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Dispute Resolution and Arbitration

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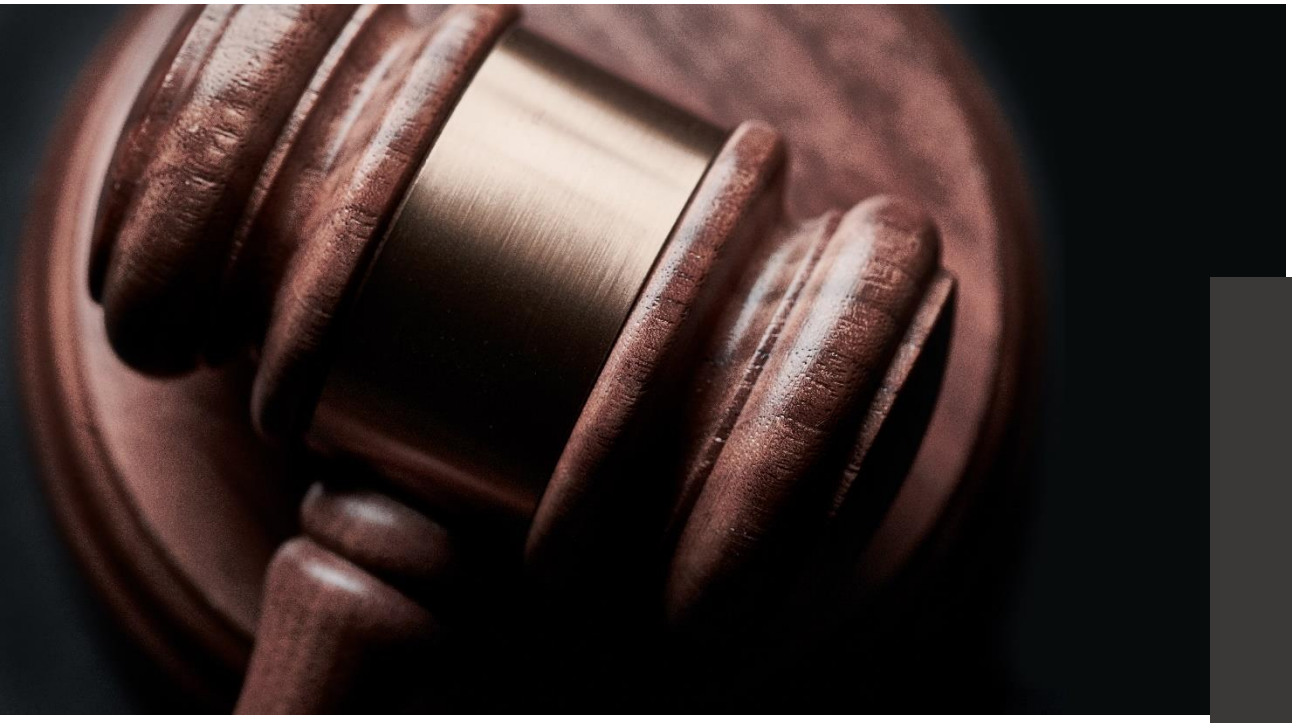
DISPUTE RESOLUTION AND ARBITRATION UPDATE



Contributors

Faranaaz Karbhari
Counsel

Kshitiz Khera
Associate Partner

Rahul P Jain
Associate Counsel

Ishwar Ahuja
Senior Associate

Khushboo Rupani
Senior Associate

Mahafrin Mehta
Senior Associate

Aasiya Khan
Associate

Akriti Shikha
Associate

Jai Dhanani
Associate

Inox Renewables Ltd v. Jayesh Electricals Ltd

Civil Appeal No. 1556 of 2021 (Arising out of SLP (C) No.29161 of 2019)

Background facts

- A Purchase Order (**PO**) dated January 28, 2012 was entered into between Gujarat Fluorochemicals Ltd (**GFL**) and Jayesh Electricals Ltd (**Respondent**) for the manufacture and supply of power transformers at wind farms. Clause 8.5 of the PO states that all disputes arising out of the PO would be referred to arbitration by a three-member tribunal. Further, it was stated that the venue of the arbitration would be Jaipur and the exclusive jurisdiction would lie with the courts in Rajasthan.
- By way of a Business Transfer Agreement (**Agreement**), a slump sale of the entire business of GFL took place in favor of Inox Renewables Ltd (**Appellant**). It is pertinent to note that the Respondent was not a party to the aforesaid Agreement. Clauses 9.11 and 9.12 of the Agreement designated Vadodara as the seat of the arbitration between the parties, vesting the courts at Vadodara with exclusive jurisdiction qua disputes arising out of the Agreement.
- Thereafter, disputes arose between the parties and the Respondent filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 (**Act**) before the High Court of Gujarat (**HC**) who passed an Order appointing Justice CK Buch (Retd.) to act as the Sole Arbitrator to resolve all disputes arising between the parties out of the PO.
- Subsequently, on July 28, 2018, the Arbitrator passed an award in favor of the Respondent, awarding a sum of INR 38,97,150 plus INR 31,32,650 as the interest on the awarded amount from March 10, 2017 till the date of the Award as well as INR 2,81,000 as quantified costs. Future interest was also awarded at 15% from the date of Award till the date of payment. Dissatisfied by the Award, the Appellant challenged the same by instituting a Petition under Section 34 of the Act in the Commercial Court at Ahmedabad. Vide an Order dated April 25, 2019, the Court disposed of the same, thereby accepting the case of the Respondent by referring to Clauses 9.11 and 9.12 of the Agreement and stated that the courts at Vadodara alone would have exclusive jurisdiction.
- Aggrieved by the Order dated April 25, 2019, the Appellant filed a Special Civil Application before the HC. In its judgment dated October 9, 2019, the HC referred to Clause 8.5 contained in the PO and held that as the exclusive jurisdiction is presented to the courts at Rajasthan, the appropriate

court would be the court at Jaipur. However, despite this finding, it found no error in the Commercial Court's decision dated April 25, 2019 and dismissed the Special Civil Application (**Impugned Judgment**)

- The Appellant filed an Appeal challenging the aforesaid Order of the HC before the Supreme Court (**SC**).

Issue at hand?

- Whether the change in venue/place in arbitration by mutual agreement would result in the said changed venue becoming the seat of arbitration?

Decision of the Court

- The Appellant relied upon the principles laid down by SC in *BSG SGS SOMA JV v. NHPC Ltd*[1] (**BGS SGS**) and stressed that the arbitrator had confirmed in the arbitral award that the venue/place of arbitration was shifted by mutual consent to Ahmedabad, because of which the place of arbitration or seat of arbitration became Ahmedabad, resulting in the courts at Ahmedabad having exclusive jurisdiction. The Respondent averred to this by stating that in the absence of a written agreement between the parties, the place of arbitration cannot be switched even by mutual agreement and leaned on *Videocon Industries Ltd v. Union of India & Anr*[2] (**Videocon**) and *Indus Mobile Distribution Pvt Ltd v. Datawind Innovations Pvt Ltd*[3] (**Indus Mobile**).
- Further, the Respondent strongly insisted that the Sole Arbitrator's finding that the venue was shifted by mutual consent from Jaipur to Ahmedabad had reference only to Section 20(3) of the Act and thus, the seat of the arbitration was always secured at Jaipur. The Respondent also stated that as per Clause 8.5, the jurisdiction of Courts in Rajasthan is independent of the venue being at Jaipur.
- At the outset, the SC perused Clause 12.3 of the Award which explicitly spells out that by mutual agreement, parties have specifically shifted the venue/place of arbitration from Jaipur to Ahmedabad. Thus, the SC held that the Respondent's submissions that this could only have been done by written agreement and that the Arbitrator's finding refers only to a convenient venue and not the seat of arbitration, does not hold much water.
- The SC carefully browsed through BGS SGS (*supra*) and concluded that since the seat is chosen as Ahmedabad in the instant case, it is equivalent to an exclusive jurisdiction clause, thereby conferring the courts at Ahmedabad with exclusive jurisdiction to deal with the arbitration. The SC also referred to the judgements relied on by the Respondent and held that the parties may commonly arrive at a seat of arbitration and may change the seat of arbitration by mutual consensus which is recorded by the Ld. Sole Arbitrator in his Award to which no challenge is made by either party.
- The SC dismissed the argument of the Respondent that the Sole Arbitrator's finding that the venue was shifted by mutual consent from Jaipur to Ahmedabad had reference only to Section 20(3) of the Act by advancing that the 'venue' being shifted from Jaipur to Ahmedabad is really a shifting of the venue/place of arbitration with reference to Section 20(1), and not with reference to Section 20(3) of the Act.
- With regards to the Respondent's argument that the courts at Rajasthan alone would have exclusive jurisdiction, the SC clarified that Clause 8.5 must be read as whole as the Courts in Rajasthan have been vested with jurisdiction only because the seat of arbitration was to be at Jaipur. Furthermore, once the seat of arbitration is substituted to be at Ahmedabad by mutual agreement, the Courts at Rajasthan are no longer vested with jurisdiction as exclusive jurisdiction is now vested in the Courts at Ahmedabad, given the change in the seat of arbitration.
- In light of the above, the SC set aside the Impugned Judgment and referred the parties to the courts at Ahmedabad for the adjudication of the Section 34 petition.

Our view

The SC's decision that when there is change in venue/place in arbitration by mutual consent, the new venue/place becomes the seat of Arbitration is cardinal as it wipes out the grey area regarding the question of competency of Courts and sets a binding precedent. The SC's judgement that the parties may change the seat of arbitration without any written arrangement by mutual consent which is recorded by the Arbitrator in his award, allows the parties to change the venue flexibly and instantly as per their convenience. The flexibility in conducting arbitral proceedings is exactly what makes it more preferential/attractive than typical court proceedings. However, it is this very flexibility that makes it binding on both the parties.

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

Civil Appeal No. 1647 of 2021 (Arising out of SLP (C) No.3936 of 2021)

Background facts

- The Appellant had issued three Purchase Orders (**PO**) to the Respondent for supply of six converters used in wind turbines. Owing to disputes regarding the expiry of the warranty of the said converters, the parties entered into a Settlement Agreement containing a dispute resolution clause (Clause 6). Arbitration clause specified that the disputes between them shall be resolved by arbitration in Zurich in accordance with the Rules of Conciliation and Arbitration of the International Chamber of

[1] (2020) 4 SCC 234
[2] (2011) 6 SCC 161
[3] (2017) 7 SCC 678

Commerce (**ICC**). Disputes arose between the parties pursuant to the settlement agreement, whereby the Appellant issued a request for arbitration to the ICC.

- In the arbitration proceedings, the Respondent filed a preliminary application objecting on the ground that as both the parties are Indians, the choice of foreign seat is invalid. The Appellant opposed the said application and asserted that there was no bar in law. The Respondent's objection was dismissed by the Arbitrator and this decision was accepted by both the parties. The Arbitrator decided that the venue will be Mumbai although the seat is in Zurich and consequently, an Award was advanced in favor of the Respondent.
- The Respondent then commenced enforcement proceedings under Sections 47 & 49 of Arbitration and Conciliation Act, 1996 (**Act**) before the Gujarat High Court (**HC**) seeking enforcement of the Award as a foreign award in India and interim relief under Section 9 of the Act. At this stage, the Appellant blew hot and cold by arguing that the choice of foreign seat by Indian parties is baseless. However, HC confirmed that two Indian parties can choose a foreign seat of arbitration although they cannot avail interim relief in Indian Courts.

Issues at hand?

- Whether two companies incorporated in India can choose a forum for arbitration outside India?
- Whether an Award made at such forum outside India, to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) applies, can be said to be a 'foreign award' under Part II of the Act and be enforceable as such?

Decision of the Court

- At the outset, SC referred to *Mankastu Impex (P) Ltd. v. Airvisual Ltd*[4] and confirmed that Zurich was the judicial seat mutually agreed by the parties as explicitly set out in Clause 6 of the Settlement Agreement. SC dismissed the challenge of the Appellant that by applying the closest connection test, the seat of arbitration will be Mumbai and reasoned that the test will be applied only if it is ambiguous that a seat has been chosen either by the parties or by the tribunal.
- SC solidified the statement of law laid down in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc* (**BALCO**)[5] that Part I and Part II of the Act are fundamentally distinct and there can never be an overlap between them. The SC held, using this as frame of reference, that the argument of the Appellant on Section 2(2) of the Act bridging the gap between the two parts of the Act, to be ill-conceived.
- SC juxtaposed Section 2(1)(f) defining 'International Commercial Arbitration" under the provisions of Part I with Section 44 dealing with 'International Commercial Arbitration" under Part II of the Arbitration Act and clarified that the former essentially revolves around one of the parties to the arbitration agreement who must be a foreign national or habitually resident outside India while the latter focuses exclusively on place/seat of Arbitration outside India. After careful perusal of Section 44 of the Act which incorporates the elements necessary for an award to be identified as a foreign award, SC advanced that the facts of this case fall within the blanket of this section.
- SC placed reliance on *Atlas Export Industries v. Kotak & Co* (**Atlas Export**)[6] and held that a foreign award cannot be tossed out merely because it was made between two Indian parties, under pari materia provisions of the Foreign Awards Act.
- To answer the contentions raised by the Appellant with respect to Sections 23 and 28 of the Indian Contract Act, SC enunciated the principles furnished in Atlas Export, that when a dispute arises where both the parties are Indian, and if the contract has the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India, the same is not opposed to public policy. Thus, SC confirmed that Sections 23 or 28, do not close the door for two Indian parties from referring their disputes to a forum outside India.
- Furthermore, SC upheld the law set out in *Sasan Power Ltd v. North American Coal Corp (India) Pvt Ltd*[7] (**Sasan I**) that two Indian parties can choose a foreign seat outside India for the purpose of resolving their disputes.
- The SC also strongly emphasized that its observations *in TDM Infrastructure (P) Ltd v. UE Development India (P) Ltd* (**TDM**)[8] were only for the purpose of determining the jurisdiction of the

Our view

The SC's decision is laudable as it settles the debate on empowering two Indian parties to freely choose a foreign seat of arbitration. This landmark judgement has in essence strengthened the legal position by reinforcing the principle of party autonomy. The SC's judgement also clearly outlines the applicability of Section 2(2) of the Act to Section 9 application so that the parties are not rendered remediless. The SC also reiterated the law that Sections 23 or 28 of Indian Contract Act do not close the door for two Indian parties from referring their disputes to a forum outside India and the same is not opposed to public policy.

[4] (2020) 5 SCC 399
[5] (2012) 9 SCC 552
[6] (1999) 7 SCC 61
[7] 2015 SCC OnLine MP 7417
[8] (2008) 14 SCC 271

Court as envisaged under Section 11 of the 1996 Act and thus, cannot be relied on while deciding whether Part I or Part II of the Act will prevail.

- SC confirmed that an arbitration resulting in foreign awards will be enforceable only in a High Court under Section 10(1) of the Commercial Courts Act, and not in a district court under Section 10(2) or Section 10(3). SC immaculately applied Section 2(2) of the Act to grant the interim relief under Section 9 application in case of foreign award. Therefore, SC endorsed the judgement of HC except for its perspective on the unsustainability of Section 9 application. In the light of the above, the SC answered the issues in affirmative.

Bay Capital Advisors Pvt Ltd v. IL&FS Financial Services Ltd & Ors

Arbitration Petition (L) No. 10089 of 2020

Background facts

- Bay Capital (**Petitioner**), IL&FS Financial Services Ltd (**IFIN/ Respondent No. 1**), Mehta (**Respondent No. 2**) and Zon Investment Advisors Pvt Ltd (**Zon/Respondent No. 5**) entered into agreements on March 31, 2017 to secure repayment of an earlier loan that Champion Agro World (**Respondent No. 3**) took for an amount of INR 40 crore as a finance facility from IFIN. This facility was acquired by a pledge of 52,86,679 shares i.e. 60.7% of the share capital of Champion Agro Ltd (**Champion Agro/Respondent No. 4**) held by its promoters, a first charge of mortgage of land at Palitana, an exclusive charge on the current assets of Champion Agro World, a pledge of the entire equity shares of Champion Agro World by its shareholders, and various personal guarantees.
- Also, on May 19, 2013 a Comfort Letter was furnished by Bay Capital, undertaking to provide the necessary funds in case of any failure in payment by Champion Agro World.
- Champion Agro World defaulted in payment on 2015 which resulted in IFIN filing a Commercial Suit in Bombay High Court (**HC**) against Champion Agro World and the personal guarantors in 2016.
- Meanwhile, contingent to the Comfort Letter, IFIN proceeded towards Bay Capital and Mehta, a promoter of Bay Capital, to pay the amount of the default. As they did not have sufficient funds satisfying the demand, the original finance facility was restructured. Inter alia IFIN agreed to subscribe to Bay Capital's 44 Optionally Convertible Debentures (**OCD**) aggregating to INR 44 crore. Of this amount of INR 44 crores, INR 34 crore was to be used by Bay Capital to subscribe to OCDs issued by Zon, and these were in turn to be utilized to square accounts with Champion Agro World facility. The remaining amount of INR 10 crore deposited with IFIN is in dispute between IFIN and Bay Capital as to whether it be retained as a deposit under the restructuring arrangement or under another facility.
- On March 31, 2017, an Assignment Agreement was executed between IFIN and Zon, as well as a Collection Agency Agreement and Subscription Agreement, by which IFIN agreed to subscribe to Bay Capital's OCDs. A Deed of Hypothecation was also executed by Zon on March 31, 2017 as well as a Pledge Agreement by which Mehta consented to pledge 100% of his equity in Bay Capital as and by way of first exclusive charge in favor of Bay Capital. However, the Pledge Agreement was unregistered and, therefore, not effected.
- On July 23, 2019, an Event of Default (**EoD**) notice was issued by IFIN whereby Bay Capital, Mehta, and Zon Software were called upon to make payment of the outstanding amount within seven days.
- It is pertinent to note that before the aforesaid EoD Notice was issued, an Order dated October 15, 2018 was passed by the National Company Law Appellate Tribunal (**NCLAT**) in a proceeding between the Union of India and IL&FS Ltd. and some 348 other entities in the IL&FS group, including IFIN. By way of the said Order, the NCLAT directed that there would be stay inter alia of the institution or continuation of suits or any other proceedings by any party or person or bank or company etc. against IL&FS and its 348 group companies in any court of law, tribunal, arbitration panel or arbitration authority (**NCLAT Order**).
- Bay Capital filed a Petition in the High Court of Bombay under Section 9 of the Arbitration and Conciliation Act, 1996 (**Act**), inter alia seeking interim protection pending arbitration to restrain IFIN from acting on its EoD notice.

Issues at hand?

- Whether in light of the Order passed by the NCLAT staying all proceedings in all Courts, would there be a resultant stay of the arbitration proceedings? And whether such a Petition under Section 9 of the Act was maintainable?
- Whether the interim relief plead by the Petitioner can be granted?

Decision of the Court

- At the outset, the HC took into consideration the judgment passed by the SC in the matter of *Cotton Corporation of India Ltd v. United Industrial Bank Ltd & Ors*[9] wherein the SC, after perusing Section 41 of the Specific Relief Act 1963, concluded that the term 'Court' here is used in its widest dimension penetrating to every forum; however, NCLAT has no jurisdiction to grant a perpetual injunction restraining a person from instituting a proceeding in a court not subordinate to it as a relief.
- Furthermore, to obtain clarity, the HC carefully glimpsed through the Sections 241 and 242(2)(m) of the Companies Act, 1956 which confer wide discretion on the NCLT and NCLAT and contemplated whether such discretion can be stretched to pass an order which is ex facie in the teeth of the statutory prohibition contained in Section 41 of the Specific Relief Act. Before deriving any conclusion, the HC referred to its decision in the matter of *Sanjay Soya Pvt Ltd v. Narayani Trading Co*[10] that there is no law that a declaration that a previous decision is per incuriam can only be done by a hierarchically superior court.
- The HC, after careful analysis, speculated that the words 'any court of law' could feasibly blanket the High Court as well because other than the NCLT, there is no other judicial establishment over which the NCLAT exercises an upper hand. The HC stated that NCLAT has absolutely no jurisdiction over the HC, even on its Original Side, given that this is a Chartered High Court. The HC also took in consideration that if hypothetically NCLAT has the power to stay arbitrations, it unquestionably lacks the supremacy to clasp the hands of the Court in hearing a petition under Section 9 or any other petition filed before this Court under the Act. The HC firmly held that NCLAT cannot make an order under Sections 9, 11, 34, 37, or any of the other provisions of the Act.
- With regards to the second issue, the HC considered the submission of the Petitioner that the provision for penal interest invoked by IFIN is in liquidated damages and further scrutinized the copy of a letter dated November 1, 2019 specifying the outstanding amounts as of September 30, 2019. The total outstanding was computed to be approx. INR 47 crore and there was a stipulation of further interest of INR 3 crore.
- The HC also clarified that the Act is founded on a contract and this necessarily means that to request an equitable and discretionary relief, a Section 9 petition is not to be driven like a regular civil suit invoking a non-contractual civil remedy. In furtherance, the HC highlighted that Section 28(2) of the Act is illuminative while assessing a commercial contract. The HC opined that it does not see Section 28(2) as constraining or limiting the power of a Section 9 Court. But it must certainly inform the nature of the relief that the Section 9 Court moulds. The relief must be one that the arbitral tribunal can legitimately confirm if and when called upon to do so. The HC also stated that a Respondent seeking to enforce its contractual rights will suffer no injunction unless it is shown that the Respondent itself is in breach or has acted contrary to the contract.
- Having found no merit in the case presented by Bay Capital, the HC dismissed the Petition with costs payable to IFIN in the amount of INR 7.5 lakh.

Our view

It is a known fact that the NCLT/ NCLAT are quasi-judicial bodies which solely deal with matters pertaining to the Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016. As such, the NCLAT will not and cannot have any sort of jurisdiction over a HC, which is superior in nature. In holding that it is not open to NCLAT to lock the hands of the HC in adjudicating a Section 9 petition or any other plea under the Act, the HC has set a binding precedent for all judicial/quasi-judicial authorities to be on toes while exercising their discretion in serving justice. Furthermore, the decision of the HC is pertinent as it guides the Courts by placing emphasis on not granting reliefs to parties with a plethora/multiple trifling claims to encourage them in breaching their contracts and who are simply forum shopping, in order to gain favorable orders.

Google India Pvt Ltd v. CIT, International Taxation, Bengaluru and Google Ireland Ltd v. CIT, International Taxation, Bengaluru

ITA 879/ 2017 along with other batch matters and ITA 502/2018 along with other batch matters

Background facts

- The Appellant is a company incorporated under the Companies Act, 1956 and is engaged in the business of global outsourced IT and IT Enabled Services. It is also a non-exclusive distributor of the online advertising space under the 'AdWords programme' to advertisers in India.
- In 2004, the Appellant-company entered into an IT Enabled Services Agreement with Google Ireland Limited and established its IT Enabled Services division for providing services which primarily involved rendering support services in administering the Google editorial guidelines in relation to global advertisements and responding to the queries from customers globally. Under the said Agreement, the Appellant has been rendering outsourced services for which the appellant is being separately compensated by Google Ireland Limited.
- Thereafter, the Assessing Officer (**AO**) initiated proceedings under Sections 201 and 201(1A) of the Income Tax Act, 1961 (**ITA**), vide Notice dated November 20, 2012 for AY 2007-08. In the said notice, the AO referred to the Assessment Order dated November 30, 2011 passed against the Appellant (for AY

[9] (1983) 4 SCC 625

[10] Interim Application (L) No 5011 of 2020 in Commercial IP Suit No. 2 of 2021, decided on March 09, 2021.

2008-09) by the Additional Commissioner of Income Tax, Range-11 under Section 143(3) of the ITA wherein disallowance under Section 40(a)(i) of the ITA was made on account of non-deduction of tax at source for the sums payable by the Appellant to Google Ireland under the Distribution Agreement.

- Vide a common order dated February 22, 2013 (for AYs 2007-08 to 2012-13), the AO passed an Order under Sections 201(1) and 201(1A) of the ITA, thereby classifying the Appellant as 'assessee in default' in respect of non-deduction of tax at source for the sums payable to Google Ireland as 'fee for distribution rights' and consequently, attaching a tax liability of INR 7,40,47,853 for AY 2007-08.
- Being aggrieved by the aforesaid common Order dated February 22, 2013, the Appellant preferred an Appeal before the CIT (Appeals), which was dismissed by an Order dated September 20, 2013.
- The said Order dated September 20, 2013 passed by the CIT (Appeals) was challenged by the Appellant before the ITAT, which was also dismissed by way of a common Order dated October 23, 2017 (**Impugned Order**).
- The Appellant filed an Appeal challenging the impugned Orders before the High Court (**HC**).

Issue at hand?

- Whether while passing the Impugned Order, the ITAT has violated the principles of natural justice and fair play as it has not afforded an opportunity to the Appellant to rebut fresh evidence, especially when the fresh evidence was based on a simple Google study?

Decision of the Court

- At the outset, the Appellant argued that even though voluminous documents were submitted by the Appellant to ITAT to enable the tribunal to decide the controversy on merits, however, ITAT did not look at the same and instead adopted a much different approach by conducting research by itself on various platforms which has been made the basis of the Impugned Order delivered by the ITAT.
- The Appellant further stated that it is a well settled proposition of law that if any material/document is relied upon, the same has to be given to all parties, otherwise it amounts to violation of principles of natural justice and that the material collected behind its back was used and relied upon by the ITAT was clearly violative of the principles of natural justice.
- On the other hand, the Respondent argued that the material relied upon by the ITAT is available on internet and merely because the material which is available on internet was not given to the Appellant, it does not mean that there is violation of natural justice and fair play.
- The HC observed that in para 38 of the Impugned Order, it was held that as the parties have failed to bring any tangible material except in the form of written note, the bench had gone through the books available in public domain as well as google.com and the Adwords links, based upon which the ITAT summarized the Google Adwords functions. The exact material on which Google Adwords functions were summarized was not mentioned in the Impugned Order nor was the said material brought to the notice of the Appellant. This would directly imply that materials collected behind back of the Appellant had been used by the ITAT and that the material brought on record through proper application was not looked into.
- Placing its reliance upon the decision of the madras HC in the matter of *Ramco Industries Ltd v. Deputy Commissioner of Income-Tax, Corporate Circle-2*[11] as well as Rule 29 of the IT (Appellate Tribunal) Rules, 1963, the HC held that the Impugned Order was violative of principles of natural justice as the Appellant was not afforded an opportunity to rebut fresh evidence, especially when such evidence was based on a mere Google study.
- The HC also stated that that alleged material based on which the ITAT had passed the Impugned Order was also not placed on record, which has directly resulted in violation of natural justice and therefore, the matter deserved to be remanded back to the ITAT for hearing it afresh and in accordance with law.
- In light of the above, the HC allowed ITA 879/ 2017 along with other tagged matters (1st Batch) and the Impugned Order was set aside. The HC remanded the 1st Batch back to the ITAT and directed the Appellant to appear before the ITAT after 15 days for a fresh hearing at which time liberty was also given to file additional documents.
- Further in the other batch cases of ITA 502/2018 (2nd Batch), it was stated that the HC had directed the ITAT to decide the 2nd Batch uninfluenced by the Impugned Order. Inspite of the same, the ITAT repeated the Impugned Order in the Order dated May 11, 2018 pertaining to the 2nd Batch. Upon comparing both the Impugned Order as well as the Order dated May 11, 2018 passed by the ITAT, the HC found that the latter was a mere cut, copy, paste job and nothing more.

Our view

This is yet another ruling which clearly highlights the high-handedness of the income tax department as well as the adjudicating authority. Laws are meant to be followed by all – the common man, government agencies and even Tribunals and Courts. The ITAT ought to have disclosed the source/research based on which it had arrived on its findings. In the absence of the said disclosure, the Appellant was at a complete disadvantage considering the fact that it was not allowed a chance to rebut the same, which is its absolute right. Accordingly, the HC has rightfully held that the Impugned Order completely violated the principles of natural justice and fair play.

[11] [2020] 117 taxmann.com 382 (Madras)

- The HC held that that the documents which were supplied by both parties were certainly looked into, but the research material on the basis of which Order dated May 11, 2018 was passed, was not brought on record. The HC remarked that the said Order is based upon the Impugned Order and there is word by word repetition in some of the paragraphs. Therefore, the proper course of action in the 2nd Batch would also to be remand the same to the ITAT for fresh hearing.
- Accordingly, the 2nd batch was also allowed and the Impugned Order was set aside. The HC remanded the 2nd batch back to the ITAT and directed the Appellant to appear before the ITAT after 15 days for a fresh hearing at which time liberty was also given to file additional documents.

Ashiq Ali & Ors v. Yasin Mistri & Ors

RSA No. 623 of 2008 along with RSA No. 624 of 2008

Background facts

- In the present case, Smt. Tulsa, the mother of Appellant No. 1 and Respondents and grandmother of the Appellants No. 2 to 4, executed a Will in favor of the Appellants No. 2 to 4, in connection to the properties owned and possessed by her solely.
- The Respondents questioned the authenticity of the Will by filing a civil suit for declaration and permanent prohibitory injunction against the Appellants. The Respondents main challenge was that even if the Will is held to be legitimately executed, it cannot operate beyond 1/3rd share in the properties owned by Smt. Tulsa, as the Will beyond 1/3rd share by Muslims is not allowed under Personal Law.
- The Trial Court held the Will to be legally valid. However, since the parties are governed by Personal Law, the Will was held to be valid only to the extent of 1/3rd share and remaining 2/3rd share was held to have devolved upon the legal heirs of late Smt. Tulsa.
- Aggrieved with the Decree passed by the Trial Court, the Appellants filed an appeal before the Appellate Court and the Respondents also filed separate appeal challenging the decree to the extent which was against them. Appellate Court dismissed the appeal filed by the Appellants on the ground of absenteeism of the scribe of the Will who was alive and disregarded the testimony of one of the attesting witnesses, Mr. Lavinder Singh who duly endorsed the Will. Thus, the Will was held to be legally unacceptable, and the order of the Trial Court was set aside by the Appellate Court.
- Indignant by this, the Appellants preferred the Regular Second Appeals in the High Court of Himachal Pradesh (**HC**).

Issues at hand?

- Whether adverse interference against the due execution of legal and valid Will could be drawn by the learned Appellate Court for not examining the scribe to prove the Will?
- Whether the learned first Appellate court has misread and mis-appreciated the statement of Lavinder Singh, the attesting witness who has supported the due execution and attestation of the Will and the findings recorded by the first Appellate Court are vitiated on this count?

Decision of the Court

- The Appellants strongly refuted that there was no requirement of law to examine the scribe of the Will, moreso when Lavinder Singh, one of the attesting witness, has already been examined. On the other hand, the Respondents highlighted that a Mohammedan Will is required to be examined under the provisions of Section 67 of the Evidence Act, 1872 (the Act) and fortified this by placing reliance on *Mehandi Hassan & Ors v. Rafiquan & Ors*[12].
- At the outset, the HC noted that the case falls within the purview of Mohammedan Law and thus, inferred that a valid Will by a Mohammedan will not be for more than 1/3rd of the surplus of his/her estate and that to a non-heir. The HC placed the order of the Appellate Court at its center of focus, wherein it was held that there is no evidence to prove that the Will was executed because the scribe had not been produced in the witness box nor was his statement taken down by appointment of commissioner, and Lavinder Singh asserted to have not seen Smt. Tulsa signing the Will.
- The HC perused Section 67 of the Act and confirmed that where the document is written by one person and signed by another, the handwriting of the former and the signature of the later both must be proved in view of Section 67 of the Evidence Act. The HC interpreted Section 67 of the Evidence Act that it focuses on the signature of a witness who counter signs a document as a person who was present at the time when the document was signed by another person. This clarification

Our view

The HC's decision that as per Section 67 of the Evidence Act where the document is written by one person and signed by another, the handwriting of the former and the signature of the later both must be proved, is pivotal in ascertaining the legality of the testamentary instrument and clasps the hands of the dishonest parties in raising false claims in Wills. The HC's decision aligns with the position held in *Miyana Hasan Abdulla and another vs. State of Gujarat* and thus establishes this rule as a binding precedent.

[12] (2001) 2 Shim. LC. 231

given by the HC is in conformity with the decision of the learned Division Bench of the Gujarat High Court in *Miyana Hasan Abdulla & Anr v. State of Gujarat*[13]. Thus, the HC underpinned the findings of the Appellate Court in speculating against the Appellants for not examining the scribe of the document Shri Shamshad Ahmed Qureshi, who was very much alive at that time and even if he was suffering from ailment, his statement could have conveniently been recorded on commission. Furthermore, the HC held that the non-examination of the scribe is cardinal because the witness Lavender Singh DW-2 declares to not have witnessed Smt. Tulsa, the testator, putting her signatures over the Will. In the light of the above, the HC answered first issue in affirmative while the second issue in negative.

Radha Krishan Industries v. State of Himachal Pradesh & Ors

Civil Appeal No. 1155 of 2021

Background facts

- Radha Krishna Industries (**Appellant**) is in the business of manufacturing lead as per the requirements of his clients and the said appellant has a factory in Meerpur Gurudwara village, at the Sirmaur district of Himachal Pradesh.
- On October 03, 2018, a notice was issued to the Appellant under Section 74 of the Himachal Pradesh Goods and Service Tax, Act (**HPGST Act**) and the Central Goods and Services Tax Act (**CGST**) by the Joint Commissioner.
- The above-mentioned Appellant was served a memo vide email dated December 15,2018 directing the Appellant to be present on December 17, 2018 for explaining the alleged illegal claim of Input Tax Credit (**ITC**) made during 2017-18 and 2018-19. The Appellant replied to the said memo vide his letter dated December 17, 2018 wherein he stated that he had rightfully claimed the ITC as he had fulfilled all the conditions as mentioned under Section 16 of the HPGST Act and the CGST Act.
- After the case of GM Powertech was investigated by the office of Commissioner of State Taxes and Excise, Himachal Pradesh found that GM Powertech have claimed and utilized ITC against invoices issued by 'fake fictitious firms without actual movement of good.' GM Powertech had issued invoices to various recipients in Himachal Pradesh including the above-mentioned appellant and on July 04, 2020 an intimation under Section 74(5) of the Act having subject matter as 'tax ascertained as being payable' was issued to the appellant and directing him to pay an amount of INR 5.03 crore and also an opportunity was provided to the appellant for making the submissions against the said intimation by August 04,2020.
- In exercise of the powers delegated by the Commissioner of State Taxes and Excise, the Joint Commissioner of State Taxes and Excise (**3rd Respondent**) issued Orders dated October 28, 2020 in relation to provisional attachment whereby attaching the receivables of the appellant from its customers the said Order stated that the appellant was found to be involved in an ITC fraud amounting to INR 5.03 crore during 2017-18 and 2018-19.
- On November 27, 2020, the Joint Commissioner of State Taxes and Excise issued a Show Cause Notice (**SCN**) to the Appellant under Section 74(1) of the HPGST Act for recovering the amount claimed as ITC, interest, and penalty. The SCN was issued on the basis that the Appellant had claimed ITC on the supplies received from GM Powertech and since the inward supplies made by GM Powertech were found to be fake during the investigation, as a result the Appellant's claim of ITC was also in question.
- The Appellant then filed a Writ Petition under Article 226 of the Constitution against the orders of the Joint Commissioner of State Taxes and Excise for provisional attachment of receivables.
- The High Court held that the said Writ Petition filed by the appellant is ordinarily not maintainable when there exists an alternative remedy. The exceptions to this rule are where the statutory authority has not acted in accordance with the provisions of the legislation; or acted in defiance of the fundamental principles of judicial procedure or where an order has been passed in violation of the principles of natural justice and it would not entertain a petition under Article 226 of the Constitution, if an efficacious remedy is available to the aggrieved person or where the statute under which the action complained of has been taken contains a mechanism for redressal of grievances. The High Court also held that when a statutory forum of appeal exists, an appeal should 'not be entertained ignoring the statutory dispensation.'
- Subsequent to the dismissal of the Writ Petition by the High Court, on 12 January 2021, the Appellant sought to inspect the files of the GM Powertech with the reason that no documents in this regard had been provided to him in the context of the proceedings initiated under Section 74. In

[13] AIR 1962 Gujarat 214

response, the Joint Commissioner of State Taxes and Excise allowed the Appellant to inspect the contents of the Appellant's case file. Thereafter, on February 18, 2021, an Order was passed by the Joint Commissioner of State Taxes and Excise under Section 74(9) of the HPGST Act confirming a tax demand of INR 8.30 crore. An appeal under Section 107 of HPGST Act was filed by the appellant against the said Order dated February 18, 2021 which was dismissed.

- Finally, the Appellant filed the above-mentioned Special Leave Petition before SC.

Issues at hand?

- Whether a Writ Petition challenging the orders of provisional attachment was maintainable under Article 226 of the Constitution before the High Court?
- Whether the orders of provisional attachment issued by the Joint Commissioner of State Taxes and Excise against the appellant on October 28, 2020 are in consonance with the conditions stipulated in Section 83 of the HPGST Act?

Decision of the Court

- SC while answering the first issue on maintainability of the Writ Petition challenging the orders of provisional attachment took into consideration the case of *Whirlpool Corp v. Registrar of Trademarks*[14].Based on the observations made in this case, it was held that the Writ Petition filed by the Appellant before the High Court under Article 226 of the Constitution challenging the order of provisional attachment was maintainable and it was also held by SC that the High Court has erred in dismissing the Writ Petition on the ground that it was not maintainable.
- SC while answering the initial part of the second issue took into consideration the case of *Valerius Industries v Union of India*[15], where the Gujarat High Court laid down the principles for the construction of Section 83 of the SGST/CGST Act and it was noted by the Hon'ble High Court that a provisional attachment on the basis of a subjective satisfaction, in the absence of any cogent or credible material, constitutes malice in law. The Gujarat High Court had laid two steps which are to be taken into consideration before attaching property of any taxable person or an Assessee.
- Based on the above observations it was held by SC that the power to order a provisional attachment of the property of any taxable person or an Assessee including his/her bank account is 'draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled'. The exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that such a step is necessary for the purpose of protecting the interest of the government revenue.
- In continuation as regards to the second issue, SC also held that the Joint Commissioner of State Taxes and Excise while ordering a provisional attachment under section 83 of the HPGST Act was acting in the capacity of a delegate to the Commissioner of State Taxes and Excise in pursuance of the delegation effected under Section 5(3) and an appeal against the order of provisional attachment was not available under Section 107 (1) of the SGST/CGST Act.

Deepa Jayakumar v. A. L. Vijay & Ors

O.S.A.No.75 of 2020

Background facts

- The Applicant took exception to an Order dated December 12, 2019, passed by the Single Judge, in the Application preferred by the Plaintiff against the Respondents for a declaration that the Respondents do not have any legal right, power and authority to publish, release, make, or exhibit the web series, in the name of the Former CM Late Dr. J Jayalalithaa and her family and their direct descendants without seeking permission from the Applicant and for a permanent injunction to restrain the Respondents from performing the aforesaid acts.
- Till the time suit was pending in between the Applicant filed the Original Application No. 1102 of 2019 seeking an interim injunction for restraining the Respondents from, 'directly or indirectly, releasing, publishing, or exhibiting a film, drama, serial, tele-serial, web serial, etc.' in respect of the life of the late Dr. J. Jayalalithaa or that of her family and their direct descendants.

Issues at hand?

- Whether the Applicant has made out a case for the grant of an interim injunction against the Respondents?

[14] (1998) 8 SCC 1
[15] 2019 (30) GSTL 15

Our view

In this case, SC has settled one of the most litigated question in public domain and provided relief regarding the maintainability of the Writ Petition for challenging the order for provisional attachment of property of any taxable person or an Assessee as per Section 83 of the SGST/CGST Act.

In majority of cases the order for provisional attachment is made without any tangible or material substance. There is no remedy other than filing of an appeal against such provisional attachment order before the GST Appellate Tribunal, which has not been constituted till date. So the only option to seek remedy for the aggrieved person is filing of the Writ Petition under Article 226 of the Constitution in the High Courts. If the High Courts also start rejecting such petitions like in the present case, then the aggrieved person would have nowhere to go in order to seek the appropriate remedy. Hence the present judgement by SC provides a big sigh of relief.

- Whether the acts of Respondents are in violation of Fundamental Right to Privacy and the Personality Rights of the Applicant/Plaintiff's aunt?
- Whether the Applicant is entitled to restrain the public exhibition of the web series in exercise of the posthumous Right of Privacy remains to be considered?

Decision of the Court

- The Court held that the release of the film would be subject to certification by the Central Board of Film Certification (**CBFC**) and during the said certification process, if there is any objectionable material present in the film then the CBFC would raise objections and, if necessary, it would insist upon deleting such objectionable part as a pre-condition for grant of the certificate for releasing the film.
- The Court took into consideration the cases cited by the respondents and held that Applicant's right to restrict the release of the web series in order to protect the posthumously Right to Privacy of her later aunt without her consent, appear prima facie to be tenuous. It was also held that the principles laid down in the *Kirtibhai v. Raghuraman*[16] were to apply.
- Reliance was also placed on the case of *Puttaswamy & Anr v. Union of India & Anr*[17] on the issue of Right to Privacy, wherein SC had held that 'Right to Privacy of any individual is essentially a natural right, which inheres in every human being by birth. Such right remains with the human being till he/she breathes last and is indeed inseparable and inalienable from human being.
- The Court also relied upon judgement of the Bombay High Court in the case of *F.A. Picture International v CBFC*[18] where it was held that 'those who hold important positions must have shoulders which are broad enough to accept with grace a critique of themselves and critical appraisal is the cornerstone of democracy. The power of the film as a medium of expression lies in its ability to contribute to that appraisal and the film-maker cannot be compelled to portray only a particular version of the facts.'
- The Appeal was dismissed by upholding the judgment passed by the Single Judge of the Court, with exception recorded that the Respondent would adhere to the commitment of providing a disclaimer 'that it is a work of fiction and that resemblance to real persons is coincidental and not intentional and also ensure that no character closely resembling the Applicant is depicted in the web series.'

Our view

By way of the present order, the High Court has rightly held that the Applicant is not liable to be given the interim injunctive relief, as she is neither a near relative of the Former CM nor she is the daughter or even a member of the same household.

Also, the Court has dealt the question of cases pertaining to posthumous Right to Privacy, which if being allowed, then the cases pending in various courts across the country, would lead to infringement of Right to Freedom of artistic expression as "the constitutional Right to Freedom of speech and expression is not conditioned or restricted on the premise that a film-maker must portray only a particular version of facts".

Canon India Pvt Ltd v. Commissioner of Customs

Civil Appeal No. 1827 of 2018

Background facts

- The Digital Still Image Video Cameras (**DSIC**) imported by Nikon India Pvt Ltd; Canon India Pvt Ltd, Sony India Pvt Ltd, and Samsung India Electronics Pvt Ltd (**Appellants/ Importers**) arrived at Delhi March 15, 2012. The Appellants submitted a Bill of Entry to the Customs Authorities on March 20, 2012. Along with the Bill of Entry, the Appellants submitted a covering letter and literature containing specifications of the cameras. After verification of the Bill of Entry by the Inspector and the Superintendent, the Importer requested the Dy. Commissioner of Customs for a first check on March 21, 2012.
- The Customs Authorities compared the goods with the description given in the literature and took a decision to clear the goods on March 24, 2012, as being exempt from duty in terms of the Notification No. 15/2012 (**Notification**) issued on March 17, 2012 by the Dy. Commissioner of Customs.
- On August 19, 2014, a Show Cause Notice (**SCN**) was issued by the Additional Director General, Directorate of Revenue Intelligence (**DRI**) under Section 28(4) of the Customs Act, 1962 (**Act**) alleging that the Customs Authorities had been induced to clear the cameras by willful misstatement and suppression of facts about the cameras.
- Subsequently, the exemption that was given was denied and consequential confiscation of goods, demand of interest and penalty was imposed. The same was challenged before Customs Excise and Service Tax Appellate Tribunal (**CESTAT**) by way of an appeal which was dismissed, and the imposition was upheld by the Appellate Tribunal.
- The Appellants challenged the order passed by the CESTAT before SC and contended that since the Dy. Commissioner, Appraisal Group, Delhi Air Cargo had cleared the goods for import, the SCN could have been issued only the clearing authorities and not by DRI.

[16] Appeal from Order No. 262 of 2007
[17] 2017 (10) SCC 1
[18] AIR 2005 Bombay 145

- The SC decided the appeals together as they involved common questions and for the sake of convenience referred to the events that took place in the case of Nikon India Pvt Ltd.

Issue at hand?

- Whether the DRI had authority in law to issue an SCN under Section 28(4) of the Act for recovery of duties allegedly not levied or paid when the goods have been cleared for import by a Dy. Commissioner of Customs who decided that the goods are exempted?

Decision of the Court

- At the outset, SC in order to answer the issue at hand, examined the rigors of Section 28(4) of the Act, which stipulates the power conferred on 'the proper officer' to recover duties (not paid or short paid). The Court noted that the obvious intention of the said Section is to confer the power to recover such duties not on any proper officer but only on 'the proper officer' and that the nature of the same is of an administrative review of an act.
- The Court placed reliance upon the *Consolidated Coffee Case*[19] and *Shri Ishar Alloy Steels Ltd Case*[20], and stated that if the Parliament had intended any proper officer could exercise power under the Section, it would have used the word 'any'. And that the use of the article 'the' by the legislature was with the intention to designate the proper officer who assessed the goods for clearance at the first instance.
- SC held that the nature of the power to recover the duty after the goods have been assessed and cleared for import, is a power to review the earlier decision of assessment and such a power is not inherent. The Court explained that this power so conferred would be on the proper officer who, in the first instance, assessed and cleared the goods i.e., the Dy. Commissioner.
- Further, the Apex Court stated that no fiscal statute had been shown to it where the power to re-open assessment or recover duties has been conferred on an officer other than the officer of such rank that took the initial decision to assess and clear the goods. SC clarified that re-assessment and recovery of duties as contemplated under Section 28(4) is to be done by the same authority and not by any superior/other authority. And accordingly, it held that, the Additional Director General, DRI was not 'the' proper officer to issue the SCN.
- The Court commented on Section 6 of the Act which provides for entrustment of functions of Customs Officer and observed that if the intention of the legislature was to entrust the officers of DRI with function of Customs Officers, it would have done so under the Act. Moreover, with regard to the contention of the Department that Additional Director of DRI has been appointed as the officer of the Customs, the Court held that the Notification No. 40 dated May 02, 2012, issued by the Central Board of Excise and Customs, appeared to be ill-founded, as no such power existed under Section 2(34) of the Act and therefore, the authority could not have had issued the SCN. The Court referred to the case of *Sayed Ali & Anr*,[21] wherein, 'the proper officer' in respect of jurisdictional area was considered.
- In view of the above, the SC held the proceedings initiated by DRI by way of the SCN was invalid, without any authority of law and therefore, set it aside. The common order dated December 19, 2017 passed by CESTAT in the connected appeals was set aside by the Court and the impugned demand notices against the three Appellants were consequently quashed as well.

Forum for People's Collective Efforts (FPCE) & Anr v. State of West Bengal & Anr

2021 SCC OnLine SC 361

Background facts

- The thirteenth report of the Standing Committee on Urban Development on the Real Estate (Regulation and Development) Bill, 2013 (**RERA Bill**) emphasized the need for enacting a comprehensive legislation to regulate the real estate sector.
- RERA, 2016 sought to achieve objectives including transparency in contractual conditions, symmetry in information, standardization of accountability and a fast-track dispute resolution mechanism. These elements provide the justification for enacting a comprehensive legislation which is uniformly applicable to all parts of the country.

Our view

In our view by this judgment the Court, for all practical and administrative purposes has clarified the concept of 'the proper officer' as provided under the Act.

However, consequent to the present judgment, the CBIC vide Instruction No. 04/2021-(Customs) dated March 17, 2021, has stated that the Department is reviewing the implications of the said judgement and has stayed all the pending SCNs issued by the DRI. Nevertheless, CBIC has, vide the same notification directed that all the fresh SCNs under Section 28 of the Act in respect of the cases that are being investigated by the DRI would be issued by the Jurisdictional Commissionerate from where the imports have taken place.

[19] (1980) 3 SCC 358
[20] (2001) 3 SCC 609
[21] (2011) 3 SCC 537

- RERA was partially enforced on May 01, 2016, while the rest of its provisions were enforced on April 19, 2017 whereas West Bengal Housing Industry Regulation Act, 2017 (**WB-HIRA**) received the assent of the Governor of West Bengal on October 17, 2017 repealing the West Bengal 1993 Act.
- Thereafter on June 08, 2018, the State of West Bengal framed rules under WB-HIRA. The overlapping provisions and direct inconsistencies in the State enactment led to the petition which was filed in February 2019. The constitutional validity of the WB-HIRA was challenged in a petition under Article 32.
- Counsel on behalf of the Petitioner submitted that:
  - The state law is a 'copy-and paste' replica and covers the field which is occupied by the central enactment.
  - RERA being an exhaustive code in the real-estate sector, WB-HIRA, with no reserved Presidential assent, is repugnant and void under Article 254(2) of the Constitution.
  - Allowing the State to provide a 'duplicate regime' under Section 88 and 89 of RERA without Presidential assent would result in complete chaos in the real-estate sector and destroy the federal legislative scheme.
  - Upon the declaration of WB-HIRA as unconstitutional, the 1993 legislation in West Bengal may also be declared as repealed in view of Section 89 of RERA.
- Counsel on behalf of the Respondent submitted that:
  - RERA does not cover the whole field and is not exhaustive as indicated by Section 88 and 89.
  - The state law is complementary to the central law. There is no repugnancy or inconsistency between WB-HIRA and RERA. Irrespective of Sections 88 and 89 of RERA, Article 254 is not attracted.
  - The inconsistencies are very minor and form no real conflict.
  - WB-HIRA follows the principle of cooperative federalism. The Union government has no authority to direct the State legislature to repeal its law.

Issue at hand?

- Whether the WB HIRA attracts repugnancy under Article 254(1) of the Constitution qua RERA 2016 to be declared void?

Decision of the Court

- The Court observed that in most of the substantive provisions, there was a complete overlap of the provisions and produced a table with the identical and varying provisions.
- While dealing with the issue of Repugnancy under Article 254, the Court relied on a catena of judgements while holding that a State legislation whose subject matter is identical to a law enacted by the Parliament would be repugnant under Article 254(1)
- The Court reiterated the three-pronged test of repugnancy accepted in *Tika Ramji v. State of UP*[22], holding that repugnancy between two statutes may be ascertained on the basis of the following three principles:
  - Whether there is direct conflict between the two provisions?
  - Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature?
  - Whether the law made by Parliament and law made by State Legislature occupy the same field?
- The Court held that once the Parliament has enacted a law, it is not open to the State legislature to legislate on the same subject matter and, as in this case, by enacting provisions which are bodily lifted from and verbatim the same as the statutory provisions enacted by Parliament.
- The Court before ruling on repugnancy, considered the issue of Section 88 and weather it allows the setting up of a parallel regime. The Court held that the effect of Section 88 is to ensure that remedies which are available under consumer legislation, including Consumer Protection Act, 2019, are not ousted as a consequence of the operation of the RERA.
- The Court then interpreted the phrase 'law for the time being in force' and observed that it is widely considered to mean not just the laws which were in existence when the statutory provision was enacted but also such laws which may come into existence at a later stage. In other cases, statutory context and scheme will determine the nature and ambit of the expression.

Our view

The Court has set out clear parameters to determine repugnancy under Article 254(1) of the Constitution of India of a state legislation viz-a-viz a central legislation such as overlap of the provisions and the three-pronged test of repugnancy (direct conflict between provisions of the two central and state legislations, intention of the Parliament to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature and the subject matter/area of the two legislations being the same). As such, uncertainty in respect thereof is to be settled on the afore-said defined parameters giving precision to any challenge to the legislations on grounds of repugnancy.

[22] 1956 SCR 393

- In other words, spaces which are left in the RERA can be legislated upon by the State legislature by enacting a legislation, so long as it is allied to, incidental or cognate to the exercise of Parliament's legislative authority.
- Instead, the State legislature has encroached upon the legislative authority of Parliament which has supremacy within the ambit of the subjects falling within the Concurrent List of the Seventh Schedule. The exercise conducted by the State legislature of doing so, is plainly unconstitutional.
- The Court further held that repugnancy under Article 254 is also attracted because several provisions of WB-HIRA are in conflict with RERA and valuable safeguards which are introduced by Parliament in the public interest and certain remedies which have been created by Parliament are found to be absent in WB-HIRA.
- It was thus held that the State legislature has transgressed the limitations on its power and has enacted a law which is repugnant to Parliamentary legislation on the same subject matter.
- The Court thus came to the conclusion that WB-HIRA is repugnant to the RERA and is hence unconstitutional. The Court also held that as a consequence of the declaration by this Court of the invalidity of the provisions of WB-HIRA, there shall be no revival of the provisions of the WB 1993 Act, since it would stand impliedly repealed upon the enactment of the RERA.
- In exercise of the jurisdiction under Article 142, the Court also directed that the striking down of WB-HIRA will not affect the registrations, sanctions and permissions previously granted under the legislation prior to the date of this judgment.

GMSPL through the Authorized Signatory v. EARC through the Director & Ors

Writ Petition (Civil) No. 1177 of 2020 and Civil Appeal Nos. 1550-1554 of 2021

Background facts

- An application under Section 7 of the IBC was filed by State Bank of India, one of the financial creditors against Orissa Manganese & Minerals Ltd, a mining company (**Corporate Debtor**). During the CIRP, Edelweiss Asset Reconstruction Co Ltd (**EARC**), Orissa Mining Pvt Ltd and Ghanashyam Mishra & Sons Pvt Ltd (**GMSPL**) submitted resolution plans.
- Initially, the Committee of Creditors (**CoC**) ranked EARC's plan first, however, as it could not satisfy all the CoC's requirements, its plan was rejected and accordingly, negotiations begun with the GMSPL. When the negotiations failed, the CoC decided to invite new resolution plans and EARC, GMSPL and SREI Infrastructure Finance Ltd submitted their plans. Subsequently, GMSPL's plan was ranked first and thereafter, it was approved by the CoC by a majority of over 89.23% of voting share of the financial creditors.
- EARC then filed applications before NCLT challenging CoC's approval of GMSPL's resolution plan, and another one challenging resolution professional's decision not to admit EARC's claim which was filed against the Corporate Debtor under a corporate guarantee issued by the Corporate Debtor for the purposes of a project run by its sister concern, Adhunik Power and Natural Resources Ltd (**APNRL**). The District Mining Officer, Jharkhand also filed an application before the NCLT challenging the RP's refusal to admit its claims. The NCLT vide order dated June 22, 2018, rejected both the EARC's applications and approved the resolution plan of GMSPL in consonance with the CoC's decision.
- Aggrieved by the NCLT's order, EARC filed an appeal before NCLAT challenging the rejection of its two applications. Appeals were also filed by Labor Union on behalf of Corporate Debtor's workmen, and by an employee of APNRL claiming dues of his salary. The NCLAT vide order dated April 23, 2019 held as follows:
  - The RP's rejection of EARC's claim was valid, however, EARC may invoke the bank guarantee against the Corporate Debtor in case of default in payment.
  - The resolution plan submitted by GMSPL was comparatively better than the other plans.
  - The Labor Union may adopt independent proceedings to enforce any of its claim.
  - The claim filed by employee of APNRL was wrongly rejected by the RP, and he was entitled to claim as an operational creditor, he may enforce that claim separately.
- Aggrieved by the decision of the NCLAT, GMSPL filed an appeal before the SC.

Issues at hand?

- Whether any creditor including Central/State Government, or any local authority is bound by Resolution Plan once it is approved by an Adjudicating Authority (**AA**) under Section 31(1) of IBC?
- Whether the amendment to Section 31 by Section 7 of IBC (Amendment) Act, 2019 dated August 16, 2019 (**2019 Amendment Act**) is clarificatory/declaratory or substantive in nature?
- Whether after approval of resolution plan by AA a creditor including the Central/State Government or any local authority is entitled to initiate any proceedings for recovery of any of the dues from the Corporate Debtor, which are not a part of the resolution plan approved by AA?

Decision of the Court

- SC analyzed the scheme of IBC wherein one of the principal objectives is to attempt to revive the corporate debtor and continue its operations as a going concern. SC placed reliance on the decisions of *Kalpraj Dharamshi and another v. Kotak Investment Advisors Ltd & Anr*[23], *K. Sashidhar v. Indian Overseas Bank & Ors*[24] and *Maharashtra Seamless Ltd v. Padmanabhan Venkatesh & Ors*[25] and observed that NCLT/NCLAT has a limited jurisdiction in the matter of approval of a resolution plan, which is provided under 31 and 61(3) of IBC and the NCLT/NCLAT cannot interfere with the commercial wisdom of the CoC.
- SC held that it is clear from a bare perusal of section 31 that once a resolution plan is approved by the AA, the claims as provided in the resolution plan shall stand frozen and it will be binding on the corporate debtor and all its stakeholders (including Central/State Government or any local authority). Such a provision is necessitated since after a resolution plan is approved, there should be no surprises and the resolution applicant should be allowed to start on a fresh slate.
- Further, SC held that once a resolution plan is approved by the AA under Section 31(1) of the IBC, all claims, which are not forming a part of approved plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect of such claims.
- Regarding the effect of amendment to Section 31 vide the 2019 Amendment Act, SC held that it is clarificatory and declaratory in nature (i.e., it will be applicable even to pending claims) and therefore, will be effective from the date on which IBC has come into effect. SC referred to the Statement of Objects and Reasons of the amendment bill and the speech given by the Hon'ble Finance Minister, which indicated that the legislative intent in amending Section 31 is to merely clarify that the resolution plans which are approved by the AA will also be binding on the Central/State Government or any local authority including tax authorities, since prior to its enactment, the Central/State governments tended to press their claims notwithstanding finality of the resolution plan. Thus, the amendment was meant to remedy this 'mischief'.
- Moreover, SC noted that it is clear from a harmonious construction of Section 3(10) and Sections 5(20) and (21) of IBC that the dues owed and payable to the Central/State Government or any local authority, would fall within the ambit of 'operational debt' and they would be covered under the term 'creditor', more specifically 'operational creditor'. Accordingly, even without considering the effect of 2019 Amendment Act, the approved resolution plan will be binding on all creditors and 'other stakeholders', which includes Central/State Government or any local authority under Section 31(1) of the IBC.
- In view of the above, the SC concluded that NCLT's approval of GMSPL's plan was correct, and the NCLAT had gone beyond the scope of the powers available with it under Section 61 (3) of IBC.

Our view

This landmark judgment provides clarity on the retrospective application of the amendment to Section 31 of the IBC and with respect to unexpected claims arising after approval of the resolution plan. The decision furthers the objective of the IBC by upholding the 'clean slate theory', which is to ensure that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate. It paves the way forward for the new management to revive the business of the corporate debtor without being saddled with fresh claims or recovery proceedings, for which the resolution plan has been accepted by the AA.

[23] 2021 SCC OnLine SC 204
[24] (2019) 12 SCC 150
[25] (2020) 11 SCC 467

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mail@hsalegal.com

HSA Advocates

PAN INDIA PRESENCE

New Delhi

81/1 Adchini
Sri Aurobindo Marg
New Delhi – 110 017

Phone: (+91) (11) 6638 7000

Email: newdelhi@hsalegal.com

Mumbai

Construction House, 5th Floor
Ballard Estate
Mumbai – 400 001

Phone: (+91) (22) 4340 0400

Email: mumbai@hsalegal.com

Bengaluru

Aswan, Ground Floor, 15/6
Primrose Road
Bengaluru – 560 001

Phone: (+91) (80) 4631 7000

Email: bengaluru@hsalegal.com

Kolkata

No. 14 S/P, Block C,
Chowringhee Mansions
Kolkata – 700 016

Phone: (+91) (33) 4035 0000

Email: kolkata@hsalegal.com