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Dispute Resolution and Arbitration

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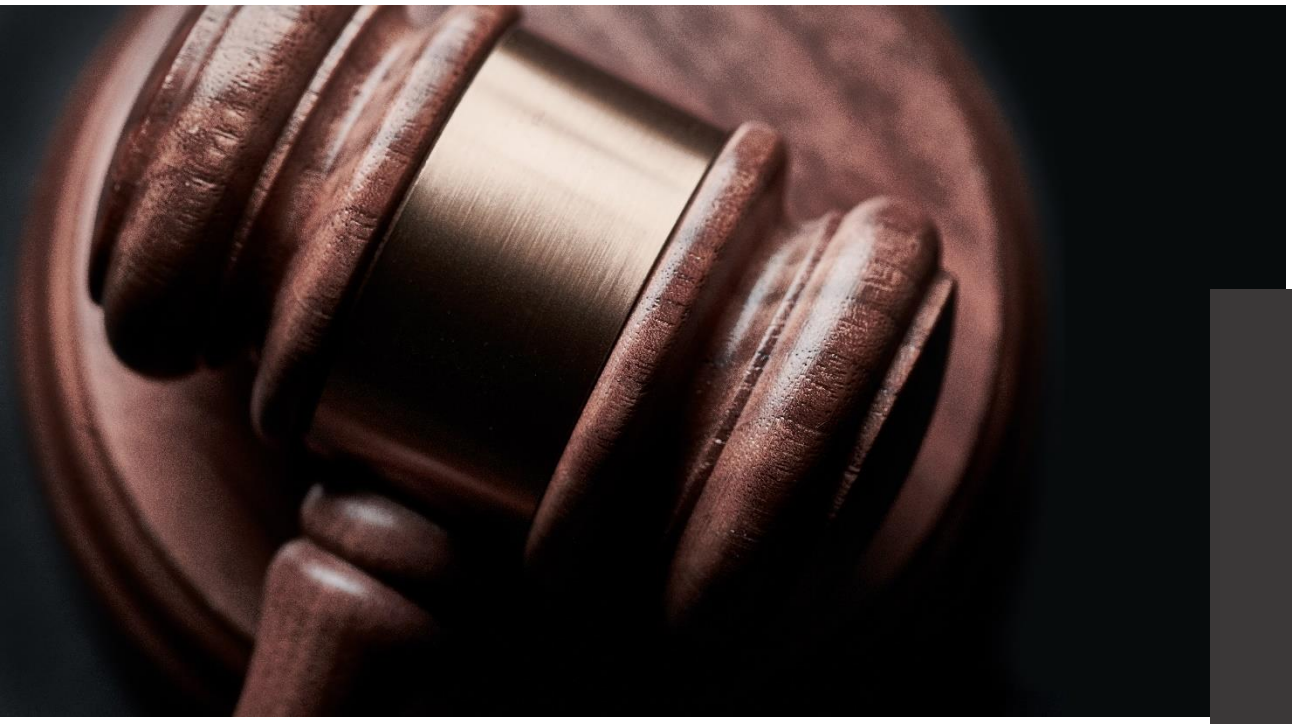
DISPUTE RESOLUTION AND ARBITRATION UPDATE



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KLA Const Technologies v. Embassy of Islamic Republic of Afghanistan and

Matrix Global Pvt Ltd v. Ministry of Education Federal Democratic Republic of Ethiopia

OMP(ENF)(COMM)82/2019 & OMP(EFA)(COMM)11/2016

Background facts

- In this instance, the Court was simultaneously concerned with two petitions by way of which enforcement of arbitral awards against Foreign States was sought in India and thus, identical issues were to be answered.
- In the first petition, Embassy of Islamic Republic of Afghanistan (**Respondent**) awarded a contract to KLA Const Technologies (**Petitioner**) for rehabilitation of Afghanistan Embassy at New Delhi, on February 11, 2008. The contract contained an arbitration clause which was thereafter invoked by the Petitioner on February 10, 2012, at the time when disputes arose between the parties during the execution of work.
- Thereafter, the Petitioner filed a Petition under Section 11 of the Arbitration and Conciliation Act, 1996 (**Act**) before the SC in which the SC appointed a sole arbitrator on January 05, 2015 to adjudicate the disputes between the parties. The Respondent participated in the arbitration proceedings till July 24, 2017.
- However, thereafter, the Respondent failed to appear in the matter and the learned arbitrator proceeded to pass an ex-parte award dated November 26, 2018 (**Award**) wherein the claims of the Petitioner were partially allowed. The Respondent did not challenge the Award which attained finality, but neither did it make any payment to the Petitioner in terms of the Award. Accordingly, by way of the present Petition filed before the Delhi High Court (**HC**), the Petitioner sought enforcement of the Award.

- In the second petition, on June 25, 2012, Matrix Global Pvt Ltd (**Petitioner**) was contracted to supply and distribute books at a fixed rate to Ministry of Education of Ethiopia (**Respondent**). The Respondent not only failed to clear the legitimate balance dues of the Petitioner but also cancelled the Contract by a letter dated April 24, 2014. Accordingly, the Petitioner initiated arbitration proceedings to recover the balance amount against the respondent and a sole arbitrator was appointed under UNCITRAL Arbitration Rules on December 04, 2014.
- The Respondent chose not to participate in the arbitration proceedings and, accordingly, the learned arbitrator passed an ex-parte award (**Award**) on October 25, 2015. The Respondent did not challenge the award dated October 25, 2015 and thus, the same attained finality. Accordingly, by way of the present Petition filed before HC, the Petitioner sought enforcement of the Award.

Issues at hand?

- Whether the prior consent of Central Government is necessary under Section 86(3) of the Code of Civil Procedure (**CPC**) to enforce an arbitral award against a Foreign State?
- Whether a Foreign State can claim Sovereign Immunity against enforcement of arbitral award arising out of a commercial transaction?

Decision of the Court

- At the outset, the HC kept the principles laid down in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Ltd*[1] as a frame of reference to outline that an arbitral award passed in an international commercial arbitration held in India, would be inferred as a 'Domestic Award' under the Act and would be enforceable under Section 36 thereunder.
- The HC placed its reliance on decisions in the matter of *Nawab Usman Ali Khan v. Sagarmal*[2], *Uttam Singh Duggal & Co Pvt Ltd v. United States of America, Agency of International Development*[3], *Ethiopian Airlines v. Ganesh Narain Saboo*[4] to demonstrate that the normative core of the enactment of the Arbitration and Conciliation Act is the exclusion of the strict rigors of the CPC, except for certain limited instances.
- HC stated that the applicability of the provisions of Section 86(3) of the CPC in relation to an arbitral award would violate the three main principles of the Act - speedy, inexpensive and fair trial by an impartial tribunal; party autonomy; and minimum Court intervention. Further, the HC also observed that with regards to international commercial arbitration, the rationale thereof is to facilitate international trade and investment by providing a stable, predictable and effective legal framework within which commercial activities may be conducted to promote the smooth flow of international transactions, and by removing the uncertainties associated with time-consuming and expensive litigation.
- HC remarked that the Respondents who voluntarily entered into a commercial contract containing an arbitration agreement with the petitioners, are not entitled to claim Sovereign Immunity to defeat the legitimate claims of the petitioners and placed its reliance on the following decisions, in support thereof: *Rahimtoola v. Nizam of Hyderabad*[5], *Trendtex Trading Corporation v. Central Bank of Nigeria*[6] & *Birch Shipping Corp v. The Embassy of the United Republic of Tanzania*[7].
- Furthermore, HC clarified that the commercial contract involving arbitration agreement between a party and the Foreign State is an implied waiver by the Foreign State and, thus, clasps its hands from hoisting a shield against an enforcement action centered on the principle of Sovereign Immunity.
- HC highlighted that the purpose and nature of the transaction of the Foreign State plays a fundamental role in determining whether the transaction, and the contract influencing the same, clearly represent commercial activity or whether the same is an instance of an operation of Sovereign Authority. The Court also stated that arbitration being a consensual and binding mechanism of dispute settlement, it cannot be contended by a Foreign State that its consent must be sought once again at the stage of enforcement of an arbitral award against it, while ignoring the

Our view

The judgement of HC that the Foreign State cannot claim sovereign immunity against the implementation of arbitral award arising out of commercial transaction is a binding precedent and tremendously strengthens the roots of International Commercial Arbitration by clarifying an important position in law. Furthermore, HC has meticulously de-alienated the applicability of Section 86(1) of CPC and in essence reconfirmed the legislative intent behind not extending Sovereign Immunity in cases of International Commercial Arbitration. By holding that prior consent of the Central Government under Section 86(3) of the CPC is not necessary, HC has placed an implied waiver thereon. This is a welcome move considering this will cut through the lengthy red-tape process and speed up the execution process of an arbitral award.

[1] (2012) 9 SCC 552
[2] (1965) 3 SCR 201
[3] ILR (1982) 2 Del. 273
[4] (2011) 8 SCC 539
[5] (1957) 3 WLR 884
[6] (1977) 2 WLR 356
[7] 507 F. Supp. 311, 1981 A.M.C. 2666

fact that the arbitral award is the culmination of the very process of arbitration which the Foreign State has admittedly consented to.

- Lastly, HC opined that allowing the Foreign States to impede the fulfilment of arbitral awards based on its foundation of being a Foreign State, will profoundly jeopardize the International Commercial Arbitration.
- Therefore, HC answered the issues in negative and concluded that both the petitions for enforcement of the arbitral awards are maintainable.

Siddhivinayak Realties Pvt Ltd v. V Hotels Ltd & Ors

Notice of Motion No.119 of 2016 in Commercial Suit No.133 of 2018

Background facts

- An Agreement for Sale of the suit property termed as 'Master Asset Purchase Agreement' (**MAPA**) was executed on March 31, 2005 for the sale of the property between the parties. Thereafter, Defendant No. 1 alleged that the Plaintiff repudiated the MAPA over the course of time and as a result Defendant No. 1 was entitled to treat himself as discharged under MAPA. In pursuance of the aforesaid, Defendant No. 1 invoked arbitration proceedings under Section 11 of the Arbitration and Conciliation Act, 1996 (**Act**) vide a Notice dated October 6, 2005.
- Thereafter, the Defendants filed an Application under Section 11 of the Act and the disputes between the parties were referred by the Court to arbitration by a sole arbitrator. Subsequently, on July 13, 2011, the Sole Arbitrator passed an award in favor of Defendant No. 1, holding that the MAPA had stood frustrated on account of its repudiation by the Plaintiff and acceptance of such repudiation by Defendant No. 1. The learned arbitrator in his award also dismissed the counter claim of the Plaintiff (**Award**).
- Thereafter, the Plaintiff challenged the Award in the Bombay High Court (**HC**) and succeeded in nullifying the said Award by an order dated May 10, 2013.
- As a result, by its notice dated July 04, 2013, the Plaintiff invoked a de novo arbitration. Defendant No. 1, for its part, filed an appeal on July 6, 2013 challenging the Order dated May 10 2013 setting aside the Award (**Appeal**). The Appeal was admitted by a Division Bench of the HC and is presently pending hearing and final disposal.
- During the pendency of the Appeal, the Plaintiff proceeded to file an application for appointment of arbitrator for such de novo arbitration. The said application was, however, withdrawn by the Plaintiff on September 17, 2014, with liberty to file a fresh application, if so advised.
- In the backdrop of these facts, on February 12, 2016, the Plaintiff filed the present Commercial Suit. Defendant No. 1 took out the captioned Notice of Motion in the said Commercial Suit, for a summary judgement of dismissal of the Commercial Suit under Order XIII A of the amended Code of Civil Procedure, 1908 (**CPC**) on the ground of bar of limitation.

Issue at hand?

- Whether the phrase 'order of the Court' referred in Section 43(4) of the Act pertains to the first order or final order setting aside an arbitral award?

Decision of the Court

- HC noted the terms of Section 43(4) and analyzed the same on principles by stating that Section 43(4) of the Act is in *pari materia* with Section 37(5) of the old Arbitration Act of 1940 (**1940 Act**), the only difference being that the end date of the exclusion period is signified under the 1940 Act, either by an order of the Court setting aside an award or declaring the arbitration agreement to have ceased to have effect with reference to the difference referred, unlike the Act which talks about only the date of the order setting aside the award.
- HC relied upon the Supreme Court's (**SC**) decision in *Kunhayammed v. State of Kerala*[8] in which the SC applied the doctrine of merger to conclude that the order of the Original Court shall merge into the order of the Higher Court which will alone be final, binding, and operative.

[8] (2000) 6 SCC 359

- After a careful speculation of the probabilities, HC derived the conclusion that the availability of limitation period cannot lean on the unpredictable event of the timing of the order passed by the Division Bench – whether within or without the original period of limitation assessed from the date of the order of the Single Judge setting aside the award. HC referred to *Collector of Customs, Calcutta v. East India Commercial Co Ltd*[9] which emphasizes that the order of the Original Authority must be held to have merged in the order of the Appellate Authority including the reversal, modification, or confirmation order.
- Furthermore, HC dismissed the contention of Defendant No. 1 that doctrine of merger is impractical on the basis of the SC's decision in the matter of *State of Uttar Pradesh v. Mohammad Nooh*[10] as the same is distinguishable on its own special facts and circumstances. The HC also held that in any event, even the Mohammad Nooh case (supra) acknowledges that the doctrine of merger does operate in full force for certain purposes, namely, for the purposes of computing the period of limitation for execution of a decree, or for computing the period of limitation for an application for final decree in a mortgage suit.
- Further, HC held that in case of a dispute referred to arbitration where an award is set aside by the Court, the principle of merger will be fruitful for figuring the exclusion period under Section 43(4) of the Act for estimating the limitation period for the arbitration proceeding.
- HC established that the 'order of the Court' mentioned in Section 43(4) of the Act is the final order of the Court - either the first order setting aside the award, which is not challenged further or the order in appeal, if the original order setting aside the arbitral award is carried in appeal and affirmed. To buttress the aforesaid, the HC cited *Babulal v. Ramswaroop*[11] wherein the Rajasthan High Court interpreted the true intention of legislation as one allowing the time taken in conducting proceedings in appeal to be excluded from limitation to not divest the suitor of his rights.
- After taking into consideration similar views of different High Courts on this subject matter and its decision in *Commissioner of Income Tax, Bombay City-II v. T. Maneklal Mfg Co Ltd*[12] that uniformity in construction of all-India statues is golden, the HC dismissed the present Notice of Motion.

Our view

The judgement of the HC in interpreting the 'order of court' referred in Section 43(4) of the Act as the final order, thereby setting aside an arbitral award or confirming such setting aside of the award, brilliantly clears the air on its exposition and clarifies the application of doctrine of merger for the functioning of this provision. Furthermore, this analysis keeps the door open for a party to exercise his right freely for subsequent litigation without putting restrictions including the time taken in conducting further appeals/litigation.

Registrar General, High Court of Meghalaya v. State of Meghalaya

PIL No. 6/2021

Background facts

- In the present case, the Deputy Commissioners of Meghalaya had casted an obligation on shopkeepers, vendors, local taxi drivers and others to get themselves vaccinated before they can restart their businesses. This oppression was brought to the attention of the High Court by filing a Public Interest Litigation (**PIL**).

Issues at hand?

- Whether vaccination can at all be made mandatory?
- Whether such mandatory action can adversely affect the right of a citizen to earn livelihood?
- Whether a State Government and/or its authority can issue any notification/order which is likely to have a direct effect on the fundamental rights of its citizens, especially on a subject matter that concerns both public health and the fundamental rights of the individual person?

Decision of the Court

- Before proceeding with the issues at hand, HC acknowledged the sheer need of vaccination to snatch victory from the jaws of the coronavirus. HC canvassed Article 21 as one encircling the right to health and healthcare as fundamental rights. With regards to the first and the second issues, HC emphasized that vaccination by intimidation or being made mandatory by endorsing pressurizing techniques, exhausts the fundamental purpose of the good linked to it. Furthermore, HC illustrated the law laid down in *Olga Tellis & Ors v. Bombay Municipal Corp & Ors*[13] that right to life includes right to the

[9] (1963) 2 SCR 563
[10] AIR 1958 SC 86
[11] AIR 1960 Raj 240
[12] 1977 SC OnLine Bom 247
[13] AIR 1986 SC 180; (1985) 3 SCC 545

means of livelihood, to highlight that any action of the State which is in absolute derogation of this basic principle is directly concerned by Article 19(1)(g). Besides, HC perused the authentic reverts to the 'frequently asked questions' (**FAQs**) on Covid-19 vaccine uploaded by the Ministry of Health and Family Welfare, Government of India, which clearly stated that vaccination for Covid-19 is voluntary. In addition, HC cited *Schloendroff v. Society of New York Hospitals*[14] and *Airedale NHS Trust v. Bland*[15] to straighten out that the feature of coercion has been cast down endlessly.

- About the third issue, HC advanced that the law-making power of the State Government must run parallel with the fundamental right to life and livelihood of an individual. In the instant case, the HC declared that there is an apparent deficiency of constitutionality in restricting freedom of performing any occupation, trade or business amongst the citizens who are otherwise eligible to do so, rendering the notification ill-conceived, arbitrary, and unfounded. HC openly professed that the burden to advertise and familiarize the citizens to the entire skeleton of vaccination with its pros and cons and facilitate informed decision-making, lies on the State. The HC extensively stressed that it is not open to the State to seize the right to livelihood of the citizens by coercive reinforcement without any justification in the agenda of public interest. Moreover, the welfare of the State lies in pulling together the combined and cooperative effort to execute a social order as mandated under Article 38 unrelenting its duty under Article 47 nor conceding its duty to secure adequate means of livelihood under Article 39(a).
- Lastly, the HC directed that the signs of VACCINATED and NOT VACCINATED must be prominently displayed outside the establishments so that the public at large is provided with an option of making a thoughtful and enlightened choice. Also, the HC expressed that in case of any attempt made by any person/organization to circulate false information regarding the potency of vaccination amongst the people of this State, the State shall immediately proceed against such person/organization in accordance with law.

Our view

HC's decision that forceful vaccination violates the fundamental right of the citizen is a balanced and bold judgement that protects the livelihood of the citizens and embraces them with a sense of security from unjustified actions of the State. The HC's decision closes the door for unreasonable policies by the State in the disguise of public interest directly concerning Article 19(1)(g).

Silpi Industries v. Kerala State Road Transport Corp & Anr

Civil Appeal Nos. 1570-1578 of 2021 and 1620-1622 of 2021

Background facts

- Kerala State Road Transport Corp (**Respondent**) invited tenders for supply of thread rubber for tyre rebuilding. Silpi Industries (**Appellant**), being a MSME supplier, was given purchase orders, according to which 90% payment had to be made on supply, and the balance 10% would be payable after a final performance report.
- However, the Respondent failed to pay the Appellant the 10% balance, and the latter approached the Industrial Facilitation Council (presently known as Micro and Small Enterprises Facilitation Council) (**Council**) for recovery, under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (**MSME Act**). The Council first attempted a conciliation, and upon its failure, it made a reference to arbitration under the provisions of the Arbitration & Conciliation Act, 1996 (**Act**), wherein an award was made in the Appellant's favor (**Award**).
- Thereafter, the Respondent challenged the Award under Section 34 of the Act. However, when that failed, the Respondent filed appeals under Section 37 of the Act before the High Court of Kerala (**HC**). HC was dealing with three questions i.e. whether the law of limitation applies to proceedings under the MSME Act, which is the starting point of limitation and whether counter claim is entertainable in the arbitration proceedings held pursuant to the provisions of the IDPASC and MSMED Acts.
- HC ruled in favor of the Respondent and held that the Limitation Act, 1963 did apply and that a counter claim was maintainable in the present case.
- Aggrieved by the findings of the High Court on the applicability of Limitation Act, 1963 and maintainability of counter claim, the Appellant has filed appeals before the Supreme Court (**SC**).

[14] (1914) 211 NY 125; 105 NE 92; 1914
[15] 1993 AC 789; (1993) 2 WLR 316; (1993) 1 All ER 821

Issues at hand?

- Whether the provisions of Limitation Act, 1963 are applicable to arbitration proceedings initiated under Section 18(3) of the MSME Act?
- Whether a counter claim is maintainable in such arbitration proceedings?

Decision of the Court

- At the outset, SC observed that MSME Act contains provisions for mandatory conciliation before reference to arbitration, which is not the case in Arbitration Act. Hence, it arrived at the conclusion that MSME Act, being a specialized beneficial legislation, has overriding effect over Arbitration Act, which is a general Act. If there is an arbitration agreement between two parties, where the seller is covered by the MSME Act, then in case of dispute, the seller is entitled to directly approach the Council under MSME Act and not resort to arbitration primarily. Further, the buyer would be entitled to file a counter claim before the Council itself, although there is no provision to this effect in the MSME Act, so that the objective of the MSME Act is not defeated.
- It was observed that Section 43 of the Arbitration Act applied the Limitation Act, 1963 expressly as it applies to court proceedings. Similarly, in a case wherein a dispute settlement fails before the Council and the said matter is referred to arbitration under Section 18(3) of the MSME Act, the Limitation Act, 1963 would also apply to such arbitration proceedings that arise out of disputes that could not be settled under Section 18 (3) of the MSME Act.
- SC reiterated that the High Court had correctly relied on the judgment in the case of *Andhra Pradesh Power Coordination Committee v. Lanco Kondapalli Power Ltd. & Ors*[16] and held that the Limitation Act, 1963 is applicable to arbitration proceedings under Section 18(3) of the MSME Act.
- As for maintainability of counter claims in arbitration proceedings, the Supreme Court noted that Section 17 of the Arbitration Act contemplates claims available to the supplier to make, whereas under Section 18, a right is given to any party to a dispute to make a reference to the Council. It was further noted that Section 23(2A) of the Arbitration Act gives every respondent the right to submit a counter claim or to plead a set-off, so long as either falls within the scope of the arbitration agreement. After perusing the statement of objects and reasons of Amendment Act 3 of 2016, it was observed that sub-Section (2A) was enacted to make possible a speedy and comprehensive determination of all parties' disputes with least court intervention.
- Apart from the provision under Section 23(2A) of the MSME Act, it was held that if counter claim is not permitted, the buyer can get over the legal obligation of compound interest at 3 times the bank rate and the 75% redeposit contemplated under Sections 16 and 19 of the MSMED Act. Thus, in view of such clear statutory language in Section 23 of the Arbitration Act and having regard to the allied purposes of the legislations, it was held that there is no reason for curtailing the right of the Respondent for making counter claim or set-off before the Council.
- In view of the aforesaid, SC answered both the questions in the affirmative by interpreting the provisions of MSME Act, Limitation Act, 1963 and the Arbitration Act and accordingly dismissed the appeals filed by the Appellant and held that on a harmonious construction of the provisions of MSME Act and the Arbitration Act, the Respondent is entitled to file a counter claim before the statutory authorities under MSME Act and that the provisions of the Limitation Act, 1963 will apply to the arbitration proceedings under Section 18(3) of the MSME Act.

Our view

This decision is a welcome move by the Supreme Court as it clarifies certain important provisions of statutory arbitration under the MSME Act. Since the MSME Act was introduced to protect the MSMEs and is a safeguard legislation for the MSMEs, it is significant that the dispute resolution mechanism which is provided in the MSME Act is in consonance with the Arbitration Act. The Supreme Court in this case has, therefore, rightly applied the limitation provisions that are applicable on a regular arbitration proceeding to the dispute resolution proceedings under the MSME Act. This decision will surely ensure prevention of multiplicity of proceedings, with the risk of a conflict of remedies and results.

[16] [2016) 3 SCC 468; paras 15 & 30

Union of India v. Raj Grow Implex LLP & Ors

2021 SCC OnLine SC 429

Background facts

- In the present case, by way of notifications, the Central Government altered the guidelines of free import of urad and peas to a limited one with a prerequisite as to annual quota and licence from Directorate General of Foreign Trade (**DGFT**).
- Certain importers i. e Raj Grow Implex LLP and Harihar Collections (**Respondents**), sought to import such restricted items and accordingly sought indulgence by the Additional Commissioner of Customs, Group-I, the Adjudicating Authority, who gave an alternative to the importers to redeem the goods in question on payment of fine in lieu of confiscation under Section 125(1) of the Customs Act, 1962.
- However, the DGFT objected the release of the goods in question that such discharge would be contrary to the import guidelines under the notifications. Aggrieved by this, the Respondents filed separate writ petitions in the Bombay High Court (**HC**), whereby the remaining goods were forthwith directed to be released.
- Questioning the legality and validity of the orders passed by the Adjudicating Authority and the HC, Union of India, the Appellant approached the Supreme Court. Apart from the Respondents, two other importers have filed impleadment applications because any final judgment shall have impact on their interests.

Issues at hand?

- Whether the goods in question are of 'prohibited goods' category?
- Whether the goods in question are liable to absolute confiscation?

Decision of the Court

- SC referred to the highlights of its decision in *Union of India & Ors v. Agricas LLP & Ors*[17] (**Agricas**) and reiterated the significance of the notifications in safeguarding the domestic agriculture market. SC juxtaposed the order of HC that permitted the goods to be set-free, alongside the contrasting order of the Appellate Authority and arrived at the conclusion that the order of HC suffers from drawbacks as it had turned a blind eye to the interest of domestic agriculture market economy as also the findings in Agricas. In view of the first issue, the SC glimpsed the relevant statutory provisions, particularly those contained in Section 3 of the Foreign Trade (Development and Regulation) Act, 1992 and Sections 2(33), 11(1) and 111(d) of the Customs Act. The SC outlined that sub-Section (3) of Section 3 of the FTDR Act pertains to the goods in question and these goods shall be considered as prohibited goods under Section 11 of the Customs Act for being imported as opposed to the notifications and the trade notice issued under the FTDR Act and without licence, under the disguise of the interim orders.
- Furthermore, on the stretch of the principles laid down in *S.B. International Ltd & Ors v. Asst. Director General of Foreign Trade & Ors*[18] and *Om Prakash Bhatia v. Commissioner of Customs, Delhi*[19], SC expressed that any import under a license within the limits specified by the notifications is the import of restricted goods but every import of goods in excess to the limits is apparently an import of prohibited goods. Therefore, the SC deduced that the goods in question are prohibited goods for the purpose of the Customs Act and answered the first issue in favor of the Appellant.
- On the second issue, SC deciphered Section 125 of the Customs Act as one which empowers the Adjudicating Authority to elect between payment of fine in lieu of confiscation or absolute confiscation. SC delved into the principles on exercise of discretion after noting that the Appellate Authority has found the discretion of the Adjudicating Authority in allowing payment of fine in lieu of confiscation as unjustified. SC discussed *Garg Woollen Mills (P) Ltd. v. Addl. Collector of Customs, New Delhi*[20] and *Shri Amman Dhall Mill v. Commissioner of Customs*[21] and observed that the Adjudicating Authority blindsided the alternative of absolute confiscation while exercising its discretion. The Court advanced that in cases of present nature

Our view

SC's judgement that any goods imported in violation to the FTDR/ DGFT Notifications are prohibited goods and liable for absolute confiscation under the Customs Act is remarkable in putting to rest the conflict on restriction of import of goods and in clearing the air on the seizure of goods. Additionally, the SC emphasized the significance of considering all the alternatives before deriving any discretion.

[17] 2020 SCC OnLine SC 675
[18] (1996) 2 SCC 439
[19] (2003) 6 SCC 161
[20] (1999) 9 SCC 175
[21] (2021) SCC OnLine Ker 362

which entail profound influence on national economy, the prudence cannot be centered solely to the misfortune faced by the importers, who launched such forbidden imports only for self-interest. Furthermore, SC advanced that at the most an option for re-export could be given to the importers and that too on payment of redemption fine and upon performing other statutory obligations. Hence, SC held that the goods are liable to be confiscated absolutely and answered the second issue in affirmative.

SREI Equipment Finance Ltd v. Marg Ltd

IA No.GA/1/2021 in EC/74/2021

Background facts

- In the present case, an Arbitral Tribunal passed an award dated August 31, 2020 (**Award**) in favor of Marg Ltd (**Award holder**), whereby SREI Equipment Finance Ltd (**Award debtor**) was directed to pay substantial sum of monies.
- Subsequently, an execution application for enforcement of the said award was filed by the Award holder under Section 36 of the Arbitration and Conciliation Act, 1996 (**Act**). However, the Award debtor opposed the said execution application by filing an application in the Calcutta High Court (**HC**), seeking dismissal of the above-mentioned execution application on the strength of two-fold points:
  - Time to execute the Award has not commenced
  - HC does not have jurisdiction to entertain the execution proceedings, since the Award debtor is based in Chennai and the assets are located outside the jurisdiction of HC

Issue at hand?

- Whether the time for the Award debtor to apply under Section 34 for setting aside of the Award has elapsed or not?

Decision of the Court

- To ascertain the maintainability of the execution proceedings, HC placed at the center of focus the first point regarding the time from which the execution could have commenced. HC took note that the Counsel appearing for the Award debtor strongly relied on the orders passed by SC wherein the period of limitation, under the general and special laws, was extended in view of the pandemic.
- To obtain clarity on the present situation, HC perused the three operative orders of SC dated March 23, 2020, March 08, 2021 and April 27, 2021 passed in Suo Motu Writ Petition (Civil) No. 3/2020. HC deduced from the orders that depending on the Covid situation, SC imposed relaxations and tightened the relaxations on the limitation period and eventually, due to the second outburst of Covid-19, SC by its last order dated 27th April 2021, has given an edge to the litigants by allowing the extension of the period of limitation.
- In addition, HC carefully analyzed the intention of Section 34 and 36 of the Act and highlighted that the Award holder can parade towards the door of enforcing the award under Section 36 without concerning himself with the filing of Section 34 application, the only fence to this door being the expiry of the time to file for setting aside of the Award. Furthermore, HC juxtaposed Section 36 of the 1996 Act and Order XXI and the Rules thereunder of The Code of Civil Procedure, 1908 and underscored that an essential difference between the two is the abovementioned prerequisite on the Award winner to wait until the expiration time to set aside the Award.
- Lastly, the HC recorded that the Award was received by the Award holder on September 07, 2020 and thus, the three months under Section 34 (3) expired on December 07, 2020. HC relied on the order dated April 27, 2021 of SC as the cornerstone to answer the issue on limitation and fathomed the intention of SC in safeguarding the interest of suitors, who would otherwise have lost out on the statutory time frame for instituting proceedings in the Courts. Therefore, HC arrived at the conclusion that the applicant's time to file the Section 34 plea ran out on December 07, 2020 but because the applicant comes within the umbrella of the benefit given to litigants from March 15, 2020 onwards, the time to apply for setting aside of the Award has still not ceased. Moreover, HC advanced that based on the principles of equity, the Award holder cannot be held back from enforcing the Award endlessly based on SC order and, thus, instructed the Award debtor to take appropriate steps within ten days from date of the judgement.

Our view

HC has remarkably gauged the intention of SC in its latest order and without mincing words allowed an extension on limitation period of 3 months, under Section 34 of the Act. Moreover, this is a balanced judgement, as it reflects due consideration towards the suitors in these unprecedented pandemic times and concurrently does not allow this consideration to last for an indefinite period to cause detriment to the winning party. As it is said that the Justice must not only be done but must also be seen to be done.

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