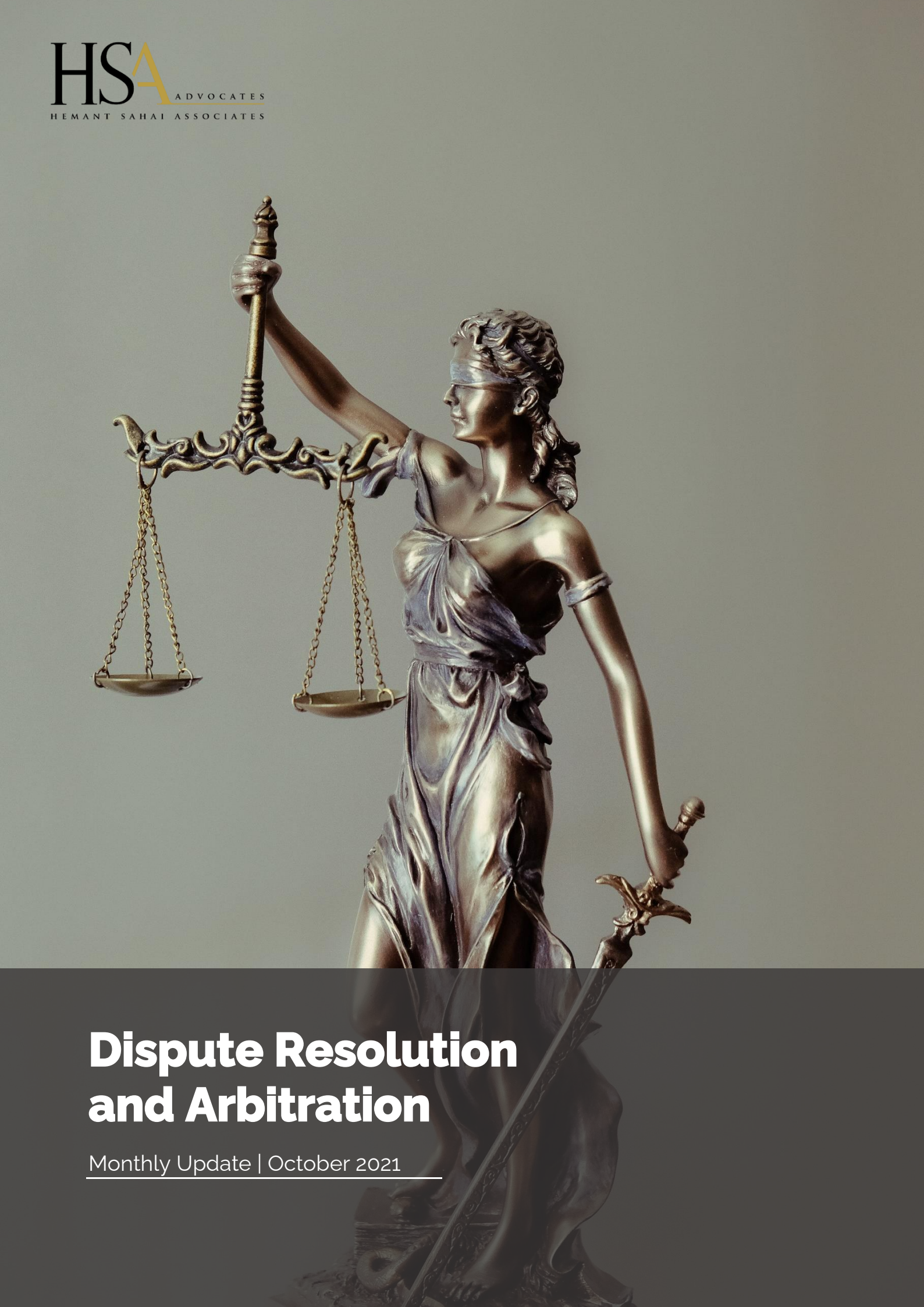
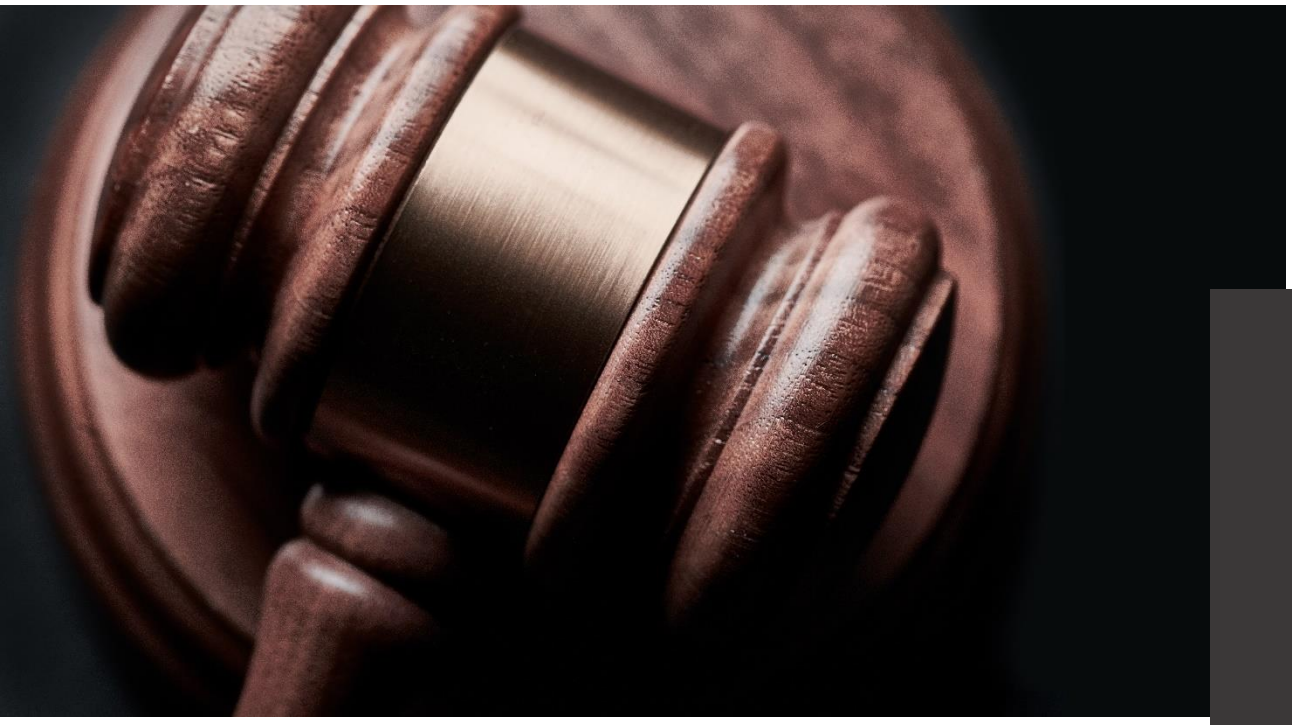
HSA ADVOCATES
HEMANT SAHAI ASSOCIATES



Dispute Resolution and Arbitration

Monthly Update | October 2021

DISPUTE RESOLUTION AND ARBITRATION UPDATE



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

Civil Appeal No. 5700 of 2021 arising out of Special Leave Petition (Civil) No.13129 of 2021

Background facts

- A Cargo Handling Agreement was executed between Arcelor Mittal Nippon Steel India Ltd (**Appellant**) and Essar Bulk Terminal Ltd (**Respondent**). Article 15 of the said Cargo Handling Agreement provided that all disputes arising out of this agreement were to be settled in Courts, in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (**Act**) and be referred to a sole Arbitrator appointed mutually by the parties.
- Due to a fall-out between the parties, the Appellant invoked the arbitration clause by a notice of arbitration dated November 22, 2020. Since there was no response from the Respondent, an application under Section 11 of the Arbitration and Conciliation Act, 1996 (**the Act**) was filed by the Appellant in the High Court of Gujarat (**HC**). A delayed response to the notice of Arbitration was generated by the Respondent wherein it was strongly contended that the disputes raised therein were not arbitrable.
- On or about January 15, 2021, the Appellant filed an application being Commercial Civil Miscellaneous Application No.2 of 2021 under Section 9 of the Act in the Commercial Court and the 12th Additional District Judge, District & Sessions Court at Surat. On March 16, 2021, the Respondent also filed an application being in the Commercial Court under Section 9 of the Act.
- The Commercial Court and 12th Additional District Judge, District & Sessions Court at Surat, heard both the applications filed by the Appellant and the Respondent respectively, under Section 9(1) of the Act and reserved the same for orders on June 7, 2021.
- Appointed on July 09, 2021, three retired judges of the HC formed Arbitral Tribunal to adjudicate upon the disputes between the parties.
- The Appellant and Respondent filed applications under Section 9(1) of the Act which were heard by Commercial Court and 12th Additional District Judge, District & Sessions Court at Surat and the same were reserved for orders on June 07, 2021.

- Subsequently, on July 16, 2021, the Appellant filed an interim application in the Commercial Court praying for reference of both the pending applications under Section 9(1) of the Act to the learned Arbitration Tribunal.
- On dismissal of the interim application on July 16, 2021, the Appellant filed an application in the HC under Article 227 of the Constitution of India challenging the order of the Commercial Court. The HC while dismissing the application on August 17, 2021, held that the Commercial Court has the power to consider whether the remedy under Section 17 of the Act is inefficacious and pass necessary orders under Section 9 of the said Act (**Impugned Order**).
- Aggrieved by the impugned Order, the Appellant challenged the same before the Supreme Court.

Issues at hand?

- Whether the Court has the power to entertain an application under Section 9(1) of the Act, 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 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 Act once an Arbitral Tribunal is constituted?

Decision of the Court

- SC elucidated that the power vested in the Arbitral Tribunal to grant interim relief is the same power conferred on the Court and the remedy under Section 17 is as fruitful as the remedy under Section 9(1) of the Act. The SC referred to the decision of *Energo Engineering Projects Ltd. v TRF Limited*[1] wherein the Delhi High Court passed an interim order under Section 9 of the Act after exercising its discretion that the remedy of interim relief under Section 17 would be inefficacious.
- The SC considered the judgement of the Division Bench of Delhi High Court in *Benara Bearings & Pistons Ltd v Mahle Engine Components India Pvt Ltd*[2] wherein it was clarified that Section 9(3) does not operate as an ouster clause insofar as the Courts powers are concerned and therefore, the constitution of the Arbitral Tribunal by itself does not snatch away the power from the Court to deal with an application under Section 9(1) of the Act.
- The SC enunciated the principles laid down in *Srei Equipment Finance Ltd (Sefl) v Ray Infra Services Private Ltd & Anr*[3] wherein the Calcutta High Court held that a Court is not to entertain an application under Section 9(1) of the Act, once the Arbitral Tribunal has been constituted, unless the Court finds that a situation exists, which leaves the remedy provided under Section 17 inefficacious.
- About deciphering the meaning of the word 'entertain' in section 9(3) of the Act, the SC leant on *Lakshmi Rattan Engineering Works Ltd v Asst. Commissioner Sales Tax, Kanpur and Anr*[4] and *Kundan Lal v Jagan Nath Sharma*[5] and concluded that 'entertain' means to consider the issues raised by application of mind. In this context, the SC highlighted that the bar of Section 9(3) would not operate, once an application has been entertained i.e., taken up for consideration, as in the instant case, where hearing has been concluded and judgment has been reserved
- The SC without mincing words expressed that when an application has already been taken up for consideration and is in the action of consideration or has already been considered, to deliberate at this stage the question of examining whether remedy under Section 17 is efficacious or not would not arise. Thereafter, the SC stated that Section 9(1) enables the parties to an arbitration agreement to approach the appropriate Court for interim measures before the commencement of arbitral proceedings, during arbitral proceedings or at any time after the making of an arbitral award but before it is enforced and in accordance with Section 36 of the Arbitration Act.
- In the light of the above, the SC answered both the issues in affirmative and held that the High Court has rightly directed the Commercial Court to proceed to complete the adjudication. Lastly, the SC advanced that it shall not be necessary for the Commercial Court to consider the efficacy of relief under Section 17, since the application under Section 9 has already been entertained and considered by the Commercial Court.

Our view

The SC's decision that the bar under Section 9(3) operates only when the application under Section 9(1) had not been entertained till the constitution of the Arbitral Tribunal clears all the hurdles faced by parties who seek interim reliefs under Section 9(1) of the Act when the Arbitral Tribunal has already been appointed. The key takeaway from this decision is that the interpretation of Section 9(3) does not exclude the jurisdiction of the Courts to grant interim relief once the Arbitral Tribunal is constituted. The SC has made several noteworthy observations regarding the discretion which is to be compulsorily exercised in examining if the remedy under Section 17 of the Act is futile or not while considering a Section 9(1) application.

[1] 2016 SCC OnLine Del 6560
[2] 2017 SCC OnLine Del 7226
[3] (2016) SCC OnLine Cal 6765
[4] AIR 1968 SC 488
[5] AIR 1962 All 54

P v. A & Ors

Suit No. 142 of 2021 before the High Court of Judicature at Bombay

Background facts

- The Bombay High Court (**HC**) addressed a range of issues revolving around the Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act) and Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Rules, 2013 (POSH Rules).

Issue at hand?

- Whether there shall be any minimum standards or guidelines which can be set by the HC for cases related to sexual harassment at workplace under the POSH Act and POSH Rules, 2013?

Decision of the Court

- At the outset, the HC observed that it was imperative to protect the identities of the parties in the proceedings under POSH Act and noted that there were no established guidelines so far towards anonymity. Therefore, the HC decided to establish guidelines as a minimum requirement for setting out a working protocol for future orders, hearings, and case file management.
- The HC issued guidelines under different subgroups as follows:
  - **Orders:** The HC issued directions that the parties names in order sheets should not be mentioned and it can be 'A v B', 'Y v Z' and so on. In the body of the order, the parties should not be referred by their real name; rather, they will be referred as Plaintiff and Defendant. Any Personally Identifiable Information (**PII**) such as telephone numbers, email ids, and addresses will not be mentioned in body of the order. Moreover, the orders or judgments will be pronounced privately i.e., in chambers or in camera, which will not be allowed to be uploaded.
  - **Filing protocols**: While filing any application, affidavit or pleading, the Registry will not be permitted to retain any PII document, and it is only at the time of verification that the Registry can ask for the identity documents for identifying the Deponent. The Registry is also prohibited from entering PII of any of the parties or witnesses in Case Information Statement. Additionally, the parties are required to use anonymous titles in further affidavits which are filed in the proceedings.
  - **Access**: The HC directed that the Registry shall only permit the Advocate-on-Record having a valid and current vakalatnama for inspection or copies of any filing or order. All records are required to be sealed, including fresh filings, and can only be given to any person by the order of the Court. Further, third-party solution providers cannot digitalize the record without the order of the Court and prior directions for permitting the same are required to be sought from the Court. The HC clarified that the witness depositions will not be uploaded under any circumstances.
  - **Hearings**: The HC directed that the hearings under POSH Act would be conducted only in private i.e., in-camera or in Chambers and the parties must attend it physically as conducting online or hybrid hearings is prohibited. During the hearing, only the Advocates, litigants, the Court Associate, and the stenographer are allowed to attend hearings and all the other support staff such as peons and clerks are required to leave the Court.
  - **Directions to Certified Copy Department**: The HC instructed the Certified Copy Department not to raise any objections pertaining to the difference in the long or short title of the case and the order in question. The HC also directed the parties to work using an authenticated, ordinary or digitally signed copy of every order to the extent possible.
  - **Public access:** The HC stated that order of the Court is necessary for releasing any order into the public domain, and it can be released only when it is in fully anonymized version.
  - **Breach:** The HC reiterated the absolute prohibition on publishing PII and stated that it will also be applicable in instances where the information about the parties has been obtained by using the contents of a judgment or order to discover information already in the public domain. Further, the HC directed all persons, including the media, to ensure strict compliance relating to anonymity, failing which it shall lead to a contempt of Court.
  - **Media disclosure forbidden**: The HC issued directions to parties, advocates, and witnesses to restrain them from disclosing the contents of the order or judgment and filing to media or publishing such content in any mode including social media. Specific leave is required from the Court for disclosing the same. Additionally, witnesses are required to sign a statement of non-

Our view

The HC's Order issuing guidelines on POSH Act and POSH Rules is a landmark step as it is the first to observe the actual procedural aspects of matters arising out of sexual harassment at workplace. The Order will protect the identities of the parties from disclosure in proceedings under the Act. While the present Order is a welcome step, the legislature may take the guidelines into consideration and ensure strict compliance of the procedure by virtue of notification or amendment to the Act.

disclosure and confidentiality. The HC clarified that these guidelines bind all concerned persons, and failure to abide by these conditions shall also be considered as a contempt of Court.

- **Recording prohibited**: The HC prohibited recording of the proceedings in any form and violation of the same will attract punishment for contempt of Court.
- **Industrial/Labor Court proceedings**: The HC directed that these abovementioned guidelines shall be strictly followed by the Industrial/Labor Court and a copy of this order shall be sent to the president of the Industrial/Labor Court for compliance.

- The HC disposed of the matter by observing that the Order sets out general guidelines and does not address the merits. It is permitted to be uploaded and these are only initial guidelines, which shall necessarily be subject to modification as needed.

Dipali Biswas and others v. Nirmalendu Mukherjee and others

LL 2021 SC 538

Background facts

- In the present case, the Supreme Court dealt with a civil suit in which an execution proceeding of a simple money decree (INR 3000) against Appellant was delayed for more than 50 years. The Petition was filed under Section 47 of CPC on the ground that essential requirement during auction was not followed which is a mandate of Order XXI Rule 64. The SC dismissed the appeal in the 5th round of litigation after a pendency of 9 years.
- In 1971, a civil suit was filed for recovery of money against Sasadhar Biswas who was the predecessor of the Appellant in the present case. In 1974, an ex-parte decree was passed against the Defendant. The proceeding for execution was invoked against property of Defendant in 1975. Biswas after the sale proclamation filed an application to set aside the sale on the ground of fraud and material irregularities. However, the application was rejected.
- In 1979, an auction sale for a bid amount of INR 5500 was conducted and pursuant thereafter an application under Order XXI Rule 90 was filed by Biswas to set aside the auction based on irregularities in the sale proclamation. During the pendency of the petition Biswas entered a compromise with the auction purchaser. However, Biswas did not deposit the entire amount and the Court closed the execution proceedings recording full satisfaction.
- Biswas next filed a fresh suit to set aside the auction sale as void, which got dismissed. Simultaneously, Biswas filed a revision petition challenging the sale certificate issued to the auction purchasers, which ultimately got dismissed by the High Court after seven years in 2001.
- Biswas had constructed a building in the suit property. In 2002, the trial court allowed an application filed by the auction purchasers seeking delivery of possession of the property after demolishing the building. In the meantime, Biswas expired, and his legal representatives appealed against the order passed by the trial court allowing delivery of possession. The SLP was then dismissed by the SC in 2006.
- The legal representatives filed a fresh application under Section 47 of the Code of Civil Procedure on the ground that the sale did not follow the mandate of Rule 64 of the Order XXI of the CPC. As Rule 64 states, that only that portion of the property should be sold to satisfy the decree amount.

Issue at hand?

- Whether Petition filed by Appellant under Section 47 of Code of Civil Procedure for violation of the mandate of Order XXI Rule 64 is maintainable or not?

Decision of the Court

- At the outset, the SC observed that the present case has taken a long time to be disposed of. The Appellant on several stages (5 rounds) have tried to invoke various provisions of Code of Civil Procedure to delay the proceedings of the execution decree, which was passed by the lower court in 1971 in a money suit for recovery of a small amount of INR 3000. The SC by dismissing the Appeal expressed its opinion that this could be the final knock out round as the Appellant has time and again tried to delay the execution proceedings.
- Since the Appellants have initiated litigation over five decades to stall the execution of a civil decree, the SC compared the Party (**Appellant**) with the tireless Vikramaditya who made various attempts to capture 'Betal'. The Court stated that the Appellant is not allowed to raise any questions relating to the contravention of Order XXI, Rule 64 and dismissed the Petition on merits based on the below mentioned reasons:
  - The objections with respect to Order XXI Rule 64 were not raised in the earlier stages of the case and the Petitioner for the first time has raised such an objection in 2006.

Our view

The SC's decision clearly states that when a party has the right to raise objections, they should adopt the remedy available at the earliest and cannot raise objections in instalments decades later intentionally to delay the proceedings. The SC caustically remarked that the present case is fit to be included in the syllabus of law schools as a study material for students to get equipped with the various provisions of the Code related to execution proceedings. The SC's decision closes the door for unreasonable delay by the Appellants in the disguise of availing remedies available to them under the Civil Procedure Code, 1908.

- The SC noted that the party had enough opportunities to make objections in earlier rounds. A judgment-debtor (**Appellant**) in execution proceedings cannot be allowed to make objections in instalments. The Appellants had sufficient time to raise objections at an earlier stage.
- The SC observed that under the present case of execution proceedings, the principle of res judicata provided in Section 11 of CPC will be applicable and thus, suit is to be barred based on res judicata. The SC opined that since the original judgment-debtor had already filed a petition under Section 47 of CPC on September 02, 1975, the principle of res judicata was not applicable to execution proceedings prior to 1976, but Explanation VII of section 11 in 1976 specifically states that the provisions of the Section were applicable to the former execution proceeding as well. Therefore, the execution proceeding under section 47 filed after 1976 will be barred by res judicata.
- The SC stated that the property for execution was only 7450 square feet which is incapable of division.
- Justice Ramasubramanian, while arriving at a decision held that, 'the Appellants have now exhausted almost all provisions available to judgement debtor to stall execution and the case on hand is fit to be included in the syllabus of a law school as a study material for students to get equipped with the various provisions of the Code relating to execution'.

- The SC held that the Appellant failed to prove its claim of making the auction an invalid one based on jurisdictional error. Moreover, the SC upheld the decision of the HC in rejecting the claim of Petitioner under Order XXI Rule 64 at the 4th round.

Rajendra Bajoria & Ors v. Hemant Kumar Jalan & Ors

Civil Appeal Nos. 5819-5822 of 2021 arising out of S.L.P. (C) Nos. 2779-2782 of 2019

Background facts

- In the instant case, Mr. Rajendra Bajoria & others (**Appellants-Plaintiffs**) and Mr. Hemant Kumar Jalan & others (**Respondents-Defendants**) are the legal heirs of the deceased original partners of Soorajmull Nagarmull, the partnership firm which was constituted under a Deed of Partnership in 1943. A suit was filed by the Plaintiffs before the Calcutta High Court in 2017, seeking various reliefs relating to the assets and properties of the firm. Subsequently, the Defendants filed two applications seeking dismissal of the Suitor alternatively, the rejection of the Plaint on the following threefold grounds:
  - The Plaint did not disclose any cause of action
  - The relief as claimed in the Plaint could not be granted
  - The Suit was filed beyond the period of limitation
- However, the Ld. Single Judge dismissed the applications and rejected the submissions of the Respondents. Discontented by this, the Respondents filed appeals before the Division Bench of the HC to challenge the aforesaid Order. The HC refused to grant the reliefs sought in the Plaint and therefore, reversed the impugned order by rejecting the Plaint.
- Aggrieved by this, the Appellants filed appeals in the Supreme Court (**SC**) to challenge the Order of the Division Bench of the HC.

Issue at hand?

- Whether the relief as claimed in the Plaint can be granted to the Appellants-Plaintiffs or not?

Decision of the Court

- At the outset, the SC pored over the entire pleadings and averments in the Plaint to ascertain whether a cause of action is made out or not. Furthermore, the SC summarized the principles laid down by it in the case of *T. Arivandandam v T.V. Satyapal and Another*[6] that if a brilliant drafting has created a pseudo-vision of a cause of action but on a meaningful reading thereof it is discovered that the pleadings do not reveal an apparent right to sue, then the Court should exercise its power under Order VII Rule 11 of Civil Procedure Code, 1908 (**CPC**) and that such a suit must be aborted at the first hearing itself. The SC also noted its observations in *Pearlite Liners Pvt Ltd v Manorama Sirs*[7] wherein it was held that if the Court finds that no relief can be granted to the Plaintiff then such a Suit should be discarded at the threshold.
- The SC advanced that the HC has deeply probed on the issue as to whether applying the provisions of the said Act read with the aforesaid clauses in the Partnership Deed, the reliefs, as claimed in the

Our view

This case set binding precedent in decongesting the clogged Court system filled with artificial litigations The SC's decision that a Plaint must be rejected under Order VII Rule 11 of the CPC if reliefs claimed in it cannot be granted proved that if you do not have actual cause of action, it ought to be wiped out at the rudimentary stage. The judgement has without the pale of doubt cleared that the Courts must meaningfully read the skilfully drafted Plaint that creates an impression of the non-existent cause of action and throw out the Suit there and then.

[6] (1977) 4 SCC 467
[7] (2004) 3 SCC 172

Plaint, could be granted or not. The SC completely endorsed the findings of the HC that even after taking the averments in the Plaint at face value, not even a single relief sought could be granted.

- Additionally, the SC threw light on its judgement in *Dahiben v Arvindbhai Kalyanji Bhanusali (Gajra) Dead Through Legal Representatives and Others*[8] which dealt with similar nature of facts wherein the underlying object of Order VII Rule 11 of CPC was highlighted, and as a matter of fact, it was expressed that when a Plaint does not communicate a cause of action then it will be indispensable to cut-off the sham litigation so that further judicial time is not wasted.
- In synchrony with the HC which concluded that the reliefs as sought in the plaint, cannot be granted, the SC answered the issue in negative and dismissed the appeals.

PNB Housing Finance Ltd v. Mr. Mohit Arora

Company Petition No. (IB)-395(ND)2021

Background facts

- In the present case, PNB Housing Finance Ltd (**Applicant/Financial Creditor**) had filed an application before National Company Law Tribunal (**NCLT**) against Mr. Mohit Arora being Personal Guarantor (**Respondent**) for initiating the insolvency resolution under Section 95(1) of IBC, 2016.
- A loan agreement was executed on March 10, 2017 between the Applicant and corporate debtor Supertech Ltd along with its co-borrowers. Simultaneously, the Respondent executed an irrevocable Deed of Guarantee according to which in case of default he will be liable to pay the debt which is payable by the corporate debtor.
- Subsequently, the corporate debtor violated the terms of the Loan Agreement by committing default in paying instalments in 2019 and was declared to be as 'Non-Performing Asset' by the Applicant.
- Pursuant to the aforesaid, the Applicant invoked the personal guarantee which was executed by Guarantor and issued a Demand Notice which was sent to the Personal Guarantor through Speed Post. The notice was duly served. Finally, the Applicant filed an application before NCLT under Section 95(1) of IBC for initiation of IR Process against the Respondent.
- The Counsel for the Respondent opposed the application made by Applicant based on the ground of maintainability and lack of jurisdiction. The Respondent submitted before the NCLT that since in the present case the Liquidation/CIRP proceeding against the corporate debtor has not yet initiated, so in that circumstances the application can be filed before Debt Recovery Tribunal (**DRT**) where Guarantor is residing and not before NCLT.

Issue at hand?

- Whether commencement of CIRP of the Corporate Debtor is a prerequisite for the maintenance of application for initiating IR Process of the Personal Guarantor before NCLT under Section 95 of IBC?

Decision of the Court

- At the outset, the NCLT after analyzing Section 179(1) of IBC observed that it is quite clear from the provision that whenever Section 60 of the Code is attracted then in that case Section 179 shall not be applicable which gives DRT the jurisdiction to deal with the insolvency matters.
- The NCLT then interpreted Section 60 of IBC to find out the appropriate jurisdiction which will be applied in the present case. The NCLT relied on the case of *Lalita Kumar Jain v Union of India*[9] for interpreting the said section. It was noted by NCLT after analyzing Section 60(1), 60(2) & 60(3) that the provision indicates the following three situations where the Adjudicatory authority **(NCLT**) will have jurisdiction:
  - When CIRP or Liquidation process has not been commenced Section 60(1)
  - When the IR process is initiated and is pending Section 60(2)
  - When transfer of insolvency proceedings is done from DRT to NCLT

  The NCLT observed that Section 60(1) was attracted and hence NCLT will have jurisdiction even when the CIRP is not being initiated against corporate debtor.
- The NCLT further relied upon various definitions pertaining to personal guarantor and applied those definitions to present case. While relying upon definition under Rule 3(f) of the Personal Guarantor

Our view

The decision of the NCLT has brought clarity with respect to the jurisdiction of NCLT and DRT in CIRP of Personal Guarantors. It is evident from the judgment of NCLT that Section 179(1) of the Code is subject to Section 60 as DRT will have jurisdiction only when NCLT does not have jurisdiction under Section 60. Moreover, the case can be considered to be a landmark one as NCLT has stated that initiation of CIRP can be commenced against Guarantor when the CIRP is pending before NCLT and initiation of such process against Corporate-Debtor is not a pre-requisite to initiate CIRP against Personal Guarantor under Section 95 of the Code. The present judgment has settled the controversy of jurisdiction of DRT and NCLT and can be said to be in the interest of Financial Creditors.

[8] (2020) 7 SCC 366
[9] Case (Civil) No. 245/2020

Rule, 2019, the NCLT opined that the definition nowhere provides that the CIRP against corporate debtor is pre-requisite to initiate the IRP against the Guarantor.

- With respect to Section 60(1), the NCLT noted that it will have jurisdiction where applications relating to Insolvency and Bankruptcy (**IB**) against corporate debtor is pending before the NCLT. Since, in the present case, IB applications are pending against corporate debtor, so at that very moment the NCLT acquires jurisdiction as Section 60(1) of IBC is attracted.
- The NCLT concluded that where initiation of CIRP is pending before NCLT, then in such a case commencement of CIRP is not pre-requisite condition for maintenance of an application provided under Section 95 of IBC.
- NCLT held that it is prima facie evident that default has been committed by Debtor/Guarantor in repayment of loan along with its interest. Further, while relying on a case of *Ravi Ajit Kulkarni v State Bank of India*[10], stated that as appearance was made by the Guarantor on advance notice, so there is no requirement of serving the notice. Accordingly, the Application was admitted, interim moratorium commenced, and a Resolution Professional proposed by the Creditor was accordingly appointed who was directed to examine the application and issue a report as per Section 99.

Garg Builders v. Bharat Heavy Electricals Ltd

2021 SCC OnLine SC 855 Civil Appeal No. 6216 of 2021

Background facts

- Bharat Heavy Electricals Ltd (**Respondent**) floated a tender for construction of boundary wall at its 2x750 MW Pragati III Combined Cycle Power at Bawana, Delhi.
- M/s Garg Builders (**Appellant**) submitted its bid for the project which was accepted by the Respondent pursuant to which the Respondent issued a Letter of Intent (**LOI**) to the Appellant dated September 09, 2008. Subsequently, the parties entered a contract on October 24, 2008 (**Contract**) which inter alia contained a clause which barred payment of any interest on Earnest Money Deposit, Security Deposit or on any moneys due to the contractor by the Respondent.
- Disputes arose between the Parties with respect to the aforesaid contract and subsequently the Appellant filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (**the Act**) whereby Mr. Justice M.A. Khan was appointed as the sole arbitrator.
- The Ld. Arbitrator awarded pendente lite and future interest at the rate of 10% p.a. to the Appellant on the award amount from the date of filing of the claim petition i.e., December 02, 2011, till the date of realization of the award amount.
- Respondent challenged the said Award under Section 34 of the 1996 Act before the Delhi High Court on the ground that the learned Arbitrator, being creature of the arbitration agreement, travelled beyond the terms of the contract in awarding pendente lite interest on the award amount as the same was expressly barred in terms of the contract.
- It was held that the Arbitrator fell in error in holding that the aforesaid clause only prescribed - pre-reference interest and not pendente lite interest. The Division Bench of the High Court has upheld the judgment and order of the Single Judge in the impugned order.
- **Submissions of the Appellant before the Supreme Court**:
  - The Appellant contended that the Ld. Arbitrator had taken a plausible view in terms of the Clause 17 of the Contract and held that the said clause does not bar the payment of interest for pendente lite period.
  - Reliance was placed on *Ambica Construction v Union of India*[11] wherein the Appellant was held entitled for the payment of interest for the pendente lite period. Reliance was also placed on *Raveechee and Company v Union of India*[12].
  - The Appellant argued that Clause 17 of the Contract barring payment of interest to the contractor on any sum due to the contractor is ultra vires and against the provisions of Section 28 of the Indian Contract Act, 1872.
- **Submissions of the Appellant before the Supreme Court:**
  - Respondent submitted that Section 31(7)(a) of the Act gives paramount importance to the contract entered between the Parties and categorically restricts the power of an arbitrator to

[10] Company Appeal (AT) Insolvency No. 316 of 2021
[11] *(2017) 14 SCC 323*
[12] (2018) 7 SCC 664

award pre-reference and pendente lite interest when the parties themselves have agreed to the contract. It was further argued that if the contract itself contains a specific clause which expressly bars the payment of interest, then it is not open for the arbitrator to grant pendente lite interest.

- Respondent further submitted that Section 3 of the Interest Act 1978 confers power on the Court to allow interest in the proceedings for recovery of debt, damages or in proceedings in which a claim for interest is already paid. However, Section 3(3) of the Interest Act 1978 recognizes the right of the parties to contract out of the payment of interest arising out of any debt or damages and sanctifies contracts which bars such payment. Therefore, Clause 17 of the Contract is not violative of any the provisions of the Indian Contract Act, 1872.

Issues at hand?

- Whether the Arbitrator can grant pendente lite interest if the Contract contains a specific clause expressly barring payment of interest?
- Whether Clause 17 of the Contract is ultra vires in terms of Section 28 of the Indian Contract Act, 1872?

Decision of the Court

- The law relating to award of pendente lite interest by the arbitrator under the Act is no longer res integra. The provisions of the Act give paramount importance to the contract entered between the parties and categorically restricts the power of an arbitrator to award pre-reference and pendente lite interest when the parties themselves have agreed to the contrary.
- If the contract prohibits pre-reference and pendente lite interest, the arbitrator cannot award interest for the said period. In the present case, clause barring interest is very clear and categorical. It uses the expression 'any moneys due to the contractor' by the employer which includes the amount awarded by the arbitrator.
- The Apex Court referred to the cases of *Sayeed Ahmed and Company v State of Uttar Pradesh & Ors*[13], *Sree Kamatchi Amman Constructions v Divisional Railway Manager (Works), Palghat*[14] and *Sri Chittaranjan Maity v Union of India*[15] and was of the view that if the contract bars payment of interest, the arbitrator cannot award interest from the date of cause of action till the date of award. As such, the arbitrator cannot award interest for the pre-award period if the contract prohibits award of interest for such period.
- It was also held that the *Ambica Construction (supra)* and *Raveechee and Company (supra)* was decided under the Arbitration Act, 1940 whereas the instant case falls under the Act passed in 1996. Hence, the said precedents have no application to the facts of the present case.
- In so far as Section 28 of the Indian Contract Act 1872 is concerned, a contract is void to the extent it restricts a party from enforcing his rights by usual proceedings in ordinary courts or if it limits the time within which he may enforce his rights.
- Exception I to Section 28 saves contracts where the right to move the Court for appropriate relief is restricted but where the parties have agreed to resolve their dispute through arbitration. Thus, a lawful agreement to refer the matter to arbitration can be made a condition precedent before going to courts and it does not violate Section 28 of the Contract Act 1872. No cause of action then accrues until the Arbitrator has made the award and the only amount awarded in such arbitration is recoverable in respect of the dispute so referred. Section 31(7)(a) of the Act which allows parties to waive any claim to interest including pendent lite interest and the power of the Arbitrator to grant interest is subject to the agreement of the parties.
- The provisions of Section 3(3) of the Interest Act 1978 explicitly allow the parties to waive their claim to an interest by virtue of an agreement while Section 3(3)(a)(ii) states that the Interest Act 1978 will not apply to situations where the payment of interest is 'barred by virtue of an express agreement'.
- When there is an express statutory permission for the parties to contract out of receiving interest and they have done so without any vitiation of free consent, it is not open for the Arbitrator to grant pendent lite interest. As such, Clause 17 of the Contract is not ultra vires in terms of Section 28 of the Indian Contract Act, 1872.
- The Appeal was dismissed.

Our view

This judgment supports the settled legal position of contractual right of the parties to waiver of claims towards interest and the arbitrator is bound by such contractual conclusion. The Court has favoured party autonomy which is the very essence of the laws of arbitration as applicable in India, thereby lending precision and certainty to contractual stipulations and encouraging arbitration as a mode of dispute.

[13] (2009) 12 SCC 26
[14] (2010) 8 SCC 767
[15] (2017) 9 SCC 611

Gujarat State Disaster Management Authority v. M/s Aska Equipments Ltd

Civil Appeal No. 6252 of 2021

Background facts

- A dispute arose between the parties regarding payment of goods which was taken by the Appellant. The proceedings under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 **(MSME Act**) commenced. The Facilitation Council passed an award dated November 10, 2017 (**Award**) in favor of the Respondent herein and directed the Appellant to pay a sum of INR 105,053,387.
- Feeling aggrieved by the Award, the Appellant preferred an application before the learned Additional District Judge (Commercial), Dehradun under Section 34 of the Arbitration & Conciliation Act, 1996 (**Arbitration Act**) read with Section 19 of the MSME Act. As per Section 19 of the MSME Act, the Appellant was required to deposit 75% of the amount awarded by the arbitrator. An application for waiver of pre-deposit was preferred which came to be dismissed. Thereafter vide order dated August 22, 2019, the Additional District Judge (Commercial), Dehradun granted one month's time by way of last opportunity to the Appellant to deposit the said amount.
- Feeling aggrieved by the said order, the Appellant herein preferred writ petition before the High Court (**HC**). By the impugned judgment and order, the HC has dismissed the said writ petition. Even while dismissing the writ petition, the HC granted further eight weeks' time to the Appellant to deposit 75% of the awarded amount.
- Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the HC, the Appellant herein preferred the present appeal.
- **Submissions of the Appellant before the Supreme Court:**
  - Prayed to dispose of the present appeal as while issuing notice on October 23, 2019, this Court directed the Appellant to deposit a sum of INR 2,50,00,000 before the Appellate Authority and on such deposit the Appellate Court was directed to take up the appeal on file and proceed with the same.
- **Submissions of the Respondent before the Supreme Court:**
  - The Respondent submitted that it is mandatory to deposit 75% of the awarded amount as a pre-deposit at the time when the appeal/application under Section 34 of the Arbitration Act read with Section 19 of the MSME Act is preferred. The Respondent submitted that the directed deposit vides ex-parte order dated October 23, 2019, is not even 25% of the amount awarded.
- The Respondent referred to the judgement of *Goodyear India Ltd v Norton Intech Rubbers Pvt Ltd*[16] wherein Section 19 of the MSME Act has been interpreted by the Apex Court and it is observed and held that requirement of deposit of 75% as a pre-deposit is mandatory.
- The expression 'in the manner directed by such court' in Section 19 has been interpreted by this Court and it is held that the expression 'in the manner directed by such court' would indicate the discretion given to the Court to allow the pre-deposit to be made in instalments, if deemed necessary. It is submitted that otherwise the deposit of 75% as a pre-deposit is mandatory and the Appellate Court would have no discretion at all to deviate from the mandate under Section 19 of the MSME Act.

Issue at hand?

- Whether in an appeal/application filed under Section 34 of the Arbitration & Conciliation Act, 1996 read with Section 19 of the MSME Act 2006, the Appellate Court would have any discretion to deviate from deposit of 75% of the awarded amount as a pre-deposit?

Decision of the Court

- On a plain/fair reading of Section 19 of the MSME Act read with Section 34 of the Arbitration Act, the Applicant/Appellant must deposit 75% of the amount in terms of the award as a pre-deposit. The requirement of deposit of 75% of the amount in terms of the award as a pre-deposit is mandatory. However, at the same time, considering the hardship which may be projected before the Appellate Court and if the Appellate Court is satisfied that there shall be undue hardship caused

[16] (2012) 6 SCC 345

to the Appellant/Applicant to deposit 75% of the awarded amount as a pre-deposit at one go, the Court may allow the pre-deposit to be made in instalments.

- The Court referred to the case of *Goodyear India Ltd v. Norton Intech Rubbers Pvt Ltd*[17] and was of the view that the provision, no doubt, requires pre-deposit to be made before an application under Section 34 of the Arbitration Act is filed, but they were not inclined to read that provision into the provision in question. The expression 'in the manner directed by such court' would indicate the discretion given to the court to allow the pre-deposit to be made, if felt necessary, in instalments.
- Considering the language used in Section 19 of the MSME Act and the object and purpose of providing deposit of 75% of the awarded amount as a pre-deposit while preferring the application/appeal for setting aside the award, it must be held that the requirement of deposit of 75% of the awarded amount as a pre-deposit is mandatory. Therefore, as such, both the High Court as well as the Additional District Judge (Commercial), Dehradun were justified in directing the Appellant to deposit 75% of the awarded amount as a pre-deposit.
- The appeal was disposed of accordingly.

Our view

The Apex Court reiterated the settled position in law and answered the question of pre-deposit being mandatory in terms of Section 34 of the Arbitration Act read with Section 19 of the MSME Act, while at the same time reiterating the discretion of the Court to command such pre-deposit in instalments on facts of the case.

Kayalulla Parambath Moidu Haji v. Namboodiyil Vinodan

2021 SCC OnLine SC 675

Background facts

- The present appeal challenges the judgment and order of the Kerala High Court (**HC**) dated August 21, 2019 & February 10, 2020.
- The Appellant-Plaintiff had filed a plaint in respect of the suit property claiming that it belonged to him by virtue of the registered assignment deed executed by Kalariyullathil Paru.
- The case of the Respondent-Defendant was that the property described in the plaint schedule and the property shown to the Advocate Commissioner was different. The property to the extent of 52½ cents belonging to the Respondent-Defendant, despite not being included in the assignment deed of 1977, was being claimed by the Appellant-Plaintiff to be in his possession. It was the case of the Respondent-Defendant that the suit property never belonged to Kalariyullathil Paru and therefore, no right could be transferred in favor of the Appellant-Plaintiff by virtue of assignment deed.
- It was the case of the Respondent-Defendant that the father of the Respondent-Defendant was having a property admeasuring 85 × 200 six feet kol. He had given possession of a portion of the property to the tenants and was holding 7.38 acres of land in which his wife and children derived title over the property. A suit bearing O.S. No. 47 of 1983 was filed in respect of a portion of the said property. As per the judgment and decree passed in the said suit, it was held that the marginally noted property belonged to the Respondent-Defendant and other legal heirs of deceased Othenan. It is the case of the Respondent-Defendant that the legal heirs of the said Othenan had partitioned their property by registered partition deed the marginally noted property was allotted jointly to the Respondent-Defendant.
- After considering the evidence led on behalf of the parties, the Trial Judge decreed the suit. Being aggrieved thereby, the Respondent-Defendant preferred an appeal before the Additional District and Sessions Judge, Vadakara being Appeal Suit No. 43 of 2003. The Appellate Court dismissed the appeal. Being aggrieved thereby, the Respondent-Defendant preferred Second Appeal to the High Court. By the impugned judgment and order dated August 21, 2019, the same was allowed by the HC and the suit was remanded to learned trial court for deciding afresh with liberty to parties to amend the pleading. A review petition was also filed by the Respondent-Defendant seeking review of the order of the HC dated August 21, 2019. The said review petition was dismissed by the High Court vide its order dated February 10, 2020. Being aggrieved thereby, the present appeals.
- Submissions of behalf of the Appellant:
  - Based on the report of the Advocate Commissioner, the Trial Court as well as the Appellate Court has found that the Appellant-Plaintiff has successfully proved his possession over the suit property and therefore, have rightly decreed the suit and dismissed the appeal.
  - Relying on *Anathula Sudhakar v P. Buchi Reddy (Dead) by LRs (2019) 14 SCC 353*, since the suit was for injunction simpliciter, the issue of title was not directly and substantially in issue and therefore, the suit, as filed by the Appellant-Plaintiff, was very much maintainable. He submitted that the HC has grossly erred in holding that the suit, as filed by the Appellant-Plaintiff, was not maintainable.

[17] (2012) 6 SCC 345

- Submissions of behalf of the Respondent:
  - Even from the report of the Advocate Commissioner, it could be seen that the identification of the property was not beyond doubt. Further, it could not be said that the title of the Appellant-Plaintiff was clear while adjudicating the suit.
  - Reliance was placed on the Apex Court's judgment in the matter of *Anathula Sudhakar v P. Buchi Reddy (Dead) by LRs*[18].

Issue at hand?

- Whether the Single Judge of the HC was right in holding that the suit simpliciter for permanent injunction without claiming declaration of title, as filed by the Plaintiff, was not maintainable?

Decision of the Court

- Relying on its judgment in the matter of *Anathula Sudhakar v P. Buchi Reddy (Dead) by LRs (supra)*, the Apex Court held that where the Plaintiff's title is not in dispute, a suit for injunction could be decided with reference to the finding on possession. It has been clearly held that if the matter involves complicated questions of fact and law relating to title, the Court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere junction.
- The Court pointed out that where there are necessary pleadings regarding title and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the Court may decide upon the issue regarding title, even in a suit for injunction. However, it has been held that such cases are the exception to the normal rule that question of title will not be decided in suits for injunction.
- The Court held that there was a serious dispute between the Appellant-Plaintiff and Respondent-Defendant with regard not only to title over the suit property but also its identification, which could not be decided unless the entire documentary as well as oral evidence was appreciated in a full-fledged trial.
- Relying on its judgment in the matter of *Anathula Sudhakar v P. Buchi Reddy (Dead) by LRs (supra)*, the Apex Court held that the question of de jure possession had to be established based on the title over the property. Since the said property was a vacant site, the issue of title would directly and substantially would arise for consideration, in as much as without the finding thereon, it will not be possible to decide the issue of possession. If the matter involved complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in the suit for mere injunction.
- The Court also relied on its judgment in the matter of *Jharkhand State Housing Board v Didar Singh*[19] wherein the Apex Court had held that 'where the Defendant disputes the title of the Plaintiff it is not necessary that in all those cases Plaintiff has to seek the relief of declaration. A suit for mere injunction does not lie only when the Defendant raises a genuine dispute regarding title and when he raises a cloud over the title of the Plaintiff, then necessarily in those circumstances, Plaintiff cannot maintain a suit for bare injunction'.
- Another aspect considered by the Apex Court was that the Appellant-Plaintiff had already amended the suit to claim a relief for declaration of title. A consequential amendment had also been made to the written statement by the Respondent-Defendant. In that view of the matter, the Court found it appropriate that the parties get their right adjudicated regarding the declaration of title on merits and found no reason to interfere with the impugned judgment and order of the HC.

Our view

The Apex Court laid down the principle of jurisdictional aspect of trial qua title to a property in a simpliciter suit for injunction basis the exceptions of necessary pleadings regarding title and necessary evidence led by the parties on issue relating to title in such suit, with the matter involved being simple and straightforward. The Court, however, took a balanced approached in opining, at the same time, that such cases are the exception to the normal rule that question of title will not be decided in suits for injunction. It has given the correct interpretation of law and hence, the judgement is fair and forms a good precedence with clarity.

Ranbir Singh v. Executive ENG. P.W.D

2021 SCC OnLine SC 670

Background facts

- The case of the Appellant was that he was working with the Respondent for a period of nearly eight years and service was terminated without complying with Section 25F of the Industrial Disputes Act, 1947 (**the Act**).
- The Labor Court rejected the contention of the Respondent that the Appellant had not worked for 240 days and found to the contrary. It was found that there is non-compliance of Section 25F of the

[18] (2019) 14 SCC 353
[19] (2019) 17 SCC 692

Act and the Labor Court awarded reinstatement of the Appellant with 25% back wages. The High Court set aside the award of the Labor Court.

- Submissions on behalf of the Appellant:
  - Counsel relied on the case of *Ajaypal Singh v Haryana Warehousing Corporation*[20].
  - Some of juniors of the Appellant were also dealt with in a different fashion, and in their case, they are working, and they have, in fact, been regularized also. Hence, the Appellant should be reinstated in terms of the order of the Labour Court.
- Submissions on behalf of the Respondent:
  - Acceptance of the contention of the Appellant shall violate the law laid down by this Court in Secretary, *State of Karnataka, and others v Umadevi & Ors*.[21] and *State of Uttarakhand & Another v Raj Kumar*[22].

Issue at hand?

- Whether the termination of the Appellant's service was justified?

Decision of the Court

- The Court took the view that when the termination is effected of service of a daily wager, there must be compliance of Section 25F of the Act. Unlike a private body, in the case of a public body, while it may be open to resort to retrenchment of the workmen on the score that there is non-compliance of Articles 14 and 16 in the appointment, in which case, in the order terminating the services, this must be alluded to, it would still not absolve the public authority from complying with the provisions of Section 25F of the Act and, should it contravene Section 25F, it would amount to an unfair trade practice.
- The Court opined that though the Appellant had worked for 240 days, the Appellant's service was terminated, thereby violating the mandatory provisions of Section 25F of the Act.
- The Appellant was notable to adduce convincing evidence to establish retention of junior workers and there was no finding of unfair trade practice, as such.
- The Court, while relying on the judgment passed by the Apex Court in *State of Uttarakhand and another v Raj Kumar (supra)*, found that reinstatement cannot be automatic, and the transgression of Section 25F being established, suitable compensation would be the appropriate remedy.
- The Court stated that though the Appellant was reinstated after the award of the Labor Court in 2006, the Appellant had not been working since 2009 following the impugned order. This coupled with the fact that the Appellant was, likely, to be employed otherwise, leads to the conclusion that the interest of justice would be best subserved with modifying the impugned order and directing that in place of INR25000, as lumpsum compensation, the Appellant be paid INR 3.25 lakhs as compensation after considering compensation already paid to the Appellant.
- The appeal is partly allowed.

Our view

The Court's interpretation of Section 25F of the Act is laudable, being a balancing act between the rights of parties in an employer-employee dispute arising out of termination.

DLF Home Developers Ltd v Rajapura Homes Pvt Ltd

2021 SCC OnLine SC 781

Background facts

- The 4 entities in this case, are DLF Home Developers (**DLF**), Rajapura Homes Private Limited (**Rajapura**), Begur OMR Homes Pvt Ltd (**Begur**) and Resimmo PCC (**Resimmo**). Rajapura and Begur are joint ventures of Petitioner and Ridgewood Holdings. These entities were established to develop residential projects around the country.
- DLF transferred its shares in Rajapura and Begur to Resimmo. To affect this transfer, two Share Purchase Agreements were executed between DLF and Resimmo namely, Rajapura Share Purchase Agreement (**Rajapura SPA**) and Southern Homes Share Purchase Agreement (**Southern Homes SPA**) (collectively, SPAs). These SPAs provided arbitration as disputes res mech between parties. The SPA arbitrations were to be governed by SIAC rules of arbitration with Singapore as the seat of arbitration.
- In terms of the construction obligation under the SPAs, DLF, Rajapura, Begur and Resimmo further executed two construction management service agreements. Firstly, the DLF-Rajapura Homes

[20] (2015) 6 SCC 321
[21] (2006) 4 SCC 1
[22] (2019) 14 SCC 353

Construction Management Services Agreement (**RCMA**), according to which DLF was to provide construction management services to Rajapura and, secondly, DLF-Southern Homes Construction Management Services Agreement (**SCMA**) under which DLF was to provide construction management services to Begur. Both RCMA and SCMA had arbitration clauses that followed the Arbitration and Conciliation Act, 1996, (**Act**) making New Delhi the seat of arbitration. According to RCMA and SCMA, DLF was entitled to a fee after completing the construction project, for which written notice of completion had to be sent by DLF to Rajapura and Begur, respectively.

- DLF issued written notice of completion to Begur and Rajapura on August 16, 2019 and October 26, 2019, respectively, under the RCMA and SCMA. Both Begur and Rajapura refused to accept the completion notice stating reasons for delay and non-completion. Thereafter, on May 26, 2020, DLF invoked the arbitration clause under the RCMA and SCMA. Begur and Rajapura refused to participate in appointment of a sole arbitrator on the pretext that the disputes between the parties relate to the SPAs if at all, and not the RCMA or SCMA. Therefore, if any, justifiable invocation of arbitration ought to be under the SPAs and not under the two construction management service agreements. Aggrieved by this, DLF filed two separate petitions before the SC under Section 11(6) read with Section 11(12) of the Act, for appointment of a sole arbitrator.

Issue at hand?

- Whether the dispute has arisen under the SPAs or the RCMA/SCMA?

Decision of the Court

- The Supreme Court (**SC**) first examined its scope under Section 11 of the Act. The SC held that the limited jurisdiction under Section 11 does not deprive it of its judicial function to look beyond the bare existence of an arbitration clause. The SC referred to *Vidya Drolia vs Durga Trading Corporation* to rely on the decision that with a view to prevent wastage of public and private resources, the Court is entitled to conduct 'prima facie review' of the matter at the stage of reference. The SC held that it is obliged to apply its mind to the core preliminary issues, albeit, within the framework of Section 11(6-A) of the Act. It was also clarified by the SC that such a review by the Court is not to be construed as usurping the jurisdiction of the arbitrator.
- The SC held that since both the parties claimed that the purchase of shares has been duly completed and that there is no infringement of the SPAs, the dispute cannot be arbitrated under the SPAs. The Court also noted that the parties have neither denied that there is no 'arbitrable dispute' and have also not challenged the existence of the arbitration clauses noted in the construction management services agreements i.e. RCMA and SCMA. Accordingly, the SC was of the view that the dispute that has arisen between the parties can be arbitrated under RCMA and SCMA.
- The Court further held that a sole arbitrator should be appointed to save time and resources and avoid conflicting awards. In addition, the SC left the question of consolidation of the arbitrations under RCMA and SCMA open for the sole arbitrator to decide.

Our view

The SC positively clarified the scope of judicial inquiry under Section 11 of the Act to include inquiry into the existence of arbitrable disputes under a contract before mechanically/administratively appointing an arbitrator.

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