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Dispute Resolution and Arbitration

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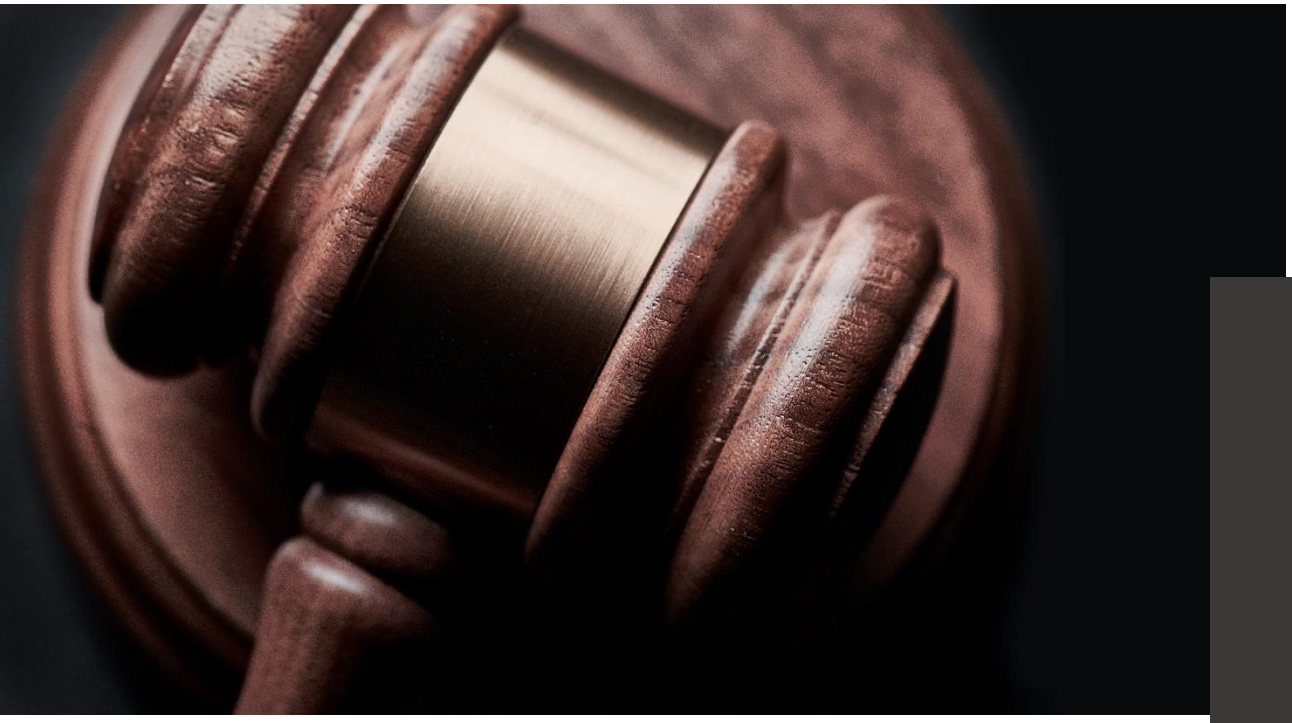
DISPUTE RESOLUTION AND ARBITRATION UPDATE



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Arbitration and Conciliation (Amendment) Bill, 2021

- The Arbitration and Conciliation (Amendment) Bill, 2021 (Bill) was introduced in Lok Sabha on February 04, 2021. The Bill sought to amend the Arbitration and Conciliation Act, 1996 (Act) with a view to achieve the following:
  - To grant unconditional stay of enforcement of arbitral awards, where the underlying arbitration agreement, contracts or arbitral award is induced by fraud or corruption
  - To omit the Eighth Schedule of the Act which laid down the qualifications, experience, and norms for accreditation of arbitrators
  - To specify by regulations, the qualifications, experience, and norms for accreditation of arbitrators
- The Bill replaces an ordinance with same provisions passed on November 04, 2020.

Automatic stay on awards

- The Act allowed a party to file an application, under Section 34 of the Act, to set aside an arbitral award. The Courts, generally, interpreted this provision to mean that an automatic stay was granted on an arbitral award under challenge, the moment an application for setting aside such arbitral award was made before a court.
- However, in 2015, the Act was amended to state that an arbitral award would not be automatically stayed merely because an application is made to a court to set aside the arbitral award.
- The Bill, introduced and passed in the Parliament, has specified that a stay may be granted on an arbitral award during the pendency of the setting aside application against the arbitral award, if the Court is satisfied of the following:
  - The arbitration agreement was induced or effected by fraud or corruption; or
  - The making of the award was induced or effected by fraud or corruption.
- The Bill also specifies that the amendment will be effective retrospectively, i.e., from October 23, 2015.

Qualifications of arbitrators

- Section 47 of the Act will be replaced by Section 43J, which provides that certain qualifications, experience, and accreditation norms for arbitrators will be specified by the Regulations as decided by Arbitration Council of India
- As a consequence, the Bill has omitted the Eighth Schedule of the Act. It has been stated in the Bill that the qualifications, experience, and norms for accreditation of arbitrators will be specified through regulations.

Our view

- The purpose of the Arbitration and Conciliation (Amendment) Act, 2015 (**2015 Amendment**) wherein the automatic stay on arbitral award was done away with was to prevent parties from misusing the provisions of the Act under Section 34 as stall tactics to comply with the arbitral award.
- However, with the re-introduction of the unconditional automatic stay on arbitral award albeit in cases of fraud and corruption seems to defeat the purpose the 2015 Amendment was seeking to achieve. Such that the establishing that the award/arbitration agreement was induced by fraud or corruption cannot be summarily decided.
- The use of the concept of 'fraud' or 'corruption' widens the gambit of interpretation by the Courts. The Courts will have to be extremely cautious in formulating a test for proving 'fraud' or 'corruption' for granting an unconditional stay on the arbitral award. This amendment may lead to excessive litigation by parties to stall the execution of the award and in turn end up wasting precious time of the Court and defeat the purpose of quick resolution via arbitration. Further, the retrospective application of the Bill may open floodgates of litigation.

Akshay Aluminium Alloys Pvt Ltd v. Prrsaar Commodities Pvt Ltd

OMP (COMM) 48/2021 & IA NO. 1846/2021

Background facts

- The Multi Commodity Exchange of India Ltd (**MCX**) is a company incorporated under the Companies Act, 1956 and operates a Commodity Exchange. The Respondent is a Trading Member (TM) of MCX. The Petitioner is a constituent (**Client**) of PCPL and has a commodity trading account with PCPL, and it trades on the MCX through PCPL.
- On April 20, 2020, the Petitioner created long positions in Crude Oil Futures. However, the price of Crude Oil Futures traded on New York Mercantile Exchange (**NYMEX**) saw an unprecedented fall to negative USD 37.63. Thereafter, MCX settled the contracts expiring on the same date first at INR 1 vide its Circular no. MCX/282/2020 and finally at negative INR 2,884 per barrel vide its Circular no. MCX/MCXCCL/282/2020. As a result, the Petitioner suffered a loss of INR. 3,60,62,500.
- MCX realized the entire financial obligation in respect of the contracts in question purchased by the Petitioner in accordance with the settlement mechanism from the Respondent, as per its aforesaid Circulars. In order to liquidate the debt balance in their account, the Respondent squared off the Petitioner's outstanding positions in commodities of Zinc, Aluminum and Silver. Concededly, the negative value of Crude Oil Futures was an aberration as the implication of the negative value would be that the person holding the said commodity would have to pay an amount of INR 2,884 per barrel as consideration for selling the commodity (Crude Oil) instead of receiving a monetary consideration for the same.
- In view of the above, both the parties filed separate Writ Petitions before the Delhi High Court (**HC**) assailing the aforesaid Circulars issued by MCX. Notwithstanding that the Respondent had challenged the aforementioned Circulars, it sought recovery of the amount outstanding from the Petitioner as it had effected the payment for settlement of the contracts purchased by the Petitioner. The Petitioner filed an application under Section 17 of the Arbitration and Conciliation Act, 1996 (**Act**) before the Arbitral Tribunal, seeking that the arbitral proceedings be listed after the decision is rendered by the Delhi High Court in the two aforesaid Writ Petitions.
- The Arbitral Tribunal rejected the said application as is expressly stated in its award dated October 21 2020 ('impugned award). The Arbitral Tribunal inter alia found that it did not have the jurisdiction to allow the application since it would amount to adjourning the proceedings sine die and the same was not a measure contemplated under Sub-clause (e) to Section 17(1)(ii) of the A&C Act. Further the Arbitral Tribunal also awarded a total sum of INR 2,81,21,667, including interest in favor of the Respondent.
- Being aggrieved by the impugned award, the Petitioner filed the present petition under Section 34 of the Act before the HC.

Issue at hand?

- Whether the Arbitral Tribunal had the jurisdiction to allow the Application filed under Section 17 of the Act by the Petitioner, for the arbitral proceedings to be listed after the decision is rendered in aforesaid two Writ Petitions?

Decision of the Court

- At the outset, the Petitioner contended that the award ought to be set aside as the Arbitral Tribunal had not decided its application under Section 17 of the Act and had proceeded to decide the main dispute. It was submitted that in this manner, the Arbitral Tribunal had effectively deprived the petitioner from availing its rights of filing an appeal under Section 37 of the Act.
- It was further contended that the Arbitral Tribunal ought to have appreciated that the entire claim of the Petitioner rested on the circulars issued by MCX, which were challenged before various courts, as a result of which no legally enforceable debt or obligation arose and thus, Petitioner could not be directed to pay the awarded amount.
- With regards to the aforesaid contentions, HC stated that they lack merit and that where the Arbitral Tribunal had proceeded to hear the disputes on merits, there was no necessity for it to pass any interim orders. More importantly, it was noted that the Arbitral Tribunal had explained that it was not empowered to defer the arbitral proceedings or stay the same pending adjudication of the writ petitions filed before the HC. Further, the subject matter of the writ was also beyond the scope of the controversy before the Arbitral Tribunal.
- Further, with regards to the contention that the impugned award could be faulted as the Petitioner's right to file an appeal under Section 37 of the Act against any decision regarding its application under Section 17 of the Act had been truncated, was held as bereft of any merit since the Petitioner had been afforded the opportunity of being heard on the merits of the claim made by the Respondent and the said contentions advanced were addressed. Thus, the Court was not persuaded to accept that any principle of natural justice has been violated in any manner.
- Lastly, the Court held that the grounds on the basis of which the Appellant had challenged the award fails to fall within the scope of Section 34(2) and/or (2A) and therefore it found no reason to interfere with the impugned award.
- Accordingly, the Court found no reason to interfere with the impugned award and the captioned Petition was disposed off.

Our view

A challenge to an arbitral award must be within the parameters as enlisted in Section 34(2) and/or (2A) of the said Act i.e. a party was under some incapacity, the arbitration agreement is not valid, proper notice of appointment of an arbitrator was not given, the award is in contravention with the fundamental policy of law in India etc. Failing to qualify under the parameters as enlisted in the aforesaid sections will render the challenge ineffective and will be liable to be dismissed. Further, it cannot be that because the Arbitrator did not decide the Application filed under Section 17 of the said Act, the other party's right to file an appeal under Section 37 was lost.

Aniket SA Investments LLC v. Janapriya Engineers Syndicate & Ors

CA No. 504 of 2019 in Commercial Arbitration Petition (L) No. 1244 of 2019

Background facts

- The Appellant is a foreign investor and shareholder of Janapriya Townships Pvt Ltd (**Respondent No. 2**) that executes real estate development project in Telangana. The other shareholder of Respondent No. 2 is Janapriya Engineers and Syndicate Pvt Ltd (**Respondent No. 1**). The Appellant, Respondent No. 1 and Respondent No. 2 entered into a Share Subscription and Shareholders Agreement dated August 21, 2008 (**Agreement**) and subsequently, on March 19, 2019, they entered into Development Management Agreement.
- Since disputes arose between the Appellant and the Respondents in relation to the implementation and execution of the real estate project, the Appellant issued a Notice of Default dated March 19, 2019 followed by a Notice to the Respondent No. 1, thereby exercising a Put Option under the Shareholders Agreement dated July 8, 2019, and finally a Notice invoking arbitration dated August 22, 2019.
- Furthermore, Appellant filed the Petition in the Bombay High Court under Section 9 of Arbitration and Conciliation Act, 1996, seeking urgent interim reliefs in relation to a dispute arising out of a Securities Subscription and Shareholders Agreement. The Shareholders Agreement included both, an exclusive jurisdiction clause conferring jurisdiction to the courts of Hyderabad (Clause 20.3) and an arbitration clause determining the seat of arbitration proceedings to be Mumbai (Clause 20.4).
- The Learned Single Judge heavily relied on the decision of SC in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*[1] , and dismissed the petition by holding that courts at Hyderabad would have jurisdiction to hear applications arising out of the arbitration (**Impugned Order**).

[1] (2012) 9 SCC 552

- Aggrieved by the impugned Order, the Appellant filed the present appeal before the Division Bench of the Bombay High Court, under Section 37 of the Act.

Issues at hand?

- Whether the impugned Order is correct in accepting the Respondents primary submission that paragraph 96 of BALCO recognizes two courts as having concurrent jurisdiction under Section 2(1)(e) of the Act, namely, the court where the cause of action accrues and the court of the seat of arbitration? Or, whether a choice of seat of arbitration has the legal effect of conferring exclusive jurisdiction on the courts of that seat and no other court would have jurisdiction under the arbitration agreement?
- If there is concurrent jurisdiction of two courts, is the impugned Order correct in holding that as a matter of party autonomy, the parties herein have made an express choice in conferring jurisdiction on the Courts at Hyderabad and that to give effect to this plain commercial term of the Agreement, the expression 'subject to' must be read as 'notwithstanding' and that expression 'seat' must be read as 'venue'?

Decision of the Court

- Appellant enunciated recent judgement of SC in *BGS SGS Soma JV v. NHPC Ltd*[2] (**BGS SGS**) which deals with an identical case and appraises all the relevant foregoing decisions including the decisions in BALCO and *Indus Mobile Distribution (P) Ltd. v. Datawind Innovatoion (P) Ltd.*[3], essentially holding that paragraph 96 of BALCO must be read consistently with the rest of that judgment and properly construed, BALCO holds that the Courts of the seat of the arbitration would have exclusive jurisdiction in relation to disputes arising in relation to the arbitration. SC in this case also stated that a reference to a 'place' or 'venue' in an arbitration agreement will generally be understood as being a reference to a 'seat' of the arbitration unless there is a clear indication to the contrary.
- Appellant placed emphasis on plain meaning of relevant clauses is that choice of courts at Hyderabad in Clause 20.3 is made 'subject to' Clause 23.4 which is the arbitration clause, and which provides for seat at Mumbai. Therefore, in event of any conflict latter must triumph because that is well settled meaning of the expression 'subject to'. Appellant also stressed on the wrongful reading of the expression 'seat' in Clause 20.4 as a mere venue. The Appellant relied on *Jawahar Sons Enterprises Pvt Ltd v. State &* Ors[4] and *South India Corpn. (P) Ltd v. Secy., Board of Revenue*[5] that the meaning of the expression 'subject to' is the opposite of 'notwithstanding' and therefore 'subject to' could never have been interpreted as 'notwithstanding' as has been done in the Impugned Order.
- The Respondents contended that Clause 20.4 should not be read as being a choice of 'seat' to displace the clear words and choice in Clause 20.3 of jurisdiction being conferred on the Courts at Hyderabad and on a proper interpretation of the Agreement, then the principles laid down in BGS SGS would be impractical to the present case. It was further stated that the concept of 'seat' is relevant only to International Commercial Arbitration and thus, the judgement in BGS SGS does not apply to a situation such as the present case because it is an international commercial arbitration seated in India.
- At the outset, the HC carefully examined the relevant observations and conclusions in BGS SGS and confirmed that the "seat" would alone have jurisdiction to entertain the challenges to the Award.
- The HC held that the impugned Order cannot be sustained based on two grounds:
  - As it holds that paragraph 96 of BALCO recognizes concurrent jurisdiction of the 'cause of action' Court and the 'seat' Court which is not consistent with the judgment in BGS SGS.
  - It has wrongly distinguished that Indus Mobile was a case where the agreement conferred exclusive jurisdiction on the Courts at Mumbai and where the parties also agreed that the arbitration would take place in Mumbai in contrast to the interpretation by the SC which states that Indus Mobile gives two separate reasons for its conclusion and the first of them is that a choice of seat has the effect of conferring exclusive jurisdiction on the Court of the seat.
- HC disregarded the contentions of Respondent relating to the non-applicability of BGS SGS in the present case on the basis that law as laid down therein was in a situation where it was a domestic arbitration, and the 'seat' was held to be in Delhi and the cause of action in Faridabad. Therefore, it would be imprecise and conflicting to the reading of the judgment itself to limit the application of the law it lays down only to some situations and not others as has been contended by Respondents.

Our view

The HC's judgement in choosing the conferment of seat to be treated as the equivalent of an exclusive jurisdiction clause has solidified the binding precedent laid down in Indus. This decision of the HC essentially throws light on the importance of interpretation of the expressions contained in the clauses of an agreement as opposed to decoding them only to focus on the intention of the parties. Thus, the judgement is a welcome move as it erases all the ambiguity by providing plain and accurate elucidation of the Clauses in an agreement.

[2] (2020) 4 SCC 234
[3] (2017) 7 SCC 678
[4] AIR 2002 Raj 206
[5] AIR 1964 SC 207

- As regards to the part one of the first issue, the HC answered in the negative; and the part two of the first issue in the affirmative.
- With regards to the second issue, at the outset, the HC focused on the interpretations of Clause 20.3 and Clause 20.4 subsequently holding that the plain language used in Clause 20.4.2 (c) of the Agreement, which is part of the arbitration clause, is that Mumbai is chosen as the seat of the arbitration proceedings. For the reasons stated above this would have the effect of conferring exclusive jurisdiction on the Courts at Mumbai
- HC emphasized that the choice of Courts at Hyderabad is made 'subject to' the seat at Mumbai, which amounts to a choice of Courts at Mumbai, and therefore in the event of any conflict the latter clause should prevail. Additionally, HC held that there is no basis for reading Mumbai as a 'venue', only because effect must be given to the choice of Courts at Hyderabad, which is itself 'subject to' the later Clause 20.4. Therefore, the Clauses should be deciphered to give importance to the terms 'subject to' and 'seat' and should not be twisted to conclude that the true intention of the parties is to be gathered by giving effect to Clause 20.3 and thus, answered the second issue as negative.
- Thus, the impugned Order was accordingly set aside, and the Appeal was allowed.

Engineering Analysis Centre of Excellence Pvt Ltd v. The Commissioner of Income Tax & Anr

Civil Appeal Nos. 8733-8734 of 2018

Background facts

- A group of appeals with the lead case of Engineering Analysis Centre of Excellence Pvt Ltd (**EAC**), were filed before the SC. The facts of the lead case are summarized as below:
  - EAC is a resident Indian end-user of shrink-wrapped computer software which is directly imported from the non-resident supplier/manufacturer in the USA. The assessment years that we are concerned with are 2001-2002 and 2002-2003.
  - During income tax assessment, the Assessing Officer by its order dated May 15, 2002, applied Article 12(3) 'royalties and fees for included services' of Double Taxation Avoidance Agreement between India and USA (**DTAA**), read with Section 9(1)(vi) of the Income Tax Act, 1961 (**ITA**) and held that since copyright was transferred the same would attract payment of royalty and thus, Indian importer/end-user i.e EAC was liable to deduct tax at source (**TDS**) for the A.Y. 2001-02 and 2002-03.
  - Aggrieved by the order, EAC filed an appeal before Commissioner of Income Tax (**CIT**) which was dismissed vide an Order dated January 23, 2004. However, EAC succeeded in its appeal before Income Tax Appellate Tribunal (**ITAT**) vide an Order dated November 25, 2005, in which the ITAT relied on its judgment passed in the case of *Samsung Electronics Co. Ltd. v. Income Tax Officer*.[6]
  - Aggrieved by the order of ITAT, the Revenue filed an appeal before the HC of Karnataka, which heard a batch of appeals and framed 9 issues. Vide a judgment dated September 24, 2009, the HC held that since no application under Section 195(2) of the ITA had been made, the resident Indian importer became liable to deduct tax at source. However, in *GE India Technology Centre (P) Ltd. v.* CIT[7], the SC set aside the view of the aforesaid judgment passed by the HC and remanded the matter to the HC to decide the case on merits.
  - Thereafter, the HC of Karnataka in a batch of appeals along with this appeal in the matter of *CIT v. Samsung Electronics Co. Ltd.*[8] vide its judgment dated October 15, 2011, held in favor of Revenue that the amounts paid by the concerned persons resident in India to non-resident software suppliers, amounted to royalty and hence constituted taxable income deemed to accrue in India, requiring payment of TDS under Section 195 of the ITA.
- However, the HC of Delhi passed a series of judgments such as *Director of Income Tax v. Infrasoft Ltd.*[9] and *Director of Income Tax v. Ericsson A.B.*[10], contrary to what was held by the HC of Karnataka stating that the payment for software was not in the nature of royalty.
- Furthermore, the Authority for Advance Rulings (**AAR**) passed a series of judgments like *Dassault Systems, K.K., In Re.*[11] and *Geoquest Systems B.V. Gevers Deynootweg, In Re.*[12] holding that the amount payable did

[6] ITA Nos. 264-266/Bang/2002
[7] (2010) 10 SCC 29
[8] (2012) 345 ITR 494
[9] (2014) 264 CTR 329
[10] (2012) 343 ITR 470
[11] (2010) 322 ITR 125 (AAR)
[12] (2010) 327 ITR 1 (AAR)

not amount to royalties. However, an opposite view was taken by the AAR in *Citrix Systems Asia Pacific Ptyl. Ltd., In Re.*[13]

- Due to there being conflicting rulings in cases with relatively similar facts, the SC clubbed the appeals into the aforesaid 4 categories:
  - The first category dealt with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer
  - The second category of cases dealt with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users
  - The third category dealt with cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users
  - The fourth category dealt with cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident suppliers to resident Indian distributors or end-users

Issue at hand?

- Whether non-resident software providers were paid for a copyrighted article or for the use or right to use a copyright and accordingly, whether the payment should be treated as royalty or not, requiring payment of TDS by the Indian distributor/end-user?

Decision of the Court

- At the outset, the SC noted that copyright is an exclusive right, which is negative in nature and includes a right to restrict others from doing certain acts and that the ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embedded.
- The SC referred to the terms of the distribution agreements/End-User License Agreement (**EULA**) for the use of software and noted that the distributor is only granted a non-exclusive, non-transferable license to resell computer software. Similarly, end-users were granted a limited right to use the software without the right to sub-license, transfer, reverse engineer, modify or reproduce the software. Thus, the SC held that a limited right to use the software, without grant of rights of the copyright owner (such as reproduction, commercial exploitation) does not qualify as grant of copyright in terms of Section 30 of Indian Copyright Act, 1957 (**CA**).
- The SC upheld the principle that once a DTAA applies, the provisions of the ITA can only apply to the extent that they are more beneficial to the assessee and not otherwise. The SC has reaffirmed the position laid down in the case of *GE Technology Centre Pvt Ltd* that the TDS obligation arises only when the sum is chargeable to tax under the provisions of the Act, read with the DTAA. The SC has rejected the Revenue's reliance on the decision of the SC in the case of *PILCOM v. CIT, West Bengal-VII*[14] on the grounds that in that ruling, the SC was concerned with payment to non-resident sportspersons and the TDS provisions in respect of such persons were governed by difference provisions of the ITA i.e. under section 194E (not section 195), which were not linked to the chargeability of income.
- The SC further held that the scope of the definition of 'royalty' in the domestic law, which was expanded by amendments vide Finance Act 2012 is not clarificatory and a payer cannot be made obligated to withhold taxes due to subsequent substantive legislative amendments which did not exist as at the date of payment. Thus, the definition of 'royalty' under the ITA is to be read as only a prospective amendment i.e. pre-2012 transactions shall not be subject to TDS.
- The SC placed reliance on its decision in the case of *Tata Consultancy Services v. State of A.P.*[15] and held that what is licensed by the foreign, non-resident supplier to the distributor and resold to the resident end-user or directly supplied to the resident end-user, is in fact the sale of a physical object which contains an embedded computer programme, and is therefore, a sale of goods.
- In view of the above, the SC noted that the definition of royalty under the ITA pre-2012 amendment, as well as the DTAAs (which are similar to the OECD Model Conventions), necessarily requires grant of a copyright in software to the licensee for the payment to qualify as royalty. Since the amount paid by end-users/distributors to non-resident computer software manufacturers/suppliers did not involve payment for grant of any rights specified in CA, these payments do not qualify as royalties

Our view

The judgment of the SC has settled a contentious issue in India on whether income arising from transactions involving grant of software program/license should be characterized as 'royalty'. This is a welcome relief in favor of the taxpayers who were being pursued by the Revenue department for not withholding tax on payments made for such kind of distribution or purchase from non-residents. The decision of the SC constitutes the law of the land and will apply to all pending litigations on this issue. For the non-resident, it is also pertinent to examine the impact of 2% equalization levy (which was introduced with effect from April 1, 2020) and its interplay with chargeability of royalty payment, especially post the amendment proposed in Finance Bill, 2021 that only payments which are otherwise not taxable as royalties or fees for technical services shall be subject to 2% equalization levy.

[13] (2012) 343 ITR 1 (AAR)
[14] 2020 SCC Online SC 426
[15] (2004) 271 ITR 401 (SC)

under the DTAA as well as pre-amended provisions of the ITA. Such payments qualify as business income not taxable in India under the DTAA.

- In light of the above, the SC, in all four categories of appeals, held that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, are not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in Section 195 of the ITA were not liable to deduct any TDS thereunder.

Tata Motors Ltd v. Antonio Paulo Vaz & Anr

Civil Appeal No. 574/ 2021 arising out of SLP (C) No. 10220 of 2020

Background facts

- Antonio Paulo Vaz (**Respondent No. 1/Vaz**) bought a car after paying the agreed total consideration price in 2011 to Vistar Goa (P) Ltd, (**Respondent No. 2/Dealer**) a dealer in cars. A 2009 model car which had run 622 kilometres was sold to him in place of a new car of 2011 make. Vaz, therefore, requested for refund of the price paid or replacement of the car with one of 2011. The price was however not refunded and neither was the car replaced. Vaz refused to take delivery of the 2009 model car and attempted a resolution of his concern and, thereafter, caused a legal notice to be issued to the dealer, as well as the manufacturer Tata Motors (**Appellant**).
- Upon his grievance remaining unaddressed, he preferred a complaint before the Goa District Consumer Redressal Forum. The district forum in the absence of the dealer proceeded ex-parte, determining the 'deficiency in service' and held the dealer and the Appellant to be jointly and severally liable to replace the car with a new one of the same model or to refund the entire amount of the car with interest @10% from the date given of delivery. Both were also jointly and severally directed to pay INR 20,000 to Vaz towards mental stress and agony in addition to costs of INR 5,000.
- Aggrieved, the Appellant preferred an appeal to the Goa State Consumer Disputes Redressal Commission (**State Commission**) under Section 15 of the Consumer Protection Act, 1986 (**Act**). The State Commission dismissed the appeal with costs. It held that Vaz was a consumer as defined under Section 2(d)(i) of the Act and that he was awaiting delivery of the car. The Appellant's plea that its relationship with the dealer was on a principal-to-principal basis was unsubstantiated according to the State Commission, by any material or evidence.
- The Appellant filed an appeal to the National Consumer Disputes Redressal Commission (**NCDRC**), which held that the Appellant had no material to substantiate its relationship between the dealer being one of principal-to-principal basis. The relationship of the dealer and the appellant in the facts appearing from the record, did not absolve it of liability. While upholding the orders of State Commission, it held that the Appellant had indulged in unfair trade practice, for which it was imposed with costs of INR 2 lakh of which INR 1 lakh was to be made over to Vaz and the balance to the Consumer Legal Aid Account of the District Forum within four weeks.
- Aggrieved by this, Appellant filed a special leave petition in the SC challenging the order of NCDRC.

Issue at hand?

- Whether a manufacturer can be held liable for deficiency in service on the part of Dealer when the relationship between them is on 'principal to principal' basis?

Decision of the Court

- SC, before deriving any conclusions, referred to its decision in *Indian Oil Corporation v. Consumer Protection Council, Kerala*[16], in which the liability of a manufacturer, such as the present Appellant, was the subject matter. SC also turned to *General Motors (I) (P) Ltd. v. Ashok Ramnik Lal Tolat*[17] wherein the concurrent findings of the three forums under the Consumer Protection Act were that the appellant was guilty of unfair trade practice, leading to award of punitive damages. Court took into consideration the fact that there was no pleading in support of such a claim for punitive damages.
- According to the SC, the record establishes the complete lack of pleadings by the complainant Vaz, about the appellant's role, or special knowledge about the two disputed issues:
  - That the dealer had represented that the car was new, and in fact sold an old, used one
  - That the undercarriage appeared to be worn out.

[16] (1994) 1 SCC 397
[17] (2015) 1 SCC 429

Our view

SC's judgement that where the relationship of the dealer and manufacturer is on principal to-principal basis, manufacturer can be made liable for the default performed by the dealer only if manufacturer's knowledge is proved, is a step forward in protecting the guilt-free manufacturers from the clenches of delinquent dealers. It not only protects the innocent manufacturers but also puts a latch on to the doors refusing the fraudulent dealers to escape the accountability.

- In the opinion of SC, this second disputed issue was fatal to the complaint. Thus, SC believed that the findings against the dealer were, in that sense, justified on demurrer. However, findings against the Appellant, the manufacturer, which had not sold the car to Vaz, and was not shown to have made the representations in question, were not justified. The failure of the complainant to plead or prove the manufacturer's liability could not have been improved upon, through inferential findings, as it were, which the district, state and National Commission rendered. The circumstance that a certain kind of argument was put forward or a defence taken by a party in each case (like the appellant, in the case) cannot result in the deduction that it was involved or culpable, in some manner.
- SC explicitly held that special knowledge of the allegations made by the dealer, and involvement, in an assumed manner, by the appellant, had to be proved to lay the charge of deficiency of service at its door. In these circumstances, having regard to the nature of the dealer's relationship with the appellant, the latter's omissions and acts could not have resulted in the appellant's liability.
- The SC emphasized that unless the manufacturer's knowledge is proved, a decision fastening liability upon the manufacturer would be untenable, given that its relationship with the dealer, in the facts of this case, were on principal to-principal basis.
- Consequently, the SC set aside the findings of the National Commission and the lower forums against the Appellant. The SC also directed that the amounts so deposited by the Appellant previously, with interest accrued should be refunded to the Appellant.

Khushi Ram & Ors v. Nawal Singh & Ors

Civil Appeal No.5167 of 2010

Background facts

- Badlu, who was the tenure-holder of agricultural land situated in District Gurgaon, had two sons Bali Ram and Sher Singh. Sher Singh died in the year 1953 issueless leaving his widow Smt. Jagno who inherited the share of her late husband, i.e., the half of the agricultural property owned by Badlu. Appellants (**Original Plaintiffs**) are descendants of Bali Ram.
- A Civil Suit No.317 of 1991 was filed by Nawal Singh (**Respondent**) and two others, who were the brother's sons of Smt. Jagno, in the Court of Sub-Judge, Gurgaon claiming decree of declaration as owners in possession of the agricultural land mentioned in the suit to the extent of half share situate in Village Garhi Bajidpur. Nawal Singh and others claimed that Smt. Jagno, has in a family settlement settled the land in favor of him and others, who were the brother's sons of Smt. Jagno. The trial Court vide its judgment and decree dated August 19, 1991 passed the consent decree in favor of Nawal Singh and others declaring owners in possession of the half share in the land.
- The Appellants filed a Civil Suit No.79 of 1991 in the Court of Senior Sub-Judge Gurgaon praying for declaration that the decree passed in Civil Suit No.317 of 1991 is illegal, invalid and without legal necessity. The plaintiffs also claimed decree of declaration in their favor declaring them owners in possession of land in question.
- The Trial Court rejected the argument of the plaintiffs that in absence of registration of decree, no right or title would pass in favor of the defendants. Trial Court held that registration is required when fresh rights are created for the first time by virtue of decree itself. It was held that in the case in hand, Respondents were having pre-existing right in the suit property under as in a family settlement Smt. Jagno acknowledged them as owner and surrendered the possession of the suit property in their favor at the time of family settlement and the decree dated August 19, 1991 merely affirms their pre-existing rights and hence, does not require registration.
- The Appellants aggrieved by the judgment filed first appeal before the learned District Judge, which too was dismissed. The First Appellate Court held that under Section 14(1) of the Indian Succession Act, 1956, a Hindu female becomes full owner of the property, which she acquires before the commencement of the Act and not as a limited owner. The First Appellate Court also held that the Respondents being near relations of Smt. Jagno, they cannot be said to be strangers to her. The findings of the trial court were affirmed by the First Appellate Court dismissing the appeal.
- Aggrieved against the judgment of the First Appellate Court, the Appellants filed R.S.A. No.750 of 2002. The High Court held that judgment and the decree rendered in Civil Suit No.317 of 1991 dated August 19, 1991 merely recognize the existing right which was created by the oral family settlement. High Court further held that apart from relationship of Smt. Jagno with Respondents, she has developed close affinity, love, and affection for Respondents as per the findings recorded by the learned Courts. The High Court thus dismissed the second appeal.
- Aggrieved by which the Appellants filed the present appeal in the SC.

Issues at hand?

- Whether the decree dated August 19, 1991 passed in Civil Suit No.317 of 1991 requires registration under Section 17 of the Indian Registration Act, 1908?
- Whether the Respondents were strangers to Smt. Jagno to disable her to enter any family arrangement with the Respondents?

Decision of the Court

- SC, at the outset, carefully glimpsed through the definitions of Sections 17(1) and 17(2)(vi) of the Act, which are relevant for the present case. The SC after proper scrutiny, concluded that since the consent decree dated August 19, 1991 relate to the subject matter of the suit, hence it was not required to be registered under Section 17(2) (vi) and was covered by exclusionary clause. Thus, the SC answered the first issue by stating that the consent decree dated August 19, 1991 was not registrable and Courts below have rightly held that the decree did not require registration.
- The SC before commenting on the second issue, focused on finding out the concept of family about which a family settlement could be entered. On this account, the SC referred to the judgement laid down by its three-Judge bench in *Ram Charan Das v. Girjanandini Devi & Ors*[18] wherein it was held that every party taking benefit under a family settlement must be related to one another in some way and have a possible claim to the property or a claim or even a semblance of a claim. SC analyzed the Section 15 and Sections 16 of the Hindu Succession Act, 1956, which deals with the general rules of succession in the case of female Hindus for properties inherited by female Hindus, which are devolved in accordance with the abovesaid sections.
- After accurate examination, the SC opined that heirs of the father are covered in the heirs, who could succeed. When heirs of father of a female are included as person who can possibly succeed, it cannot be held that they are strangers and not the members of the family qua the female. Thus, the SC answered the second issue in negative and dismissed the suit of the Appellants.

Our view

The SC's judgement that the heirs of female Hindu are not strangers and thus, have right to inherit her property is cardinal. The SC by its judgement has also rightly upheld the earlier precedents about registration of a decree or order of a court and has further thrown light on the profuse ingredients and exceptions to be observed by courts in ascertaining the prerequisites for registration of a decree or order.

Dholi Spintex Pvt Ltd v. Louis Dreyfus Co India Pvt Ltd

CM(M) 452/2020

Background facts

- Dholi Spintex (**Plaintiff**) entered into a contract with Louis Dreyfus (**Defendant**) for supply of 600 MT of American imported raw cotton by May 30, 2019 (**Contract**). The shipment and delivery of the raw cotton was delayed, and thus the Plaintiff refused to take delivery of the goods. Pursuant to the rejection of the goods by Plaintiff, the Defendant initiated arbitration proceedings, under Clause 6 of the contract, against the Plaintiff before the International Cotton Association (**ICA**) which provided for the arbitration to be in accordance with the ICA rules and procedures and prescribed the venue of the arbitration as London.
- However, it is important to note that Clause 7 of the Contract conferred exclusive jurisdiction on the courts of New Delhi.
- Upon reference to ICA by the Defendant, the ICA directed the Plaintiff to appoint its nominee arbitrator. The Plaintiff objected to the arbitration proceedings on the following grounds:
  - The Contract was executed between two Indian companies in India and was to be performed in India. Therefore, the proper law/substantive law governing the parties' obligations under the Contract can only be Indian law.
  - Clauses 6 and 7 made it clear that by conferring exclusive jurisdiction upon the courts of New Delhi, the parties intended for Indian law to govern the arbitration proceedings.
  - ICA Bylaws are opposed to and directly contravened Indian public policy which envisages that Indian parties cannot contract out of Indian law.
- Thus, the Plaintiff instituted a suit for the correct interpretation of Clauses 6 and 7 of the Contract along with seeking a decree of declaration for declaring Clause 6 of the Contract providing for reference of dispute between the parties through arbitration under the rules and arbitration procedures of ICA as invalid, null, and void.

[18] 1965 (3) SCR 841

Issues at hand?

- Whether two Indian parties can choose a foreign system of law as the substantive law of the contract?
- Whether the express designation of a court, under Clause 7 of the Contract providing for exclusive jurisdiction at New Delhi is determinative of the Seat of Arbitration?

Decision of the Court

- The Delhi HC relied on the judgment of the SC in *Atlas Export Industries v. Kotak & Company*[19] and held that the relationship between the parties in the present case must be seen on the basis of the terms of Contract executed between the parties and not the breach thereof. such that the Delhi HC observed that payment for the goods had to be made when the goods were in transit and 10 days prior to arrival of the vessel at the discharge port and thus not in territorial waters of India. There was a clear foreign element to the Contract between the parties, and hence the two Indian parties, could have agreed to an international commercial arbitration governed by the laws of England.
- In support of its holding, the HC relied heavily on the SC judgment in *Centrotrade Minerals and Metal Inc v. Hindustan Copper Ltd*[20], wherein the SC emphasized the principle of party autonomy in arbitration and held that the same is virtually the backbone which permits parties to adopt the foreign law as the proper law of arbitration.
- Further, the Delhi HC also observed that if the general practice for trading in American Cotton is that parties subject themselves to arbitration under the ICA byelaws, it cannot be held that the two Indian parties, were precluded from entering into an agreement for a foreign seated arbitration under the ICA byelaws. Therefore, two Indian parties can choose a foreign law as the law governing arbitration. Hence, Clause 6 of the Contract between the parties is not null or void.
- In adjudicating upon the second issue, the Delhi HC heavily relied on the SC judgments in *Shin Satellite Public Co Ltd v. Jain Studios Ltd*[21], *BGS SGS Soma JV v. NHPC Ltd*[22], *Mankatsu Impex Pvt Ltd v. Airvisual Ltd*[23] and *IMAX Corp v. E-City Entertainment (India) Pvt Ltd*[24]. Thus, it held that even though in Clause 6 of the Contract between the parties the term 'venue' has been used, by agreeing to conduct the arbitration through ICA the parties have agreed that the seat of arbitration would be London and not Delhi. This is despite the language of Clause 7 of the Contract by which the Substantive Law of the Contract is determined to be Indian law and parties have agreed to exclusive jurisdiction of the courts at Delhi.
- HC held that Clause 7 of the Contract entered between the parties would be relevant if by an agreement both parties decide not to settle their disputes through arbitration but by approaching the court of law, in which case the exclusive jurisdiction would be of the Courts at New Delhi.
- The Court also held that the scope of interference by the Court in an International Arbitration is limited to the Court determining, whether a valid arbitration agreement exists between the parties. At this stage, the Court cannot enter into a full-fledged inquiry on merits of the matter as only a prima facie finding is required to be arrived at.

Our view

The HC has reiterated that it is well settled that even though an agreement to refer disputes to arbitration may be a part of the substantive contract, however, the said agreement is independent of the substantive contract and survives despite termination or repudiation or frustration of the substantive contract. Thus, an arbitration agreement/clause does not govern the rights and obligations arising out of the substantive contract and only governs the manner of settling disputes between the parties. Since the arbitration agreement is an independent agreement, it may be governed by proper law of its own which need not be the same law as governing the substantive contract.

Unitech Ltd v. Telangana State Industrial Infrastructure Corp & Ors

Civil Appeal No. 317 of 2021, arising out of SLP (C) No 9010 of 2019

Background facts

- Unitech Ltd (**Unitech/Appellant No. 1**) entered into a contract with Andhra Pradesh Industrial Infrastructure Corp (**APIIC**). The bid submitted by Unitech was accepted upon payment of an earnest money deposit of INR 20 crore and Unitech was contractually required to pay an amount of INR 140 crore as project land cost and INR 5 crore towards project development expenses. The allotment of land was subject to the outcome of a pending litigation before the High of Andhra Pradesh.
- Consequently, results of the pending litigation did not go in favor of APIIC. Therefore, APIIC could not further sell a land to which they did not have proper title. Meanwhile, the State of Andhra Pradesh was reorganized into two separate states – 'Telangana' and 'Andhra Pradesh' under Andhra Pradesh Reorganization Act, 2014.
- Accordingly, Unitech requested refund from APIIC and newly formed body – Telangana State Industrial Corp Ltd (**TSIIC**) – for payment of INR 165 crore along with interest and damages for the

[19] (1999) 7 SCC 61
[20] (2017) 2 SCC 228
[21] (2006) 2 SCC 628
[22] (2019) SCC OnLine SC 1585
[23] Arbitration Petition No. 32 of 2018
[24] Civil Appeal No. 3885 of 2017

loss towards by them including cost of borrowing capital from bank and expenses for planning and designing of the project.

- APIIC and TSIIC did not refund the amount. Accordingly, Unitech filed a Writ Petition before High Court of Telangana seeking refund of INR 165 crore along with interest at SBI Prime Lending rate from September 2007 (date from when Unitech started making payment of the contract). Aggrieved by the order, APIIC and TSIIC appealed the decision to division bench which upheld the judgment of single bench making a slight modification that interest would be paid at SBI rate from 2015 (i.e., when Appellant had first sought for refund of all amounts instead of September 2007 as Unitech was aware of the pending litigation).
- Aggrieved by the order, Appellant, as well as the Respondents filed SLPs.

Issue at hand?

- Whether HC is right in entertaining a Writ Petition filed before it under Article 226 of Constitution in a purely contractual matter especially when it also contains an arbitration clause?

Decision of the Court

- SC allowed the appeal and held that HC stands justified in accepting Writ Petition under Article 226 of the constitution when the basic foundational representation of the contractual terms have failed. The court opined that TSIIC and APIIC both of which are an instrumentality of State have breached their contractual obligations and unlawfully stopped the refund of the principal and interest on the consideration paid by Unitech from last ten years.
- SC held that State and its instrumentalities are always expected to act in a fair manner and merely because they entered into a contract which had an arbitration clause does not imply that state can act arbitrarily. Accordingly, Court can always interfere under Article 226 irrespective of the arbitration clause for asserting rights arising out of contractual obligations against the state or its instrumentalities. The court reasoned this finding on the premises that Article 226 is not only a public law remedy but also acts as a constitutional safeguard against any arbitrary or unfair action of the state or in case of misuse of power by the state or its instrumentality.
- The Apex Court taking note of the actions done by TSIIC throughout the contract period stated that state or any of its instrumentality is bound to act fairly under Article 14 of the Constitution of India. Investors rely on the representations made by the state while investing in public projects, and thus, are legitimately entitled to assert that the representations must be fulfilled and to enforce the compliance of the duties which have been contractually assumed.
- SC further held that existence of a force majeure event (i.e., the reorganization of states) coupled with contractual breach on part of its instrumentality (to convey the land encumbrance free) entitles Unitech to claim compensation from the date on which first payment of project price was made.
- Lastly, SC held that as per reorganization act, TSIIC can pursue legal remedies in relation to appointment or adjustment of the refunded amount with APIIC and State of Andhra Pradesh.

Our view

The present judgment further clarifies that writ remedy under Article 226 against the State and its instrumentalities in commercial contracts which contain arbitration clause is not all together excluded. Considering the nature of government contracts which are majorly unilateral, private parties do not have much say in the contractual relationship and hence when disputes arise in such contracts on account of arbitrary/unfair actions of the State, it is important that writ remedy is available to a private entity and the same is not ousted merely because the disputes arise out of a commercial contract.

Kridhan Infrastructure Pvt Ltd v. Venkatesan Sankaranarayan & Ors

Civil Appeal No 3299 of 2020

Background facts

- Kridhan Infrastructure Pvt Ltd (Now known as Krish Steel and Trading Pvt Ltd) (**Appellant**) submitted a Resolution Plan for a company by the name of Tecpro Systems Ltd which was undergoing the Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016 (**Code**).
- The Resolution Plan was approved by the Committee of Creditors (**CoC**) as well as the National Company Law Tribunal (**NCLT**).
- The Appellant deposited an amount of INR 5 crore in an escrow account of the Corporate Debtor on approval of its resolution plan by the CoC but failed to fulfil further obligations under the Resolution Plan including equity infusion despite numerous opportunities over a period of six months, thereby resulting in the NCLT approving the liquidation of the Corporate Debtor which was upheld by the National Company Law Appellate Tribunal (**NCLAT**) while declining to exercise its jurisdiction under Rule 11 of the NCLAT Rules, 2016.
- On appeal before the SC, the Appellant gave an undertaking to deposit an amount of INR 50 crore by a defined timeline or even the extended timeline for a period but defaulted to do so. The Appellant had taken over the Corporate Debtor after the order of stay. Though given charge, the Appellant failed to fulfil its reciprocal obligations.

- A Civil Appeal was filed, seeking direction to the Ministry of Corporate Affairs, the Registrar of Companies and the Insolvency and Bankruptcy Board of India to take on record the newly appointed directors and signatories of the Corporate Debtor, to accept the Corporate Debtor as an active company and change its status from 'under liquidation' to 'active' and generally to take all actions in compliance of the previous orders of this Court.
- The Appellant submitted that:
  - The Appellant had moved the Term Lenders for finance; however, before finance could be made available to the Appellant, the Term Lenders insisted that the status of the Company must be altered from that of a company under liquidation, to an active company
  - The previous court orders recognized that Appellant was required to deposit an amount of INR 50 crore in terms of the understanding which was arrived at with the CoC on February 25, 2020
  - Appellant would hence raise the funds after securing a mortgage on the assets of the Corporate Debtor; however, the Term Lenders were not ready and willing to make funds available unless the status of the Company was altered
- It was further argued that Edelweiss Asset Reconstruction Co Ltd (**EARC**) has largest stake in respect of the Corporate Debtor and had supported Appellant in its efforts to comply with Resolution Plan.
- The Counsel, on behalf of Liquidator, submitted that though the management was handed over to Appellant, Appellant had proceeded to take action towards settling various disputes, including arbitration matters and despite various opportunities having been granted to it, Appellant was unable to raise funds.

Issue at hand?

- Whether the Order of Liquidation can be set aside in view of the unwarranted delay of over 8 months?

Decision of the Court

- The Apex Court, while staying the order of the NCLAT, directed the Appellant to deposit an amount of INR 50 crore before January 10, 2021 and such timeline was extended with the Appellant having been put on notice that the amount of INR 20 crore already deposited by it would stand forfeited on its failure to comply with the terms of the order.
- The Appellant was unable to raise funds from the Term Lenders who were insisting that the status of the Company should change to an active status from a company under liquidation. As such, the Apex Court rejected the Appellant's request which reduced itself to an attempt to raise funds on a mortgage of the assets of the Company which was not possible unless the Company was brought out of liquidation.
- The Apex Court held that the Appellant has not been able to comply with the terms of the Resolution Plan as evident from the orders of the NCLT and NCLAT and allowing such proceedings to lapse into an indefinite delay will plainly defeat the object of the statute, while a good faith effort to resolve a corporate insolvency was the preferred course.
- As such, Apex Court dismissed Civil Appeal and directed the management to revert to the Liquidator for taking steps in accordance with law.

Our view

The Apex Court upheld the rationale behind the genesis of the Code to resolve a corporate entity out of liquidation while the same has to be balanced with a time-bound approach to do so, thereby lending equal credence to a timely revival.

Pravin Electricals Pvt Ltd v. Galaxy Infra and Engineering Pvt Ltd

Civil Appeal No. 825 of 2021

Background facts

- On July 07, 2014, Pravin Electricals Pvt Ltd (**Appellant**) and Galaxy Infra and Engineering Pvt. Ltd. (**Respondent**), entered into a Consultancy Agreement (**Agreement**) wherein the Respondent was to facilitate the Appellant in getting a contract against an online tender invited by Chief Engineer, South Bihar Power Distribution Company Ltd (**SBPDCL**) for appointment of implementing agencies for executing a Scheme to strengthen, improve and augment the distribution systems capacities of 20 towns in Bihar. The Appellant was declared the L1 bidder pursuant to its submission of a technical and financial bid.
- The Appellant failed to make payments and replied to the Respondent's legal notice by denying the existence of any agreement dated July 07, 2014 pursuant to which the Respondent invoked the arbitration clause in the Agreement and nominated a sole arbitrator to adjudicate disputes between the parties. On the Appellant's challenge to such appointment, the Respondent filed a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the Act) which was allowed by the Delhi HC vide its judgment dated May 12, 2020.

- The Delhi HC held the arbitration agreement to be valid in light of the evidence presented and stated the case to fall within the ambit of Section 7(4)(b) of the Act with the inevitable result that the parties must be referred to arbitration for adjudication of their disputes. HC appointed Justice G.S. Sistani, a former Judge of the Delhi HC, as the Sole Arbitrator to adjudicate the dispute between the parties, which resulted in the appeal.
- The Appellant submitted that:
  - The Agreement dated July 07, 2014 was a concocted document as apparent from the Central Forensic Science Laboratory (**CFSL**) report and therefore, the arbitration agreement between the parties was not valid in view of the subsequent negotiations between the parties which shows that such an alleged agreement does not exist
  - The agreement was notarized at Faridabad, Haryana, while the parties are from Mumbai and Bihar respectively
  - The so-called Notary's license had expired much earlier than the notarization allegedly took place
  - That once the case pleaded between the parties is found to be incorrect, the Respondent cannot be allowed to rely upon documents produced here for the first time to show an agreement is made out in correspondence between the parties after the said date
  - That the judgment under appeal ought to be set aside due to several inconsistencies
- The Respondent submitted that:
  - Even if the Agreement is not relied upon, an arbitration clause did exist in the draft agreement that was exchanged between the parties that culminated in a final agreement
  - The Respondent acted as a go-between and successfully obtained the bid for the Appellant having earned its commission thereon
  - The judgment under appeal did not require interference as the CFSL report was inconclusive and that the correspondence referred by the Court would clearly show that the dramatis personae in this case interacted with each other and that without the effort of the Respondent, the Appellant would have never gotten the bid

Issue at hand?

- Whether a valid arbitration agreement exists under Sections 8 and 11 of the Act and whether the findings of the Delhi HC were correct?

Decision of the Court

- The Court observed that Sections 8 and 11 were amended pursuant to a detailed Law Commission Report (246th Law Commission Report) on Arbitration. It referred to the case of *Mayavati Trading (P) Ltd v. Pradyuat Deb Burman*[25] to trace the history of the law prior to 2015 the proposals of the Report and the changes made thereafter.
- The Court relied upon the dictum of *Vidya Drolia v. Durga Trading Corporation*[26] to hold that when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the Arbitral Tribunal selected by the parties by consent. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.
- The Court further relied on the dictum of the aforesaid judgement on matter of 'existence' under Section 11 to hold that the existence and validity are intertwined, and an arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. An invalid agreement is no agreement. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the Court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and no arbitrability.
- The Court stated that by a process of judicial interpretation, *Vidya Drolia* has now read the 'prima facie test' into Section 11(6A) so as to bring the provisions of Sections 8(1) and 11(6) read with Section 11(6A) at par. Considering that Section 11(7) and Section 37 have not been amended, an anomaly thus arises.
- Whereas in cases decided under Section 8, a refusal to refer parties to arbitration was appealable under Section 37(1)(a), a similar refusal to refer parties to arbitration under Section 11(6) read with Sections 6(A) and 7 was not appealable. The Court observed that in the light of what has been

Our view

The Hon'ble Apex Court, while considering the facts of the case in an appeal against order passed under Section 11 of the Act, has reiterated the restricted scope of judicial review under Sections 8 and 11 of the Act and circumscribed such review only to a prima facie view of the existence or otherwise of the arbitration agreement between the parties, free from such issue being subject to trial and evidence before the arbitral, if constituted. This fortifies judicial precedents pronounced earlier.

[25] (2019) 8 SCC 714
[26] (2021) 2 SCC 1

decided in *Vidya Drolia* , the Parliament may need to have a re-look at Section 11(7) and Section 37 so that orders made under Sections 8 and 11 are brought at par qua appealability as well.

- It stated that the CFSL did not express an opinion either way, and hence it became incumbent upon the learned Single Judge to determine as to whether the Agreement could have been entered into given the surrounding circumstances of the case.
- HC erred in holding that the parties were ad idem regarding submission of the disputes to arbitration in view of the fact that the Respondent vide its email dated July 15, 2014 disputed various terms of the Agreement, hence there being no concluded contract between the parties.
- The allegation that the Agreement had a signature that may not be that of Mr. M.G. Stephen (MD of the Appellant) was brushed aside stating that an arbitration agreement need not be signed by the parties.
- While holding it unsafe to conclude, one way or the other, that an arbitration agreement exists between the parties in view of the facts of the case, the Apex Court held that the prima facie review spoken of in *Vidya Drolia* can lead to only one conclusion on the facts of this case - that a deeper consideration of whether an arbitration agreement exists between the parties must be left to an Arbitrator who is to examine the documentary evidence produced before him in detail after witnesses are cross-examined on the same.
- While the Apex Court set aside the impugned judgment of the Delhi HC in so far as it had conclusively held the existence of an arbitration agreement between the parties, SC upheld the appointment of the sole arbitrator by the HC and further directed that the arbitrator shall first determine as to whether an Arbitration Agreement exists between the parties as a preliminary issue and thereafter go on to decide the merits of the case.

Alka Khandu Avhad v. Amar Syamprasad Mishra & Anr

Criminal Appeal No. 258 of 2021

Background facts

- Amar Syamprasad Mishra (**Respondent No. 1**) filed a criminal complaint against Alka Khandu Avhad (**Appellant/Accused No. 2**) and her husband (**Accused No. 1**) under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (**NI Act**) in the Court of the learned Metropolitan Magistrate, Borivali, Mumbai.
- Respondent No. 1 raised a professional bill for services rendered by him to represent the accused in legal proceedings. Thereafter, accused 1 handed a post-dated cheque dated March 15, 2016 for INR 8,62,000 in lieu of the legal work done by the Respondent. The said cheque was presented for encashment and the same came to be returned unpaid with the endorsement 'funds insufficient'. On due service of notice on the accused, Respondent 1 filed a complaint against the Accused for the offence punishable under Section 138 of the NI Act.
- The learned Metropolitan Magistrate, Borivali, Mumbai directed to issue process against both the accused for the offence punishable under Section 138 read with Section 141 of the NI Act.
- The Appellant then filed a Criminal Writ Petition in the HC to quash the criminal complaint filed against her primarily on the ground that the Appellant was neither a signatory to the cheque dishonored nor there was a joint bank account, therefore the Appellant could not be prosecuted for the offence punishable under the NI Act.
- Respondent No. 1, however, submitted that both the Accused were jointly liable to pay the professional bill as the original complainant represented both the Accused and therefore considering Section 141 of the NI Act, the Appellant would also be liable for the offence punishable under the NI Act. The High Court refused to quash the criminal complaint filed against the Appellant, which gave rise to the appeal.
- The Appellant submitted that:
  - The dishonored cheque was issued by Accused No.1 and not the Appellant and the bank account in question was not a joint account and that the Appellant was neither the signatory to the cheque nor the cheque was drawn from the bank account of the Appellant and, therefore, the Appellant cannot be prosecuted for the offence punishable under Section 138 of the NI Act
  - The ingredients of Section 138 of the NI Act are not satisfied, and, therefore, the High Court ought to have quashed the criminal complaint against the appellant
  - Even Section 141 of the NI Act shall not be applicable as the cheque was issued by a private individual
- Respondent No. 1 submitted the following:

- The liability to pay the debt towards the professional bill was the joint liability of both the Accused as the Respondent represented both the Accused and, therefore, Section 141 of the NI Act was applicable
- 'Company' means anybody corporate and includes a firm or other association of individuals and therefore in case of a joint liability of two or more persons it will fall within 'other association of individuals' and, therefore, with the aid of Section 141 of the NI Act, the Appellant who is jointly liable to pay the debt, can be prosecuted
- The cheque was issued towards discharge of legal liability of both the Accused which included the Appellant and hence the complaint was maintainable against the Appellant

- Learned counsel appearing on behalf of the State has supported the impugned judgment and order passed by the HC.

Issue at hand?

- Whether the Appellant can be prosecuted for the offence punishable under Section 138 read with Section 141 of the NI Act when she is neither a signatory to the cheque dishonored nor the account in question is a joint bank account?

Decision of the Court

- The Apex Court underlined that the dishonored cheque was issued by Accused No. 1 from his bank account and having signed the cheque himself, the Appellant is neither the signatory to the cheque nor the dishonored cheque was drawn from her bank account. Further, the account in question was not a joint account.
- As per Section 138 of the NI Act, before a person can be prosecuted, the following conditions are required to be satisfied:
  - The cheque is drawn by a person and on an account maintained by him with a banker.
  - For the payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability.
  - The said cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honor the cheque or that it exceeds the amount arranged to be paid from that account.
- Section 138 of the NI Act does not speak about the joint liability. Even in case of a joint liability, in case of individual persons, a person other than a person who has drawn the cheque on an account maintained by him, cannot be prosecuted for the offence under Section 138 of the NI Act. A person may be jointly liable to pay the debt but cannot be prosecuted unless the bank account is jointly maintained and that he was a signatory to the cheque.
- In relation to applicability of Section 141 of the NI Act, the said provision related to the offence by companies, and it cannot be made applicable to the individuals. Private individuals cannot be said to be 'other association of individuals'. Therefore, the Appellant is neither a Director nor a partner in any firm who has issued the cheque. Therefore, even the Appellant cannot be convicted with the aid of Section 141 of the NI Act.
- The Appeal was allowed.

Our view

The view in respect of joint liabilities of the accused under Section 138 read with 141 of the NI Act has been clarified with precision while clarifying and holding that satisfaction of the twin conditions of maintaining a 'joint bank account' and being a 'signatory to the cheque issued' are mandatory for constituting the offence against the accused under the said Act.

In Re: Cognizance for Extension of Limitation

Suo Moto Writ Petition (Civil) No. 3 of 2020

Background facts

- SC through an order dated March 08, 2021 lifted its earlier order pertaining to extension of limitation period on account to Covid-19 pandemic. The court through its earlier order dated March 27, 2020 extended the period of limitation prescribed under the general laws or special laws with effect from March 15, 2020 i.e. the date of nation-wide lockdown.

Decision of the Court

- In computing the period of limitation for any suit/appeal/application/proceeding, the period from March 15, 2020 till March 14, 2021 shall stand excluded. Accordingly, balance period of limitation remaining as on March 15, 2020 if any shall become available with effect from March 15, 2021.

- In case where limitation expired between the time period March 15, 2020 to March 14, 2021, then notwithstanding the actual balance of period of limitation remaining, all person shall have limitation period of 90 days from March 15, 2021. In case the balance period of limitation remaining was more than 90 days, then the longer period would apply.
- The period from March 15, 2020 till March 14, 2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the NI Act and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.
- Lastly, Court enumerated that the Government of India shall amend the guidelines for containment zones, to state. '*Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job-related requirements.*'

Balasore Alloys Ltd v. SREI Equipment Finance Ltd

Civil Appeal No. 14665 of 2015

Background facts

- In September 2020, SREI Equipment Finance Ltd. (**Respondent**) filed an application under Section 9 of the Arbitration & Conciliation Act, 1996 (**Act**).
- Thereafter, the arbitral tribunal was constituted in December 2020.
- Vide an Order dated January 7, 2021 the High Court (**HC**) recorded that there could be a possibility of settlement between the parties. Thereafter, on January 22, 2021, the HC recorded certain steps being taken by the parties to arrive at a settlement and according adjourned the application till January 29,2021. Unfortunately, the aforesaid efforts did not result into a settlement.
- Vide an order dated January 29, 2021, the Court passed the impugned judgment and order appointing a receiver to take physical possession of the hypothecated assets. It appears that it was only on January 29, 2021 Balasore Alloys Ltd (**Appellant**) for the first time took the point that since the arbitral tribunal had been constituted, the Court was denuded of its jurisdiction under Section 9 of the Arbitration and Conciliation Act, 1996 (**Act**) since there was no pleading that such remedy could be efficaciously obtained from the arbitral tribunal.
- Aggrieved by the said order, the Appellant filed the present appeal before the Calcutta High Court.

Issue at hand?

- Whether it was the duty of the Court to entertain application filed under Section 9 of the Act after constitution of the arbitral tribunal?

Decision of the Court

- At the outset, the Court referred to its decision in the matter of *Kotak Mahindra*[27] wherein orders were passed in a Section 9 Petition before the constitution of the arbitral tribunal and the question before the Court was with regards to the fate of the orders once the Court was denuded of its jurisdiction after constitution of tribunal. The Court drew a corollary and dismissed the objection with regard to the lack of jurisdiction of the Court to entertain the application after the constitution of the arbitral tribunal. The Court then proceeded to pass orders recording the settlement efforts between the parties. Each and every order was passed after constitution of the tribunal.
- Accordingly, the Court held that the bar created under Section 9(3) of the Act is absolute and once the arbitral tribunal has been constituted, the court cannot entertain any new application or proceed to entertain any old application. The Court further clarified that this jurisdiction cannot be conferred with consent or waiver.
- The Court held that after becoming aware of the constitution of arbitral tribunal, the Court shall either vacate earlier orders and enable the parties to approach the arbitral tribunal or direct that its orders shall be subject to continuance under orders of the arbitral tribunal.

  Accordingly, the captioned appeal and the connected application were disposed off.

[27] Kotak Mahindra Bank Ltd v. Arjun Sharma & Anr (FMAT 5 of 2021)

Our view

Section 9 of the Act was amended with effect from October 23, 2015 to the effect that a party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to the Court for protective orders. Sub-section 3 provided that once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-Section 1 unless the Court found that circumstances existed which may not render the remedy under Section 17 efficacious.

By way of the present Order, the autonomy of arbitral tribunal has been upheld. It highlights that the bar under Section 9(3) of the Act is absolute and the courts cannot allow application under Section 9(1) after the constitution of the arbitral tribunal.

It is pertinent to highlight that in *Manbhupinder Singh Atwal v. Neeraj Kumarpal Shah* [(2019) 4 GLR 3229], the Gujrat HC Court observed that Section 9(3) of the Act is made to mention an exception that in circumstances where remedy under Section 17 does not become efficacious, then in such eventuality, application under Section 9 may be entertained by the Court. Thus, it was held that once the arbitration has commenced, measures of protection by invoking Section 9 cannot be availed of, since the remedy under Section 17 would be specifically available before the Arbitral Tribunal.

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