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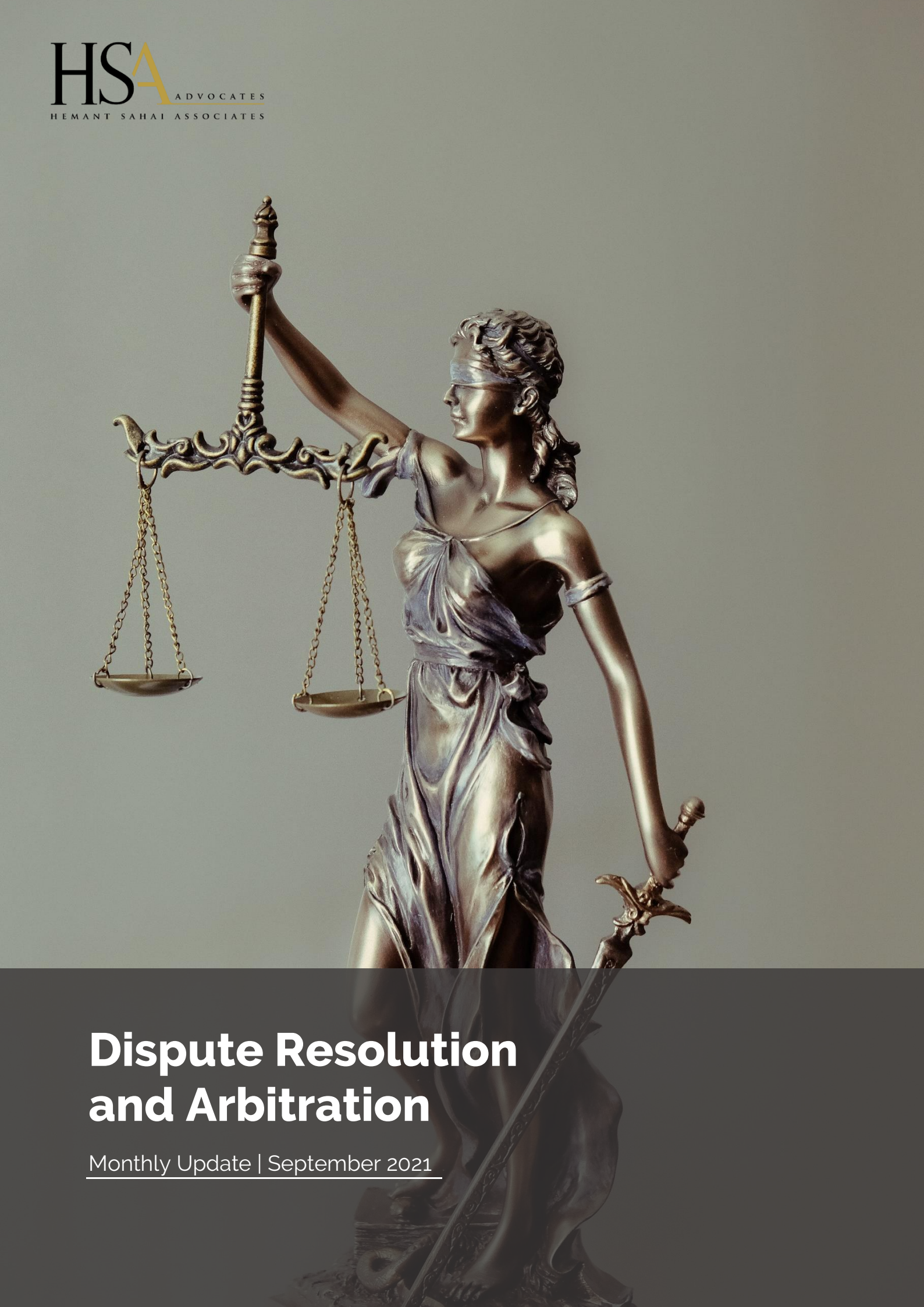
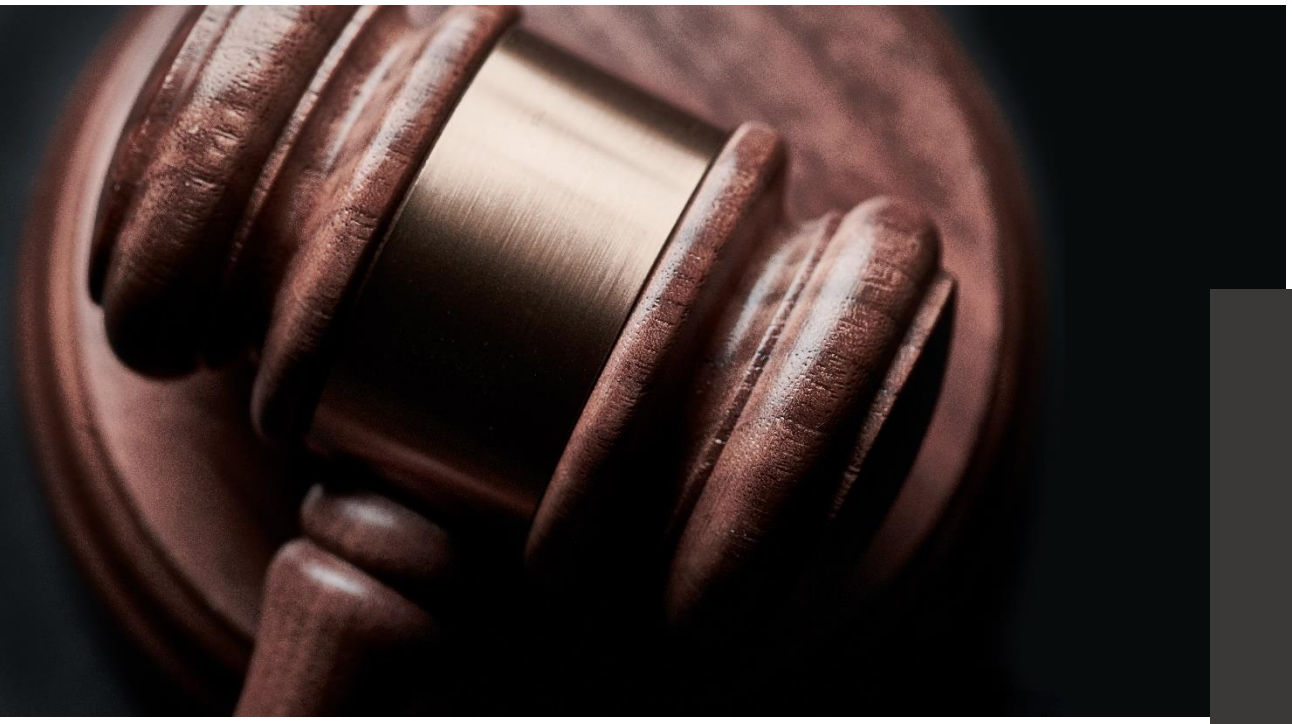


Dispute Resolution and Arbitration

Monthly Update | September 2021

DISPUTE RESOLUTION AND ARBITRATION UPDATE



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L&T Ltd & Anr v. PNB & Anr

W.P. (C) 7677/2019

Background facts

- Based on an erroneous interpretation of Section 28 of the Indian Contract Act, 1872 (**Contract Act**), Punjab National Bank (**PNB/Respondent No. 1**) forced a mandatory and unalterable claim period of a minimum of 12 months pertaining to bank guarantees. It defined that claim period is a time-period contractually agreed between the creditor and principal debtor which provides a grace period beyond the validity period of the guarantee to make a demand on the bank for a default which occurred during the validity period. The claim period is meant to provide grace time beyond the validity of the guarantee which may or may even exist in a bank guarantee.
- Based on the above premise, Larsen & Toubro Ltd (**L&T Ltd/Petitioner**) had challenged the communication issued by Respondent No. 1 dated August 18, 2018 addressed to the Petitioners stating that a claim period in a bank guarantee which is less than 12 months would render the claim period void and will effectively increase the claim period under the bank guarantee to 3 years under the Limitation Act, 1963.
- The Petitioner had also challenged the communication issued by RBI (**Respondent No. 2**) dated February 10, 2017 which stated that it will be open to the banks to stipulate time as a condition precedent to the claim. If the claim is not lodged before that stipulated time, the bank guarantee shall be revoked or terminated, but the stipulated date cannot be less than 1 year. The communication dated December 5, 2018 by Respondent No. 2 to all banks also reiterated the above contention stating that if a bank issues a claim period of less than 1 year on top of the guarantee period, then such a bank guarantee will not have the benefit of Exception 3 to Section 28 of the Contract Act.
- The Petitioner made a prima facie case in its favor by showing that since the Petitioner is one of the largest construction companies of India, it has a few contracts with Government bodies and Public Sector Undertakings. The Petitioner must normally issue 'Performance Bank Guarantee' or 'Advance Bank Guarantee' during performance of the contract. On account of the abovementioned interpretation of Section 28 of the Contract Act, the Petitioner is unnecessarily made liable to pay commission charges for such extended bank guarantee when, as per the contract between the

principal debtor and the creditor, the claim period would be shorter. The Petitioner also becomes liable to maintain collateral security for supporting extended claim period.

- The extended claim period effects the Petitioners' capability to do business by entering new contracts and effects the fundamental rights of the Petitioners under Article 19 (1) (g) of the Constitution of India. Thus, the present Writ Petition.

Issue at hand?

- Interpretation of Section 28 of the Indian Contract Act, 1872.

Decision of the Court

- Prior to the amendment, Section 28 of the Contract Act provided that a clause limiting the time within which the rights are to be enforced, is void, if the rights to be enforced under the contract continued to exist even beyond the shorter period agreed for enforcing the rights. The Law Commission, however, held that prima facie such a position appears highly anomalous. By providing for extinction of a right, the parties are creating a law of limitation of their own.
- The amended Section 28 of the Contract Act was enacted to do away with the earlier distinction between remedy and right i.e., a clause barring the remedy only was void but a clause extinguishing a right was valid. The T.R. Andhyarujina Committee recommended that the time to approach the appropriate court for enforcement of beneficiary's rights under the bank guarantee must be reduced to 1 year. Thereafter, Exception 3 to Section 28 of the Contract Act was added.
- The Court held that Exception 3 to Section 28 of the Contract Act deals with curtailment of the period for the creditor to approach the Court/Tribunal to enforce his rights. It does not deal with the claim period within which the beneficiary is entitled to lodge his claim with the bank/guarantor. The Court further relied on the judgment of *Union of India v. IndusInd Bank*[1], specifically paragraph 28, which clearly shows that the Court interpreted the relevant clauses of the bank guarantee to hold that neither of the clauses seek to limit the time within which the right is to be enforced. The said clauses were not dealing with the claim period i.e. the grace period beyond the validity of the bank guarantee to make a demand on the bank for a default which had occurred during the validity period.
- Based on the above, the Court held that Respondent No. 1 is erroneously of the view that they are in law mandated to stipulate a claim period of 12 months in the bank guarantee, failing which the clause shall be void under Section 28 of the Contract Act. A claim period is a time-period contractually agreed between the creditor and principal debtor which provides a grace period beyond the validity period of the guarantee to make a demand on the bank for a default which occurred during the validity period. Section 28 of the Contract Act does not deal with said claim period; rather, it deals with right of the creditor to enforce his rights under the bank guarantee in case of refusal by the guarantor to pay before an appropriate Court or Tribunal

Our view

There are conflicting judgments on this subject matter. However, this recent judgment of the Delhi High Court (HC) brings relief to large infrastructure companies that are required to routinely submit performance bank guarantees/advance bank guarantees while bidding for government contracts. In favour of companies routinely furnishing bank guarantees, HC held that there is no mandatory requirement under Exception 3 to Section 28 of the Indian Contract Act, 1872 for a bank guarantee to have a claim period of 12 months. Thus, the consequences of the court's decision require a party to furnish a bank guarantee with a claim period for the required time prescribed under the contract or bidding document and not necessarily for a mandatory period of 12 months.

Gemini Bay Transcription Pvt Ltd v. Integrated Sales Service Ltd & Anr

Civil Appeal Nos. 8343-8344 of 2018

Background facts

- An award was granted in favor of Integrated Sales Services Ltd (**Respondent**) and damages amounting to USD 690 million were jointly payable by the opposite parties who were non-signatories to the arbitration agreement. The proceedings were governed by Delaware law with the seat of arbitration in Kansas City, Missouri, USA.
- Subsequently, the Respondent filed an application for enforcement of the award under Section 48 of the Arbitration and Conciliation Act, 1996 before the Bombay High Court. The Single Judge Bench held that the foreign award was not enforceable against the non-signatories to the arbitration agreement. On appeal, the Division Bench reversed the judgement and held that none of the grounds enumerated in Section 48 were satisfied to resist the enforcement of the foreign award. Consequently, Gemini Bay Transcription Pvt Ltd (**Petitioners**) approached the Supreme Court (**SC**) resisting the enforcement of the foreign award. The grounds relied upon by the Petitioners were:
  - Under Section 47(1)(c) and Section 44, the burden of proving that the foreign award is enforceable is on the award-holder. In the case of non-signatory to the arbitration agreement, such a burden can only be discharged if evidence is advanced which would independently establish that the non-signatory party is covered by the foreign award. Since the Respondents did not do so in the present case, the award was unenforceable.

[1] (2016) 9 SCC 720

- The award could not be enforced because non-signatories to an arbitration agreement would be covered under sub-clauses (a) and (c) of Section 48(1).
- The ground of 'natural justice' under Section 48(1)(c) for refusal to enforce the award would be attracted since the award lacked reasons. Hence, the award suffered from perversity.
- Commission of tort is outside the scope of contractual disputes and, as the cause of action in the present case arose in tort, the award cannot be enforced.
- Under Section 46, the foreign award is binding only on the people between whom it is made and not the ones who may claim under the parties.
- Damages were awarded but the actual loss was not proved.

Issues at hand?

- Whether under Section 47(1)(c) the burden to prove that the foreign award is enforceable is on the award-holder or such burden can be discharged only if the award-holder leads evidence to prove that a non-signatory can be bound by a foreign award?
- Whether non-signatory to an arbitration agreement is covered by sub-clause (a) as well as sub-clause (c) of Section 48(1) of the Act?
- Whether perfunctory reasoning can be a ground for refusal for enforcement of foreign awards under Section 48(1)(b)?
- Whether commission of tort is outside the scope of arbitration agreement?
- Whether under Section 46 the foreign award will be binding only on the persons between whom it was made?
- Whether under Section 48 a foreign award can be resisted on the ground that the award was contrary to the substantive law governing the arbitration proceedings?

Decision of the Court

- SC observed that the Section 47(1) is procedural in nature. The objective of the provision is to ensure that the award in question is indeed a foreign award and that it is enforceable against the persons bound by the award. Sub-clause (c) of the said section only stipulates evidence to prove that the award is indeed a foreign award. It would be applicable to adduce evidence to prove that the arbitration agreement is a New York Convention agreement. It does not require substantive evidence to establish that the non-signatories to an arbitration agreement can be bound by the foreign award. Hence, the first ground relied upon by the Petitioners was held to be outside the scope of Section 47(1)(c).
- Interpreting Section 48(1) – specifically sub-clauses (a) and (c) – SC observed that the literal construction of both the sub-clauses clearly indicates that their scope is restrictive, which does not allow for expansive interpretation. Section 48(1)(a) is about parties to the agreement being under some incapacity, or the agreement being invalid under the law to which the parties have subjected it. Additionally, while Section 44 concerns arbitral award on differences between 'persons', Section 48(1)(a) only refers to 'parties' to the agreement referred to in Section 44(a). Hence, non-signatories cannot be included within Section 48(1)(a) as it would be contrary to the literal construction of the provision. The grounds under Section 48 are specific and exhaustive and the scope for expansive interpretation is little.
- Similarly, with respect to Section 48(1)(c), SC observed that the sub-clause only relates to disputes that could be argued to be outside the ambit of the arbitration agreement between the parties. It does not relate to whether a 'person' who is a non-signatory to the arbitration agreement can be bound by the same. This is reinforced by the fact that proviso to Section 48(1)(c) specifically provides that the disputes outside the submission to arbitration can be segregated, thus implying that Section 48(1)(c) only concerns the issue whether the dispute between the parties are outside the scope of the arbitration agreement.
- SC observed that Section 48(1)(b) is highly specific as it does not deal with lack of reasons by the arbitrator. Under the said provision, the enforcement of foreign award can only be refused on the ground of natural justice pertaining to the issue of notice of appointment of the arbitrator or of the tribunal proceedings, or that a party could not present its side before the tribunal. Relying on *Vijay Karia v. Prysmian Cavi E Sistemi SRL*[2], SC held that Section 48(1)(b) cannot be interpreted expansively and must be interpreted in the context of the provision. The narrow construction of the said provision would indicate that the ground of natural justice can only be raised in case of fair hearing not given by the arbitrator. On the ground of perversity, the SC relied on *Ssangyong Engg & Construction Co Ltd v. NHAI*[3] (**Ssangyong Engg case**) and held that after the 2015 Amendment to the

Our view

SC's decision reinforces the pro-enforcement stance of the Indian judiciary. The decision emphasizes that the scope for expansive interpretation of Section 48, allowing the award-debtors to evade the enforcement of foreign awards, is little. By clarifying the contours of Part II of the Act in the context of non-signatories to the arbitration agreement, the Court has left no room for ambiguity in the provisions.

While the position of non-signatories to the arbitration agreement in the Indian arbitration regime is settled now, the decision has left some reasons to be concerned about the lack of recourse available to non-signatories. Non-signatories must have at least some recourse(s) available under the law to challenge the enforcement of the arbitral award against them.

[2] (2020) 11 SCC 1
[3] 2019 SCC OnLine SC 677

Act, perversity as a ground to set aside an award in an international commercial arbitration no longer exists. The ground of "public policy of India" to set aside the foreign award under Section 34 does not include within its ambit the ground of perversity. Since Section 48 is a pari materia provision, perversity as a ground is not available under Part II as well.

- With respect to the issue of commission of tort being outside the scope of arbitration agreements, SC observed that under Section 44 tort claims may be adjudicated by the arbitrator provided they arose in relation to the agreement. Relying on *Renusagar Power Co Ltd v. General Electric Co*[4], SC observed that the only issue that must be determined is if it is a tortious claim, whether it arose out of the contract in question. SC also placed reliance on *Tarapore & Co v. Cochin Shipyard Ltd*[5] and *Astro Vencedor Compania Naviera S.A. of Panama v. Mabanaft GmbH*[6]. Thus, this argument was rejected.
- SC rejected the argument of the Petitioners that a comparison between Section 35 and 46 indicates that the power of the enforcement under Section 46 was limited to only the parties who are bound by the foreign award and not the persons claiming under them. It was held that unlike Section 35, which speaks about 'persons' in the context of the award being binding on the 'parties' and 'persons claiming under them', Section 46 only speaks about 'persons. The usage of this term in Section 46 indicates that the provision is not restrictive and, hence, non-signatories to the arbitration agreement will be covered under it.
- SC disagreed with the Division Bench's approach that the foreign award would have to be upheld because the Delaware law was followed to apply the Alter Ego Doctrine correctly. SC held that Section 48 does not provide grounds for refusing the enforcement of the foreign award simply based on the foreign being contrary to the substantive law agreed between the parties. Under the *pari materia* provision of Section 34, an award cannot be set aside on the ground that the substantive law of that country was infracted. The award can be interfered with only if it was held to be contrary to the public policy of India. Hence, under Section 48, the enforcement of foreign awards could not be resisted on the ground that the substantive law of the agreement was infracted.
- SC held that such a ground was not provided under exceptions contained in Section 48(1). The Petitioners had relied on the Delhi High Court judgement of *Agritrade International Pvt Ltd v. National Agricultural Coop Mktg Federation of India Ltd*[7]. Distinguishing the facts in the present case, it was held that actual loss can be said to have been occasioned on the Respondent. Further, in *Ssangyong Engg case*, it was held that only in rare and exceptional cases involving miscarriage of justice that would shock the conscience of the Court such a plea could be entertained. Since it did not happen in this case, the contention was rejected.

Agij Promotion of Nineteenonea Media Pvt Ltd & Ors v. UoI & Anr Nikhil Magesh Wagle v. UoI

Writ Petition (L) No. 14172 of 2021 PIL No. 14204 of 2021

Background facts

- Two petitions were filed before the Bombay High Court (**HC**) challenging several provisions of the Information Technology (**Intermediary Guidelines and Digital Media Ethics Code**) Rules, 2021 (**IT Rules, 2021**), which was enacted by the Ministry of Information, Government of India on February 25, 2021 to strengthen the Information Technology Act, 2000 (**IT Act**). The Writ Petition was filed by Agiz Promotion of Nineteenonea Media Pvt Ltd, which owns and operates a digital news web portal – The Leaflet – and another by Mr. Nikhil Mangesh Wagle, a journalist (**Petitioners**).
- Additionally, several Writ Petitions were filed before different High Courts challenging the IT Rules, 2021, to which the UoI filed a Transfer Petition[8] seeking to transfer the respective pending petitions to the Supreme Court (**SC**).
- Vide Order dated August 09, 2021, HC noted that the Central Government urged the Court to wait till the decision of the SC on the transfer petition. The HC, however, proceeded to hear the matter in view of any absence of stay on the proceedings by the SC and the Transfer Petition being currently pending to be adjudicated.
- The Petitioners contended that the provisions of Rules 9, 14 and 16 of the IT Rules, 2021 are ultra vires Section 69A of the IT Act and violative of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution. Since the IT Rules, 2021 go far beyond permissible restrictions of freedom of speech and freedom of trade for digital news publisher, they are ex-facie draconian, arbitrary and can have a terrible chilling

[4] (1984) 4 SCC 679
[5] (1984) 2 SCC 680
[6] (1971) 2 QB 588
[7] 2012 SCC OnLine Del 896
[8] UoI & Ors v. Sayanti Sengupta & Ors TP (C) No. 1248-1252 of 2021

effect on the right of citizens to exercise freedom of free speech and expression, so much so that they must be stayed immediately. It was also prayed that Rule 7 of the IT Rules, 2021 must be stayed on the ground that a statutory protection granted under Section 79 of the IT Act has been taken away by way of the same.

- Central Government, through the Ministry of Information and Broadcasting, argued that there is a presumption of constitutionality of the IT Rules, 2021 till the provisions are struck down and, as such, no adverse action has been initiated against the Petitioners. It was also contended that Part III of the IT Rules, 2021, which provides for 'Code of Ethics and Procedure and Safeguards in Relation to Digital Media', is within the legislative competence of the Ministry of Electronics and Information Technology, to make subordinate legislation and therefore, Part III of the IT Rules, 2021 is not ultra vires the IT Act.

Issue at hand?

- Whether Rules 7, 9, 14 and 16 of the IT Rules, 2021 are arbitrary in nature and violative of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution of India?

Decision of the Court

- At the outset, the HC perused and examined the provisions of IT Rules, 2021 and the IT Act. The Court held as far as Rule 14 is concerned, which provides for Inter Departmental Committee to consider complaints referred to the Committee, whether arising out of the grievances or referred to it by the Ministry of Information and Broadcasting, there is no immediate urgency to grant any interim relief as such Committee is yet to be constituted.
- With respect to Rule 16 of the IT Rules, 2021 which provides for blocking of information in case of emergency, the HC observed that this rule is *pari materia* to Rule 9 of the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, which is still in operation. The HC further noted that the grounds provided for blocking any information under Rule 16 are traceable in Section 69A (1) of the IT Act and are in consonance with the restrictions imposed by Article 19(2) of the Constitution of India, thereby rejecting the prayer of the Petitioners for stay of Rule 16.
- HC noted that Rule 9 (1) of the IT Rules, 2021 mandates a publisher to adhere to the prescribed Code of Ethics laid down in the Appendix to the IT Rules, 2021. Rule 9 (3) of the IT Rules, 2021, proposes to set up a three-tier grievance redressal committee. It was observed that Rule 9 of the IT Rules, 2021, which imposes a mandatory obligation on the publishers to observe and adhere to the Code of Ethics, is regulated under a completely different statutory regime alien to the IT Act i.e., by applying norms of Journalistic Conduct of the Press Council of India under the Press Council of India Act, 1978 (**PC Act**) and the Program Code under Section 5 of the Cable Television Network Act (**Cable TV Act**), which provides for an independent mechanism for any violation of the provisions of such legislation. Thus, HC opined that such fields could not be brought within the purview of the IT Rules, 2021 nor substantive action be taken for its violation. It further noted that the PC Act norms that form the basis of the Code of Ethics are not statutory, but merely moral norms which are not enforceable.
- HC examined clause (z) and (zg) of Section 87 (2) of the IT Act, under which the IT Rules, 2021 were framed, and held that it does not confer any power on the Central Government to frame a provision in Rule 9. The HC further observed that the IT Act does not seek to censor content on the internet, except to the extent provided in Section 69A i.e., in the interest of India's sovereignty, integrity, defense, security and public order. Accordingly, the HC held that Rule 9 of the IT Rules, 2021 goes beyond the restrictive ambit of Section 69A of the IT Act as they regulate online content and is ultra vires the IT Act. The HC also opined that Rule 9 is an intrusion into the fundamental rights guaranteed under Article 19(1)(a) of the Constitution.
- In view of the above, HC imposed an interim stay on two provisions i.e., Rules 9 (1) and 9 (3) of the IT Rules, 2021. However, the HC refused to grant stay on Rule 7 observing that the Petitioner could not prove himself as an 'intermediary' within the meaning of Section 2(w) of the IT Act.

Our view

The HC's decision staying certain Rules of the IT Rules, 2021 ,especially those pertaining to adherence to Code of Ethics, is a welcome move for the digital media industry. The HC has rightly taken cognizance of the need for freedom of speech and expression and has explicitly indicated that the freedom of press must be preserved and protected and such extreme measures that supress the voice of the media will be a jolt to democracy.

However, the HC has only passed an interim order and has not permanently struck down the IT Rules. The final determination regarding the constitutionality of the IT Rules, 2021 remains undecided. We understand that the final judgment of the HC in the matter will be pronounced on September 27, 2021.

Tulsi Developers India Pvt Ltd v. Dr. Appu Benny Thomas

AR No. 105 of 2020

Background facts

- Tulsi Developers India Pvt Ltd (**Petitioner**) filed an application in Kerela High Court (**HC**) for appointment of sole arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (**Act**) as per clause 27 of the lease agreement, entered between the Petitioner and Dr. Appu Benny Thomas (**Respondent**).

- However, the Respondent contested the arbitration request as not maintainable on twofold grounds:
  - The grounds raised by the Petitioner indicated that they have, in fact, approached this Court under Section 11(5) of the Act, though labelling it as being under Section 11(6) thereof, and therefore, before the lapse of 30 days of demanding the appointment of arbitrator, the arbitration request was untimely.
  - The lease agreement did not provide for arbitration of disputes relating to the lease arrangement, which could only be considered by a competent Rent Control Board.

Issues at hand?

- Whether the arbitration request filed by the Petitioner is maintainable?
- Whether a party to dispute can nominate an arbitrator?
- Whether the disputes raised by the Petitioner are capable of being arbitrated under the provisions of the Act?

Decision of the Court

- HC advanced that a collective reading of sub-Sections (2), (5) and (6) of Section 11 of the Act clearly implies that Section 11(5) of the Act would be drawn only in cases where an agreement as to the procedure for appointment of an arbitrator between the parties has failed as referred to in Section 11(2). Furthermore, the HC submitted that as far as Section 11(2) is concerned, the parties can independently enter into an agreement for procedure to appoint an arbitrator wherein only Section 11(6) would apply.
- The HC urged that the requirement of waiting thirty days before approaching this Court is set forth only in Section 11(5) of the Act and not in Section 11(6) and, therefore, as per Section 11(6) appointment is to be carried out according to the procedure agreed upon by the parties. After carefully analyzing clause 27 of the agreement, the HC deduced that a specific procedure pertaining to the appointment of an arbitrator had been agreed between the parties which ultimately satisfied the mandate of Section 11(2) of the Act and. hence, Section 11(5) is indubitably off the table. Therefore, the HC answered the first issue in affirmative and in favor of the Petitioner.
- Regarding the second issue, the HC discussed sub-Section (5) which was inserted into Section 12 after the amendments to the Act in the year 2016 and its outcome which was taken in account by the Supreme Court in *TRF Ltd v. Engineering Projects Ltd*[9] by deciding that neither a party to the disputes nor a person nominated by it can be appointed as an Arbitrator. Thus, considering the above precedent, the HC answered the second issue in negative.
- In relation to the third issue, the HC chose not to dig deeper into the averment by reasoning that under the authority of Section 16 of the Act, the arbitrator can himself elect whether he has the competence to adjudicate or not and to rule appropriately on his jurisdiction regarding all or any of the disputes, under the Kompetenz-Kompetenz Doctrine, which is incorporated into the Act.

Our view

The HC's decision that a party to dispute cannot nominate arbitrator even if the arbitration agreement allows it, is in consonance with the decision of the SC in TRF limited v. Engineering Projects Ltd[9] and provides much-needed clarity on the application of sub-Sections (2), (5) and (6) of Section 11 of the Act. The decision of the HC can be deemed to have captured the true essence of arbitration by leaving it to the arbitrator to adjudicate the question of competence under the provision of Section 16 of the Act.

Priyanka Communications (India) Pvt Ltd & Ors v. Tata Capital Financial Services Ltd

Review Petition (L) No. 5868 of 2021 in Comm Arbitration Petition No. 434 of 2021

Background facts

- Priyanka Communications (India) Pvt Ltd, (**Petitioner**) filed an Arbitration Petition under Section 9 of the Arbitration and Conciliation Act, 1996 in the Bombay High Court (**HC**) to seek relief through interim protection. However, the Ld. Single Judge HC passed an order in favor of Tata Capital Financial Services Ltd, (**Respondent**). Thereafter, the Petitioners filed an appeal wherein the Division Bench disposed of the appeal by granting the Petitioners a liberty to file a review.
- Consequently, a Review Petition under Section 114 and Order XLVII of the Code of Civil Procedure, 1908 (**CPC**) was filed by the Petitioner in the HC to seek reinstatement of the Arbitration Petition which was well-settled by pronouncement in the open Court. Particularly, the Review Petition was filed on grounds which were neither argued nor pleaded.

Issues at hand?

- Whether the HC has power to reinstate this appeal either by the rules or by reason of inherent jurisdiction?
- Whether the Review Petition is maintainable?

[9] (2017) 8 SCC 377

Decision of the Court

- HC emphasized on *Hession v. Jones*[10] which dealt with similar set of facts, wherein it was concluded that no Court is empowered to review an order consciously passed after argument and to entertain a fresh argument upon it with a perspective to ultimately confirming or reversing it. The HC considered each ground on which the Review Petition was filed and advanced that most of them were neither argued nor were a part of the written submissions. Hence, the HC individually ticked off each ground as not worthy to furnish a cause for review within the constricted scope of Section 114 or Order 47 under CPC. Most importantly, the HC highlighted that if Counsel has not pressed a point, the fact that there were written submissions is meaningless if those written submissions were never argued. Further, the HC forwarded that Counsel's oversight to argue written submissions can never be construed as a ground for review or even appeal.
- The HC cited *Mohinder Rijhwani & Ors v. Hiranandani Construction Pvt Ltd*[11] in which similar facts arose, and the petition was disposed of by relying on the decision of the SC in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius*[12] that if it was the Counsel, who was under a delusion as to the position of the court and therefore, preferred not to argue a point, that alone is no ground for review and cannot be brought in by way of an Affidavit. Further, the HC focused on the interpretation given by the SC in Moran Mar (**supra**) of 'other sufficient reason' in Order XLVII to mean 'a reason sufficient on grounds at least analogous to those specified in the rule'. Moreover, to shed light on the outline of Review Petition, the HC referred to the Division Bench judgement in *Radhakrishna CHSL & Anr v. State of Maharashtra & Ors*[13] wherein the elements as to when the review will not be maintained were discussed from the SC's decision in *Kamlesh Verma v. Mayawati & Ors*[14]. Considering the above, the HC answered the issues in favor of the Respondent.
- HC considered the unnecessary time that was invested in the proceedings. To send a clear signal, the HC discussed the factors laid down by the Commercial Courts Act, 2015 (**CCA**) while ordering costs in Section 35(3) of the amended CPC. Thus, the HC dismissed the Review Petition by imposing a cost of INR 5 lakh on the Petitioners.

Our view

The HC's decision that Counsel's failure to argue written submissions is not a ground of review is incredible in limiting the litigants filing Review Petitions unnecessarily on the baseless ground of an unfortunate mistake of not arguing the written submission and lays down a crystal-clear outline of the scheme of review under CPC. By imposing high costs on the party, the judgement not only prevents the filing of misconceived Review Petitions but also renders justice to the litigants waiting in line with genuine grounds.

Assistant Commissioner of State Tax v. Commercial Steel Ltd

Civil Appeal No.5121 of 2021 (Arising out of SLP (C) No 13639 of 2021 @ D No.11555 of 2020)

Background facts

- This appeal arises from a judgment of a Division Bench of Telangana High Court (**HC**) dated March 4, 2020 wherein the HC exercises writ jurisdiction under Article 226 of the Constitution of India to set aside the action of the Assistant Commissioner of State Tax (**Appellant**) in collecting an amount of INR 4,16,447 from Commercial Steel Ltd (**Respondent**) towards tax and penalty under the Central Goods and Services Tax Act, 2017 (**CGST**) and State Goods and Services Tax Act (**SGST**) and, inter alia, directed a refund with interest at the rate of 6% p.a. from December 13, 2019.
- The Respondent is a proprietary concern engaged in the business of iron and steel and is registered under CGST and had been allotted a GST code. The Respondent purchased goods from a dealer, JSW Steel Limited, Vidyanagar, Karnataka, under a tax invoice dated December 11, 2019. The consignment of goods was being carried in a truck bearing registration No KA 35 C 0141. While it was proceeding from the State of Karnataka, it was intercepted on December 12, 2019, at 5.30 pm at Jeedimetala. The tax invoice indicated that the goods were earmarked for delivery at Balanagar, Telangana. The case of the Appellant is that Balanagar is situated between the State of Karnataka and Jeedimetala and that no reasonable person would cross Balanagar and then turn around to go back to the destination. The purchase value of the goods appeared to be in the amount of INR 11,14,579 from the tax invoices.
- The case of the Revenue was that in the guise of an inter-State sale, the Respondent was attempting to sell the goods in the local market by evading SGST and CGST. An order of detention was issued in Form GST MOV-06 on December 12, 2019, and a notice was served on the person in charge of the conveyance. The Respondent paid the tax and penalty, following which the goods and the conveyance were released on December 13, 2019.
- The Respondent instituted writ proceedings under Article 226 of the Constitution before the HC to challenge the order of detention dated December 12, 2019 and seek tax refund wherein the notice was issued under Section 20 of the IGST Act 2017. HC ordered the refund of the amount collected towards tax and penalty combined with interest, and observed that a mere possibility of a local sale would not clothe the officials to take such an action especially since there was no material to

[10] (1914) 2 KB 421
[11] 2019 SCC OnLine Bom 1827: (2019) 6 Bom CR 837
[12] (1955) 1 SCR 520: AIR 1954 SC 526)
[13] 2017 SCC OnLine Bom 9855: (2017) 6 Mh LJ 932
[14] (2013) 8 SCC 320: AIR 2013 SC 3301

indicate that an attempt was made by the Respondent to deliver the goods at a different place and sell them in the local market evading CGST and SGST. HC concluded that since the vehicle was being driven from Karnataka by the local driver from that State, 'it is perfectly possible for the driver to lose his way on account of being unfamiliar with the roads' in Hyderabad and bypass Balanagar to proceed to Jeedimetala. This was challenged in the Supreme Court.

- The Appellant submitted that the HC was in error in entertaining the Writ Petition under Article 226 of the Constitution, having regard to the statutory alternative remedy which is available under Section 107 of the CGST Act. Counsel urged that while the existence of an alternative remedy under the statute is not an absolute bar to the maintainability of a Writ Petition under Article 226, none of the exceptions which have been enunciated by the judgments of this Court apply in this case. On merits, it was submitted that HC proceeded based on surmises.
- The Respondent submitted that having entertained the writ petition, the HC was justified on merits in setting aside the detention and the order by which the tax and penalty was collected under duress. Hence, it is urged that no interference of this Court is warranted.

Issue at hand?

- Whether the HC ought to have entertained the Writ Petition when an alternate remedy was available and none of the exceptional circumstances favoring entertaining the Writ Petition were applicable?

Decision of the Court

- Availing the statutory remedy under Section 107 of the CGST Act, the Respondent instituted a petition under Article 226 of the Constitution of India. While the existence of an alternate remedy is not an absolute bar to the maintenance of a Writ Petition under Article 226 of the Constitution, exceptions can be made under following situations: (i) breach of fundamental rights; (ii) violation of the principles of natural justice; (iii) excess of jurisdiction; or (iv) challenge to the vires of the statute or delegated legislation. In the present case, none of the above exceptions was established, more so when there has been no violation of the principles of natural justice since a notice was served on the person in charge of the conveyance.
- Fact assessments must be conducted by the Appellate Authority. While doing this exercise, HC proceeded based on surmises. While the Apex Court was inclined to relegate the Respondent to the pursuit of the alternate statutory remedy under Section 107 of the CGST Act, it did not make any observation on the merits of the case of the Respondent.
- The Apex Court allowed the appeal and set aside the impugned order of the HC with liberty to the Respondent to take recourse to appropriate remedies available in terms of Section 107 of the CGST Act.

Our view

The Apex Court articulated the exceptional circumstances for the maintainability of recourse to writ jurisdiction of a Court while abstaining from going into merits of the case, which are to be decided by the judicial forum/Court under appropriate statute, if available.

Jitendra Singh v. The State of Madhya Pradesh & Ors

Special Leave Petition (C) No.13146 of 2021

Background facts

- Jitendra Singh (**Petitioner**) filed an application under Section 109/110 of the Madhya Pradesh Land Revenue Code to mutate his name in the revenue records in respect of Khasra No. 41/03, 101/03, 314/03, 102/02, 132/02, 133/03, 142/02, 145/02, 146/02, 313/01, total area of 4.53 acres situated in village Dudha, Tehsil Rampur Baghelan, District Satna, based on the alleged Will executed on May 2, 1998 by Smt. Ananti Bai, widow of Bhagwandeen Bargahi, his maternal grandmother.
- By order dated September 30, 2011, the Nayab Tehsildar, District Satna directed to mutate the name of the Petitioner from the revenue records regarding the aforesaid lands solely based on the alleged Will. The legal heirs and daughters of Smt. Ananti Bai preferred appeal before the Sub-Divisional Officer, Tehsil Rampur Baghelan, District Satna, Madhya Pradesh. The SDO allowed the said appeal and set aside the order passed by the Nayab Tehsildar vide order dated September 12, 2018.
- The Petitioner preferred an appeal before the learned Additional Commissioner, Rewa Division, Rewa challenging this order passed by the SDO. The learned Additional Commissioner allowed the said appeal and quashed and set aside the order passed by the SDO.
- By the impugned judgment and order, the HC set aside the order passed by the Additional Commissioner observing that once the Will is disputed, and even otherwise, the Petitioner who is claiming rights/title based on the Will executed by the deceased Ananti Bai, the remedy available to the Petitioner would be to file a suit and crystalize his rights and only thereafter the necessary consequence shall follow.
- Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the HC, the original applicant has preferred the present Special Leave Petition.

Issues at hand?

- Whether the name of the Petitioner could be mutated from the revenue records?
- Whether mutation entry confers any right, title or interest?

Decision of the Court

- The record points out that the application before the Nayab Tehsildar was made on August 9, 2011, i.e., before the death of Smt. Ananti Bai. It cannot be disputed that the right based on the Will can be claimed only after the death of the executant of the Will, while in the present case, the Will itself has been disputed.
- The settled proposition of law is that mutation entry does not confer any right, title or interest in favor of the person but is only for the fiscal purpose. If there is any dispute with respect to the title, particularly when the mutation entry is sought to be made on the basis of a Will, as in the present case, the party who is claiming title/right on the basis of the Will has to approach the appropriate Civil Court/Court and get his rights crystalized and only thereafter, on the basis of the decision of the Civil Court, necessary mutation entry can be made.
- The Court relied on the judicial precedents in *Balwant Singh v. Daulat Singh*[15], *Suman Verma v. Union of India*[16], *Faqruddin v. Tajuddin*[17], *Rajinder Singh v. State of J&K*[18], *Municipal Corporation, Aurangabad v. State of Maharashtra*[19], *T. Ravi v B. Chinna Narasimha*[20], *Bhimabai Mahadeo Kambekar v. Arthur Import & Export Co*[21], *Prahlad Pradhan v. Sonu Kumhar*[22], and *Ajit Kaur v. Darshan Singh*[23] and *Suraj Bhan v. Financial Commissioner*[24] to come to the conclusion that an entry in revenue records does not confer title on a person whose name appears in record-of-rights. Entries in the revenue records or Jamabandi have only a fiscal purpose i.e., payment of land revenue, and no ownership is conferred based on such entries. In so far as the title of the property is concerned, it can only be decided by a competent Civil Court.
- HC did not commit any error in setting aside the order passed by the revenue authorities and relegating the Petitioner to approach the appropriate Court to crystalize his rights based on the alleged Will dated May 20, 1998. The Special Leave Petition was accordingly dismissed.

Our view

This judgment affirms the settled position in law that if there is any dispute with respect to the title, and more particularly when the mutation entry is sought to be made based on the Will conferring such title, the party who is claiming title/right based on the will has to approach the appropriate Civil Court/Court and get his rights crystallized.

Arcelor Mittal Nippon Steel India Ltd v. Essar Bulk Terminal Ltd

Special Leave Petition (Civil) No.13129 of 2021

Background facts

- The Appellant and the Respondent entered into an agreement for cargo handling at Hazira Port. Disputes and differences having arisen under the said Cargo Handling Agreement, the Appellant invoked the arbitration clause by a notice of arbitration dated November 22, 2020. According to the Appellant, the Respondent did not respond to the notice of arbitration whereupon the Appellant approached the High Court of Gujarat (**HC**) at Ahmedabad under Section 11 of the Arbitration and Conciliation Act 1996 (**Act**), for appointment of an Arbitral Tribunal. On or about December 30, 2020, the Respondent replied to the notice of arbitration, contending that the disputes between the parties were not arbitrable and further contending that the total amount due and payable by the Appellant as on December 24, 2020 was INR 673.84 crore inclusive of interest of INR 51.11 crore.
- Both Appellant and Respondent filed an application under Section 9 of the Act in the Commercial Court.
- On or about July 16, 2021, the Appellant filed an interim application praying for reference of both the applications filed by the Appellant and the Respondent respectively under Section 9 of the Act, to the learned Tribunal. The Commercial Court dismissed the said application but granted the Appellant 10 days to challenge the order of the Commercial Court if it so desired.
- The Appellant filed R/Special Civil Application No.10492 of 2021 before HC under Article 227 of the Constitution of India challenging the order of the Commercial Court. The High Court dismissed the application, holding that the Commercial Court has the power to consider whether the remedy

[15] (1997) 7 SCC 137
[16] (2004) 12 SCC 58
[17] (2008) 8 SCC 12
[18] (2008) 9 SCC 368
[19] (2015) 16 SCC 689
[20] (2017) 7 SCC 342
[21] (2019) 3 SCC 191
[22] (2019) 10 SCC 259
[23] (2019) 13 SCC 70
[24] (2007) 6 SCC 186

under Section 17 of the Act is inefficacious and pass necessary orders under Section 9 of the Act. Hence, the present Petition.

- Submissions on behalf of the Appellant:
  - The purpose of insertion of Section 9(3) of the Arbitration Act was to curtail the role of the Court. Even though Section 9(3) does not oust the jurisdiction of the Court under Section 9(1), it restricts the role of the Court, post the constitution of an Arbitral Tribunal. Once an Arbitral Tribunal is constituted, the Court is not to entertain an application under Section 9 of the Arbitration Act unless it finds that circumstances exist which may render the remedy under Section 17 of the Act inefficacious.
  - The Commercial Court had erred in construing the word 'entertain' narrowly, observing that entertain would not mean admitting for consideration, but would mean the entire process up to its final adjudication and passing of an order on merits.
  - Reference was made to the observations of the 246th Report of the Law Commission of August 2014, that the insertion of Section 9(3) in the Act 'seeks to reduce the role of the Court in relation to grant of interim measures once the Arbitral Tribunal has been constituted'. This also appears to be the spirit of the UNCITRAL Model Law as amended in 2006. Accordingly, Section 17 of the Act has been amended to infuse the Arbitral Tribunal with the same powers as a Court.
  - The Report dated July 30, 2017, of the High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India observed that the '2015 amendments, in two important respects, signal a paradigm shift towards minimizing judicial intervention in the arbitral process. First, the amendment to Section 9 of the ACA provides that Courts should not entertain applications for interim relief from the parties unless it is shown that interim relief from the Arbitral Tribunal would not be efficacious'.
  - Section 9(3) of the Act was a measure of Negative Kompetenz-Kompetenz. This is substantiated by the corresponding introduction of Section 17(2) in the Act which lends further efficacy and enforceability to orders passed by the Arbitral Tribunal under Section 17. It is well settled that a Court becomes functus officio only after it pronounces, signs and dates the judgment. Mere dictation of a judgment after it is reserved, does not constitute pronouncement of a judgment, reference being made to the judgment of *State Bank of India and Ors v. S. N. Goyal*[25].
  - The fact that an order is reserved does not mean that the District Court stopped entertaining petitions under Section 9 of the Act. A judge can make corrections to a judgment and/or in other words continue to adjudicate and thus continue to entertain a proceeding even after a judgment is pronounced, until it is signed.
  - The Commercial Court had not passed its orders in petitions under Section 9 of the Act. It had not even pronounced its orders. Thus, as on the date of the impugned order, the Commercial Court was and is entertaining petitions under Section 9 of the Act. The fact that orders were reserved on June 7, 2021, does not mean that the Commercial Court stopped entertaining the said petitions.
  - The word 'entertain' in Section 9(3) must be interpreted in the context of Section 9(1) of the Act. Section 9(1) of the Act provides for the "making of orders" for grant of interim relief. The internal aid to construction provided under Section 9 of the Act further substantiates the Appellant's submission that entertain would necessarily mean all acts including the act of making orders under Section 9(1) of the Act.
  - In the case of *Manbhupinder Singh Atwal v. Neeraj Kumarpal Shah 2019 GLH (3) 234*, the Gujarat High Court (**HC**) held that a party which is intentionally trying to render the remedy under Section 17 of the Act inefficacious, cannot be permitted to approach the Court under Section 9 of the Act to secure interim reliefs which can be granted by the Tribunal. The intention of the Respondent was to avoid adjudication by the Arbitral Tribunal under Section 17 of the Act.
- Submissions on behalf of the Respondent:
  - The applications were finally heard on merits and reserved for orders on June 7, 2021, before the constitution of the Arbitral Tribunal on July 9, 2021.
  - Section 9(1) of the Act provides that a party will apply to the court before, during or after the arbitral proceedings. The Courts therefore do not lose jurisdiction upon constitution of the Arbitral Tribunal.
  - Section 9(3) of the Act was neither a non-obstante clause nor an ouster clause that would render the courts coram non judice, immediately upon the constitution of the Arbitral Tribunal.
  - Subject to the checks and balances provided under the Act itself, a Court would continue to have powers to grant interim relief under Section 9 of the Act.

[25] (2008) 8 SCC 92: AIR 2008 SC 2594

- Section 9(3) of the Act restrains the court from "entertaining" an application under Section 9, unless circumstances exist which may not render the remedy provided under Section 17 of the Act efficacious. In this case, only the formality of pronouncing the order in application filed under Section 9 of the Act remained. Since the application under Section 9 of the Act had been entertained, fully heard and arguments concluded, Section 9(3) of the Arbitration Act would not apply. Application is 'entertained' when the Court applies its mind to it. Entertain means 'admit into consideration' or 'admit dealing with'.

Issues at hand?

- Whether the Court has the power to entertain an application under Section 9(1) of the Arbitration and Conciliation Act, 1996 once an Arbitral Tribunal has been constituted and if so, what is the true meaning and purport of the expression 'entertain' in Section 9(3) of the Arbitration Act?
- Whether the Court is obliged to examine the efficacy of the remedy under Section 17, before passing an order under Section 9(1) of the Arbitration Act once an Arbitral Tribunal is constituted?

Decision of the Court

- Sub-Section (3) of Section 9 of the Act has two limbs. The first limb prohibits an application under sub-Section (1) from being entertained once an Arbitral Tribunal has been constituted. The second limb carves out an exception to that prohibition, if the Court finds that circumstances exist, which may not render the remedy provided under Section 17 of the Act efficacious.
- The Arbitral Tribunal has the same power to grant interim relief as the Court and the remedy under Section 17 is as efficacious as the remedy under Section 9(1) of the Act. There is, therefore, no reason why the Court should continue to take up applications for interim relief, once the Arbitral Tribunal is constituted and is in seisin of the dispute between the parties, unless there is some impediment in approaching the Arbitral Tribunal, or the interim relief sought cannot expeditiously be obtained from the Arbitral Tribunal.
- In the present case, there is no material on record to show that there were any lapses or laches on the part of the Respondent which delayed the constitution of an Arbitral Tribunal. The allegation that the Respondent had disabled itself from availing the remedy under Section 17 of the Act, is unsubstantiated. Moreover, mere delay in agreeing to an Arbitrator does not dis-entitle a party from relief under Section 9 of the Arbitration Act. Section 11 of the Arbitration Act itself provides a remedy in case of delay of any party to the arbitration agreement to appoint an Arbitrator.
- The bar of Section 9(3) of the Act operates after an Arbitral Tribunal is constituted. There can therefore be no question of usurpation of jurisdiction of the Arbitral Tribunal under Section 17 before the Arbitral Tribunal is constituted. The Court is obliged to exercise power under Section 9 of the Act, if the Arbitral Tribunal is yet to be constituted. Whether the Court grants interim relief or not is a different issue, for that would depend on the facts of the case.
- The term 'entertain' means to consider by application of mind to the issues raised. The Court entertains a case when it takes a matter up for consideration. The process of consideration could continue till the pronouncement of judgment. On a combined reading of Section 9 with Section 17 of the Arbitration Act, once an Arbitral Tribunal is constituted, the Court would not entertain and/or in other words take up for consideration and apply its mind to an application for interim measure, unless the remedy under Section 17 is inefficacious, even though the application may have been filed before the constitution of the Arbitral Tribunal. The bar of Section 9(3) would not operate, once an application has been entertained and taken up for consideration, as in the instant case, where hearing has been concluded and judgment has been reserved.
- The appeal was allowed.

Our view

This judgment is laudable since it very rightly interprets the bar under Section 9(3) and the remedy under Section 17 of the Act. The Court has relied on various judgements and passed its decision. It has rightly portrayed the relationship between an Arbitral Tribunal and the Courts and colour-shaded the greyed-out area of concurrence of jurisdiction and power derived by fora and Court under the same statute.

K.N. Nagarajappa V. H. Narasimha Reddy

2021 SCC Online SC 694

Background facts

- In these appeals by Special Leave, a common judgment in two second appeals rendered by the Karnataka High Court reversing the decree of the first appellate court, has been challenged.
- The registered sale deeds were executed on May 28, 1973, regarding distinct parcels of land. On the same day, one of the transactions related to the sale of three parcels collectively called 'the suit lands' by common sale deed - exhibited as Ex-1 was also executed. In OS No. 20/1985, the Plaintiff/Respondent and purchaser herein filed a suit for declaration of title and recovery of possession as well as mesne profits in relation to the suit properties (**first suit**).
- The claim was premised on the fact that the Plaintiff/Respondent had purchased the suit properties by the registered sale deed from the Appellants (defendants in the suit). It was contended that though the Appellants had put the Plaintiff/Respondent in possession, they moved the Land Tribunal

seeking occupancy rights and proceeded to dispossess the Plaintiff/Respondent from the suit property.

- The Appellants filed another suit (**second suit**) where it was alleged that the sale deed Ex P-1 in favor of the Respondent (**Defendant in second suit**) was a nominal one and was executed as a security for the loan advanced by the Respondent. The Appellants filed the second suit for declaration of title and permanent injunction and, in the alternative, specific performance of the agreement of sale dated May 28, 1973. The Appellants also urged and claimed being in possession of the suit properties.
- The Trial Court held that the Respondent was absolute owner of the suit properties by virtue of a registered sale deed and that the Appellants, who had filed the second suit, were in illegal possession of the suit properties. With respect to the disputes in the second suit, the Trial Court held that the Appellants failed to establish execution of the agreement for which they had sought specific performance. Aggrieved by the dismissal of the second suit as well as the decree in favor of the Respondent in the first suit, appeals were filed by the Appellants before the Additional District Judge, and it was held that the sale deed in favor of the Respondent was a nominal one and not meant to be acted upon. It was also held that the Appellants had proved the agreement to sell and were entitled to a decree for specific performance. The aggrieved Respondents approached the High Court with two second appeals.
- The High Court, after noting these facts and considering the agreement to sell relied upon by the appellant (**Ex. D-3**), held that the Trial Court's judgment and decree, based on an overall consideration of the findings before it, was sound and justified. The High Court believed in the course of a trial, the Court could examine a document under Section 73 of the Evidence Act. Since the Respondent had not admitted his signatures on Ex D-3, the Court acted within its powers to examine the admitted document and compare the signatures on it with that of the disputed documents.
- Another important circumstance which weighed with the High Court was that the Appellants did not claim themselves to be owners despite executing Ex. P-1 because in their application before the Land Tribunal (filed after executing Ex. P-1), they had admitted that the Respondents were the owners of the suit lands. In fact, the Appellants' plea was that they were tenants of the Respondent. The High Court held that there was no reason for the Appellants to put forward such a contention before the Tribunal had Ex. P-1 been merely a nominal document. The High Court noted that the Trial Court had also considered other evidence, such as the revenue records in which the Respondents were shown as khatedars. The High Court reasoned that had Ex. P-1 been only a nominal sale deed, the Appellants would not have permitted the revenue authorities to change the names of owners of land by allowing the Respondent's name to be replaced on the record.
- Submissions on behalf of Appellants:
  - The High Court fell into error, in interfering with the first Appellate Court's decree. Pointing to Section 100 of the Code of Civil Procedure (**CPC**), it was urged that in a second appeal, the High Court's jurisdiction is limited to examining only substantial questions of law. In this case, the Court proceeded to appreciate the evidence, and differ with the findings of the first Appellate Court, which is the final court of facts. Examination of documents, particularly Ex. D-3 was a purely factual aspect, which could not be, by any stretch of the imagination, considered a legal issue, much less a substantial question of law.
- Submissions on behalf of Defendants:
  - No interference with the impugned judgment was warranted. The High Court endorsed the findings of the Trial Court, which were in consonance with law and the evidence on the record. Having regard to the evidence led, the trial court noted several important features about Ex. D-3, such as lack of any details of the land or such like particulars or any mention about the interest payable; all of which rendered it suspect. Furthermore, the so-called agreement to sell was contradicted by other evidence on the record.

Issue at hand?

- Whether the High Court had the requisite jurisdiction to appreciate evidence?

Decision of the Court

- The jurisdiction which a High Court derives under Section 100 of the CPC is based upon its framing of a substantial question of law. As a matter of law, it is axiomatic that the findings of the first Appellate Court are final. However, the rule that the High Courts cannot interfere with findings of the lower Court or concurrent findings of fact, is subject to two important caveats - the first being that when the findings of fact are palpably perverse or outrage the conscience of the Court, while the other being where the findings of fact may call for examination and may be upset in the limited circumstances spelt out in Section 103 CPC.

- While referring to its judgment in the matter of *Municipal Committee, Hoshiarpur v. Punjab State Electricity Board & Narayan Sitaramji Badwaik (Dead) through LRs. v. Bisaram*, the Apex Court held that in the present facts, the High Court recorded sound and convincing reasons why the first Appellate Court's judgment required interference. These were entirely based upon the evidence led by the parties on the record. The appreciation of evidence by the first Appellate Court was based on overlooking material facts, such as appreciation of documentary and oral evidence led before the trial court, that the execution of Ex. D-3 was denied. In these circumstances, the burden was upon the Appellants to establish that the registered sale deed was a nominal document.
- The findings of the Trial Court, as was duly noticed by the High Court, recorded five cogent reasons why the Appellants' pleas could not be accepted. The deposition with respect to repayment of INR 9000 apart from being bereft of particulars, was also contrary to the provisions in as much as there was no averment on payment of interest @ 15%. Furthermore, the Appellants' application for occupancy rights made after the sale deed and the alleged agreement to sell were executed claimed that the Appellants were tenants under the Respondent. Overlooking these important aspects, the first Appellate Court fell into error in overlooking important evidence and appreciating the record in its true perspective and reversed the decree of the trial court.
- Moreover, the High Court, in second appeal proceeded to examine the documents considering the evidence led and corrected the findings as it were under Section 103 of the CPC. If the Appellants' arguments were to prevail, the findings of fact based upon an entirely erroneous appreciation of facts and by overlooking material evidence would necessarily have to remain and bind the parties, thereby causing injustice. It is precisely for such reasons that the High Courts are empowered to exercise limited factual review under Section 103 CPC. Exercise of such power cannot be doubted. While the impugned judgment does not expressly refer to that provision, it is evident that the High Court exercised the power in the light of that provision.
- The Apex Court held that having regard to the overall circumstances, the impugned judgment did not call for interference in exercise of Special Leave jurisdiction, which power is available to the Apex Court even at the stage of final hearing.

Our view

The rule that the High Courts cannot interfere with findings of the lower Court or concurrent findings of fact, is subject to two important caveats - the first being that when the findings of fact are palpably perverse or outrage the conscience of the Court, while the other being where the findings of fact may call for examination and may be upset in the limited circumstances spelt out in Section 103 CPC. This judgment establishes a judicial precedent while maintaining the distinction on powers of the High Courts in absence of the two caveats.

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