falls below the required security cover were also entered into the agreement. Also, the parties agreed for settlement of disputes, if any, by means of arbitration.
- On account of failure to maintain the required security in spite of multiple intimations and due to default in payment of the amount on the due date, Vistra issued a notice under Section 176 of the Indian Contract Act , 1872 for sale of CGP shares in March 2019 and of BILT shares in June 2020. Shares of CGP and BILT were sold in the open market.
- Aggrieved by this, Avantha filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (**Act**) for grant of interim measures before commencement of the arbitration proceedings. It sought three main reliefs:
  - Transfer of the pledged CGP shares back into its Demat account
  - Injunction against the sale of BILT shares
  - Injunction against taking any steps against Avantha under the debenture deeds and pledge documents

[8](2016) 1 ALT 194(DB)
[9](2020)6MLJ544
[10] 2016 (3) ARBLR 303 (AP)

Issue at hand?

- What are the pre-requisites for passing an order under Section 9? And whether the Court under Section 9, at a pre-arbitration stage, can assume the jurisdiction of the arbitral tribunal?

Decision of the Court

- The Supreme Court referred to the case of *Bank of Maharashtra v. M River Oghese*[11], in which the court said that interim reliefs *'serve the temporary purpose of protecting the plaintiff's interest so that the suit is not frustrated.'*
- Therefore, the Court reiterated that the ingredients for obtaining an interim measure under Section 9 of the Act that must be satisfied are (i) the existence of a prima facie case; (ii) the balance of convenience; and (iii) the possibility of irreparable loss or prejudice, if the interim relief is not granted. However, the Court held that the mere satisfaction of these ingredients does not automatically make out a case for ordering interim measures under Section 9 of the Act.
- The court then made reference to *Adhunik Steels Ltd. v. Orissa Manganese and Minerals Ltd.*,[12] where the Court discussed factors to be considered in granting interim relief before an arbitral tribunal has been established. The Court stated that for upholding an application under section 9 of the act, apart from the three requirements under Order XXXIX of the CPC, i.e., existence of a prima facie case, balance of convenience & possibility of irreparable loss, the court needs to be satisfied that the relief sought cannot await the constitution of the arbitral tribunal.
- The Court, in light of the facts of the case, denied Avantha's application for relief under Section 9 of the Act.

Our View

We observe that the court held that no interim relief to transfer the pledged CGP shares into the DEMAT account of the petitioner could be granted as all the shares stood invoked, and a majority thereof stood sold in the open market,. Therefore, the court rightly observed that while the scope of Section 9 may be broad, it could not be justified to use Section 9 of the Act *to 'set the clock back.'*

Lindsay International Pvt Ltd & Ors v. Laxmi Niwas Mittal & Ors

2020 SCC OnLine Cal 1658

Background facts

- Plaintiff No. 1 was engaged in trade and supply of raw materials within and outside India since 1996, inter alia to Mittal Group of Companies which are owned and controlled by Defendant No. 1.
- Agreements executed between Plaintiff and Defendants allotted 25% of issued, subscribed and paid up share capital of Plaintiff No. 1 to Defendant No. 3. The balance 75% shares would be held by the Plaintiff No. 2 and 3. The Board of directors of Plaintiff No. 1 would consist of 3 directors, 2 of whom would be nominated by Plaintiffs Nos. 2 and 3 and one by Defendant No. 3. It was also agreed that plaintiff No. 1 was to be sole procurer/supplier for Arcelor Mittal Group of Companies i.e. Defendants Nos. 2 to 38, world-wide. Defendants Nos. 39 to 42 were eventually actual suppliers under agreements between plaintiffs and Defendants Nos. 2 to 38.
- Agreements provided for terms and conditions of management of Plaintiff No. 1, an exit option to Defendant No. 3 and an Arbitration Clause. Disputes and differences arose between plaintiffs and Defendant No. 3 in connection with supply and payment of goods, which led to the present suit. Plaintiff sought specific performance of said agreements, whereas Defendant No. 3 contended that agreements stood terminated.
- The Plaintiff filed present suit inter alia praying for specific performance of a Shareholders' Agreement dated January 21, 2010, February 29, 2016 and other agreements express, implied, written and unwritten, apart from permanent injunction against Defendant No. 39 to 42 from acting in breach of parts of aforesaid agreements.
- Prior to institution of suit, Defendant No. 3 had filed an application under Section 9 of Arbitration and Conciliation Act, 1996 (**Act**) against Plaintiffs inter alia seeking orders of security and attachment.
- Defendant No. 3 filed a written statement in the suit taking all general and specific defences to plaint comprehensively while reserving its right in terms of Clause 34 of SHA, in event Plaintiff elects to dispute in accordance with law, termination of SHA. In the event, Plaintiffs seek any adjudication on any matter claiming any relief in relation to SHA in this Suit proceedings, then the same may be deemed to be objected to by Defendant No. 3 in view of arbitration clause in SHA read with the Act.
- Three years after filing its written statement, Defendant No. 3 purported to invoke Arbitration Clause in SHA and filed a Statement of Claim before International Chamber of Commerce (**ICC**).

[11] AIR 1990 Bom 107[5]
[12] (2007) 7 SCC 125

- Plaintiff argued that while Section 8 of the Act provides for a specific procedure to a Defendant seeking to enforce arbitration agreement, same was not followed and Defendant has filed a comprehensive written statement without an application under Section 8(1) of the Act, thereby having waived his right to have the disputes settled by arbitration. It was further argued that a mere pleading in the written statement that it is being filed without prejudice to the Arbitration agreement is inconsequential.
- Defendants submitted that application is not under Section 8 of Act but under Section 5 thereof which is all pervading while a Civil forum cannot stay a reference made by a party. It was further argued that the scheme of the Act is such that an arbitration once commenced cannot be interfered with and that the Reference may be held simultaneously with the Civil proceedings, and it is for the Arbitral Tribunal to decide as to whether it has jurisdiction and or whether the arbitration agreement has been waived or not.

Issues at hand?

- Does a Civil forum lose jurisdiction to determine the existence and validity of an Arbitration Clause if a party seeks to wrongfully assert and act in furtherance thereof?
- Has the Defendant No. 3, by its conduct waived the arbitration agreement in the SHA and hence could not have moved for the RFA?
- Would an averment in the Written Statement of defence that it is being filed 'Without Prejudice to the Arbitration Agreement' constitute an application under Section 8 of the 1996 Act?
- Can a Court pass an order of Stay of RFA when the Defendant has not filed an application under Section 8? What would be law to be applied in such a situation?

Decision of the Court

- **Issue No. 1:** While amendments in 2015 and 2019 have sought to restrict scope of judicial intervention, scope of examination under Section 8 and 45 are slightly larger than those under Section 11. Section 8 and section 45 call for examination by Courts on the matters mentioned therein. Hence, the caveat set out in Section 5 (Interference by Civil Fora only as specified under the Act) mandates the application of Section 8. Civil fora retain jurisdiction to examine/determine, if 'no Arbitration clause exists' or has been waived (under Section 8 in Part I) or has become null and void, inoperative or incapable of being enforced (Under section 45 in Part II). The finding of waiver or whether the Arbitration agreement is null and void is also required to be prima facie.
- **Issue No. 2:** While the issue of 'arbitrability' or appropriateness of adjudication by a private forum is not embarked upon by the Court under Section 11 of the Act with such issues to be decided by the Arbitral Tribunal amendable to challenge under Section 34 of the Act after the passing of the Arbitral Award, Section 8 stands on a different footing. Under Section 8 of the Act, all aspects of arbitrability will have to be decided by the court seized of the suit which cannot be left to the decision of the arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject-matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal. A Party must file an application under 8 at the earliest stage in the proceedings or at the time when the first statement of defence to the Plaintiffs claims is filed.
- The only contesting Defendant No. 3 had originally filed an application under Section 9 and abandoned further remedies under the Act, after failing to obtain favorable orders therein. The said Defendant thereafter went on to contest the present suit at the interlocutory stage for over 2 months without a whisper about the Arbitration agreement and files an affidavit in opposition substantially indicating its defence in the suit with mentioning the arbitration agreement. Further, the Defendant then went on to file a comprehensive written Statement of Defence taking objections and addressing on merits each of the claims in the plaint individually and specifically. The Defendant moved for RFA not until the expiry of three full years. As such, the Defendant No.3 has waived the Arbitration agreement and has submitted to the jurisdiction of this Court for all intents and purposes and the Arbitration agreement has been rendered inoperative by waiver.

- **Issue No.3:** The language of Section 8 requires a formal, independent, specific application seeking reference to Arbitration before and or at the time of the filing of the written statement and is required to be made at the earliest stage in proceeding and/or with the written statement. The Defendant's conduct to the contrary is further confirmation of the waiver and abandonment of the Arbitration Clause. Relying upon the matter of *Tarapore and Company v. Cochin Shipyard*[13], the Court held that actions taken 'without prejudice' do not totally negate them or revive the reserved stand at the drop of a hat. The expression without prejudice cannot be a ruse to approbate and reprobate and the validity of such reservation is to be determined in the facts of each case. The Court finally held that consequences of waiver of arbitration cannot be avoided by filing of a written statement without prejudice to the Arbitration Clause since where a statute prescribes that something ought to be done in a particular manner, it has to be done only in that way. In view of complete primacy given to an Arbitration agreement under the Act, a Defendant has to exercise a clear and prompt option as statutorily available. In the facts of this case, the Defendant No. 3 has waived the Arbitration agreement and has, by its conduct, unequivocally submitted to the jurisdiction of Court.
- **Issue No. 4:** Relying on view taken by Supreme Court of Western Australia, in *Caratti v. Caratti*, the Court held that to allow an Arbitration to proceed even after the Defendant has waived the Arbitration agreement, or that the same is null and void or inoperative would be a travesty of justice. The argument of the Defendant that Plaintiff submitted to the jurisdiction of the ICC in terms of seeking time to file response to the arbitration reference on the ground of being nabe to seek appropriate legal advice on account of the pandemic, was rejected by the Court since in terms of the Act, it is only the Civil forum that can decide, under Section 8 of the Act as to whether the arbitration agreement has been waived or not.

Our View

The Court has carved out a distinction between a 'without prejudice' approach to waiver of a right to arbitration and a categorical exercise of rights under Section 8 of the Act by way of an application under the said provision. However, the test of parameters for rejection of the factual aspect of the Defendant in a suit having already sought interim reliefs under Section 9 of the Act by filing a independent application under the said provision prior to the filing of the civil suit needs to be microscopically examined since the essence of a reference of a dispute to arbitration lies not only on (a) the existence of an arbitration agreement, but also on (b) recognition of arbitration as the mode of adjudication of dispute as evident by an intent to seek interim relief under Section 9 of the Act.

[13] (1984) 2 SCC 680

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