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Dispute Resolution and Arbitration

Monthly Update | December 2021

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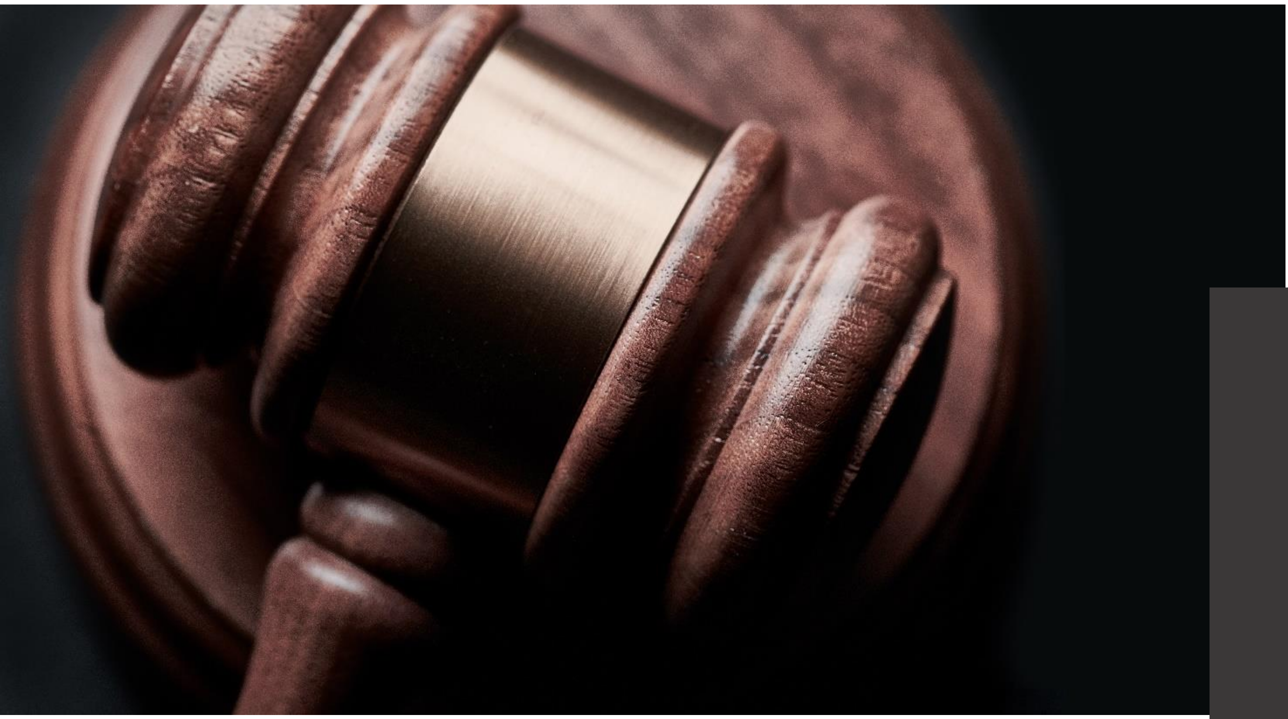
DISPUTE RESOLUTION AND ARBITRATION UPDATE



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Jacob Punnen & Anr v. United India Insurance Co Ltd

Civil Appeal No. 6778 of 2013

Background facts

- In 1982, Mr. Jacob Punnen & his wife (**Appellants**), both senior citizens, availed a medical insurance policy (referred as **Mediclaim**), from United India Insurance Co Ltd (the **Insurer**), which was renewed annually. Thereafter, the existing insurance policy was renewed by the Appellants for the period of 2008-2009 with a coverage of INR 8 lakh. However, at the time of renewal, the Insurer failed to disclose that the terms of the new policy would be different from those of the earlier, lapsed policy. In 2008, the 2nd Appellant had to undergo angioplasty surgery and a claim of INR 3.82 lakh was submitted by her to the Insurer. However, the Insurer partially accepted the claim by paying only INR 2 lakh to the Appellants. It was the case of the Insurer that the renewed policy had a new clause which limited the liability with respect to surgeries like angioplasty to an overall limit of INR 2 lakh.
- Aggrieved by this, the Appellants filed a complaint before the District Consumer Disputes Redressal Forum (**District Forum**). Subsequently, the District Forum directed the Insurer to pay the balance amount and also awarded compensation to the Appellants.
- Discontented by this, the Insurer challenged the said order in the State Consumer Disputes Redressal Commission. Accordingly, the State Commission reversed the order of the District Forum by holding that the terms of the policy were known to the Appellants and, therefore, they were bound by it.
- Unsatisfied with this, the Appellants approached the National Consumer Disputes Redressal Commission (**NCDRC**) with a Revision Petition wherein the findings of the State commissions were upheld. The Appellants then filed an appeal in the Hon'ble Supreme Court of India to challenge the order of the NCDRC.

Issue at hand?

- Whether the Appellants, as beneficiaries of the policy, could complain about mistake in its terms, and the possible consequences of such mistake?

Decision of the Court

- At the outset, the Supreme Court focused upon the 'administrative guidelines' of the Insurer for renewal of the existing policy and expressed that there was no consensus ad idem on the introduction of the cap on the coverage by the Insurer because the new term was introduced unilaterally about which the Appellants were uninformed. The Supreme Court applied the general law of avoidance of contract to the facts of the case by referring to *Canara Bank v. United India Insurance Co Ltd*[1] and *Tarsem Singh v. Sukhminder Singh*[2] and held that the Appellants could insist on the old insurance policy, on the ground that it renewed the pre-existing policy.
- The Supreme Court also placed reliance on *United India Insurance Co Ltd v. MKJ Corp*[3] and *Modern Insulators Ltd v Oriental Insurance Co Ltd*[4] wherein the importance of principle of uberrima fide (duty of utmost good faith) and its application to the Insurer was highlighted in the following terms: 'It is the fundamental principle of insurance law that utmost good faith must be observed by the contracting parties and good faith forbids either party from non-disclosure of the facts which the parties know'. The Court also reiterated the principles laid down by it *in Pioneer Urban Land & Infrastructure Ltd v Govindan Raghavan*[5], to underline those unfair terms in a contract cannot be enforced, in case of absence of free choice on the part of a consumer.
- The Supreme Court further pointed that in the present case, the Standard Form Contract, renewed year after year, left the Appellants only with the choice of raising the insurance cover. The details with respect to the increased coverage, which could have resulted in the higher individual limits (for surgical procedures) from the Appellants, were denied to them, and the Court held that withholding such information was a crucial omission on part of the Insurer.
- The Court summarized the principles with respect to the role of insurance agents and the liability of insurance companies in the event of failure to discharge the duties cast upon agents, and the likely vicarious liability of the insurer, by placing confidence in *Delhi Electric Supply Undertaking v. Basanti Devi*[6] and *the Clauses 3 (2) & 4 (1) of the notification*[7] issued by the Insurance Regulatory and Development Authority.
- The Court also perused the definition of 'deficiency' in service under the Consumer Protection Act, 1986 and deduced that an unjustifiable non-disclosure about a change in the policy by the Insurer would amount to 'deficiency in service' within the purview of the Act.
- In this backdrop, the Hon'ble Supreme Court allowed the Appeal and granted the medical relief to the Appellants.

HSA
Viewpoint

The Supreme Court has rightly observed that an Insurer has a duty to disclose the changed policy conditions during renewal to the policyholders. This progressive view helps in protecting the interests of the policyholders from the shackles of the insurers, who may seek unfair benefits by making unilateral changes under the guise of renewal of policies.

Another key takeaway from this judgement is that the Court without mincing words expounded that failure to inform the policyholder about the changes in the policy at the time of renewal will fall within the purview of deficiency in service under the Consumer Protection Act, thereby widening the scope of this Act.

Attorney General for India v. Satish & Anr

Special Leave Petition (Crl) Nos. 925, 1339, 1159, 5071 and 7472 of 2021

Background facts

- Four appeals with the lead case of the accused, Satish, were filed before the Supreme Court. The facts of the case of accused are summarized as below:
  - On December 14, 2016, the victim aged 12 years had gone out to bring guavas. However, when the victim did not return back for a long time, mother of the victim (**Informant**) searched for her and was informed by one neighbor that Satish (**Accused**) had taken her with him to his house.
  - Thereafter, the Informant went to the house of the Accused and was told by the Accused that the victim was not in his house. However, the Informant barged into the house of the Accused as she could hear the shouts and cries of the victim in the room.
  - Upon making inquiry as to what had happened, the victim stated to the Informant that the Accused had asked her to come with him and told her that he would give her a guava. The victim further told the Informant that the Accused took her to his house, then pressed her breast and tried to remove her salwar. To which, the victim tried to shout but the Accused pressed her mouth.
  - Accordingly, the Informant lodged a complaint at the police station of Gittikhadan, Nagpur.

[1] (2020) 3 SCC 455
[2] (2020) 3 SCC 455
[3] 1996 (6) SCC 428
[4] 2000 (2) SCC 734
[5] 2019 (5) SCC 525
[6] (1999) 8 SCC 229
[7] Dated 16th October 2002

- Thereafter, investigation was conducted and upon its completion, the charge sheet was filed in the Special Court, Nagpur against the Accused.
- The Extra Joint Additional Sessions Judge, Nagpur (**Special Court**) vide the Judgment and Order dated February 5, 2020, convicted, and sentenced the Accused for the offences punishable under Sections 342, 354 and 363 of the Indian Penal Code (**IPC**) and Section 8 of the Protection of Children from Sexual Offences Act, 2012 (**POCSO Act**).
- Aggrieved by the decision of Special Court, the Accused preferred an Appeal before the Bombay High Court, Nagpur Bench (**HC**). The HC vide Judgment and Order dated January 19, 2021, disposed of the said Appeal by acquitting the accused for the offence under Section 8 of the POCSO Act on the ground that the act of the Accused would not fall in the definition of 'sexual contact' and there is no direct physical contact i.e., skin to skin contact with sexual intent without penetration. The HC instead convicted the Accused for the minor offence under Sections 342 and 354 of the IPC (**Impugned Order**).
- Aggrieved by the Impugned Order, the Attorney General for India, the National Commission for Women, the State of Maharashtra and the Accused filed appeals before the Hon'ble Supreme Court (**SC**).

Issues at hand?

- Whether skin to skin contact is necessary for the offence of sexual assault under the POCSO Act?
- Whether the interpretation of Section 7 of the POCSO Act as laid down by Bombay High Court is valid?

Decision of the Court

- Upon perusal of the Impugned Order and the arguments advanced by the parties, the SC perused the relevant provisions of the POCSO Act and observed that the courts have a duty to accept an interpretation or construction which promotes the object of the legislation and prevents its possible abuse.
- The SC noted that the restrictions in the interpretation of the words, 'touch' or 'physical contact' to 'skin to skin contact' contained in Section 7 of the POCSO Act, would lead to an absurd interpretation of the said provision. Thus, the SC used the dictionary to interpret Section 7 of the POCSO Act, concluding that the word 'touch' has been used to refer to special parts of the body, whereas the term 'physical contact' has been used to refer to any other act. As a result, touching the sexual part of the body with 'sexual intent' would constitute sexual assault under Section 7 of the POCSO Act. The sexual intent, not the child's skin-to-skin contact, is the most essential factor and the sexual intent is a matter of fact that must be determined based on the surrounding circumstances.
- The SC further noted that the prosecution was not required to prove a 'skin to skin' contact to prove the charge of sexual assault under Section 7 of the POCSO Act and that the HC had committed an error in holding that there was no offence since there was no direct physical contact i.e., 'skin to skin' with sexual intent.
- According to Section 30 of the POSCO Act, the courts are entitled to raise the presumption about the mental state of the accused; since it had not been rebutted by the accused, the allegation of sexual intent stood proved by the prosecution.
- After careful examination of the facts and provisions, the SC held that the acts committed by Accused were the acts of sexual assault contemplated under section 7 and therefore liable to be punished under Section 8 of the POCSO Act.
- In view of the above, the SC quashed and set aside the orders and judgments passed by the HC and convicted Satish for the offences punishable under Section 8 of the POCSO Act and under Sections 342, 354 and 363 of the IPC with rigorous imprisonment for a period of 3 years and fine of INR 500.

HSA
Viewpoint

By reversing the Bombay High Court's judgment, the SC's decision, whilst taking a humane view, has rightly struck a perfect balance between the rights of victims or society and those of the accused. The decision ensures that the objectives of the POSCO Act are advanced. There have been instances wherein acts of taking children by force and tearing their clothes have been considered as falling outside the ambit of 'physical contact' under Section 7 of the POCSO Act.

The SC rejecting the High Court's restrictive interpretation of sexual assault is a significant move and has set a precedent for several cases pending before special courts involving physical contact with sexual intent. It is pertinent to mention that the HC must exercise caution while interpreting the statutes of POSCO Act relating to 'sexual assault' as it is a serious offence and can lead to traumatic impact on children affecting their mental state.

Rajendra Kumar Gupta v. Dr Virendra Swarup Public School & Anr

First Appeal 852/2016

Background facts

- The Appellant is the father of Late Master Raunak Gupta, who was studying in the Respondent School, i.e., Dr. Virendra Swarup Public School. In 2007, the school offered various summer camp activities including swimming and invited students to participate by paying INR 1000.
- The Appellant paid a sum of INR 1000 to the school, so that his son could participate in the said Summer Camp. On May 28, 2007 at about 9.30 A.M., the Appellant received an urgent call from

the school requesting him to come immediately as his son was unwell. The Appellant, upon reaching the school, was informed that his son had been taken to O.E.F. Hospital as he had drowned in the swimming pool of the school.

- The Appellant (then **Complainant**) then rushed to O.E.F. Hospital where he saw the dead body of his son and learnt that his son was brought dead to the hospital. Thereafter, the Appellant filed a Consumer Complaint in the State Commission alleging negligence and deficiency in service on part of the school and claimed INR 20 lakh as compensation for the death of his son as well as INR 2 lakh on account of mental agony suffered by him and INR 55,000 towards the cost of litigation.
- The school took a preliminary objection to the maintainability of the Consumer Complaint. It was stated that the Complainant was not a Consumer as the Educational Institutions are not covered under the ambit of Consumer Protection Act.
- Factum of death of Complainant's son due to drowning in the swimming pool was admitted by the Opposite Party. It was stated that the incident of drowning was not attributable to the negligence of the school as all necessary services and equipment were duly provided by them and the Swimming Pool was under strict supervision. Therefore, there was no deficiency in service on the part of the school.

Issues at hand?

- Whether education is a service? If not, how can the question of deficiency of services arise for consumer court to have jurisdiction?
- Whether extra-curricular activities imparted alongside education considered as rendering of services?
- Whether education is a commodity?

Decision of the Court

- Before approaching the National Consumer Dispute Redressal Commission (**NCDRC**), the Petitioner approached the State Commission. While hearing the matter, the State Commission arrived at a conclusion that the Complainant – the father of the deceased student – is not a consumer of the defendants and is not covered under the Consumer Protection Act.
- Thereafter, the petitioner approached the NCDRC challenging the order passed by the State Commission under Section 19 of the Consumer Protection Act, 1986.
- The NCDRC while arriving at its decision placed reliance on the judgement passed by the Supreme Court in *Anupama College of Engineering v Gulshan Kumar*[8] and *Maharshi Dayanand University v Surjeet Kaur*[9] which held that: "The only question raised in this case is whether a college is a service provider for the purposes of the Consumer Protection Act, 1986. Learned Counsel for the appellant has placed the decision of this Court in *Maharshi Dayanand University v. Surjeet Kaur(Supra)*. The aforesaid decision was followed by this Court in *P.T. Koshy & Anr v. Ellen Charitable Trust & Ors*[10] and reads as follows: '*In view of the judgment of this Court in Maharshi Dayanand University v. Surjeet Kaur, wherein this Court placing reliance on all earlier judgments has categorically held that education is not a commodity. Educational institutions are not providing any kind of service, therefore, in matter of admission, fees, etc., there cannot be a question of deficiency of service. Such matters cannot be entertained by the Consumer Forum under the Consumer Protection Act, 1986. In view of the above, we are not inclined to entertain the special leave petition. Thus, the special leave petition is dismissed*'. In view of the consistent opinion expressed by this Court, the orders passed by the National Consumer Disputes Redressal Commission in Revision Petition No. 3571/2013 and Revision Petition No. 807/2017 are not in accordance with the decision of this Court and are therefore set aside. The civil appeals were allowed."
- The NCDRC dismissed the appeal on the grounds that educational institutions do not fall within the ambit of the Consumer Protection Act, 1986 and education, which includes co-curricular activities such as swimming, is not a 'service' within the meaning of the Consumer Protection Act, 1986.

HSA
Viewpoint

The NCDRC has rightly held that educational institutions as well as education and co-curricular activities provided by the educational institutions do not fall within the ambit of the Consumer Protection Act, 1986. We are of the view that it is imperative to lay down a clear procedure of law to be followed in the event/circumstances students or their parents are aggrieved by the educational institutions. The Petitioner has filed an Appeal before the Supreme Court, which is pending, wherein the Apex Court will determine whether education is a service under the Consumer Protection Act, 1986. In the interest of justice for all students, we hope that the Court will rightly address the issue at hand.

[8] Civil Appeal No. 17802 of 2017
[9] (2010) 11 SCC 159
[10] SLP (C) No. 22532/2012

Sunil Todi & Ors v State of Gujarat & Anr

Criminal Appeal No. 1446 of 2021 with Criminal Appeal No. 1447 of 2021

Background facts

- The dispute in the present case pertains to a Letter of Intent dated December 19, 2015 issued by the Appellant Company to the Second Respondent for providing uninterrupted power supply at the plant of the company situated at Aurangabad, Maharashtra. Payment under the said Letter of Intent was to be made through a Letter of Credit (**LC**). Further, two post-dated cheques were issued by the Appellant Company for the purpose of security deposit.
- On July 24, 2016, a Power Supply Agreement (**PSA**) was entered into between the Second Respondent and the Appellant Company. As per the term and conditions of PSA, the Appellant Company was liable to make payment to the Second Respondent by a LC. Power was supplied for the months of July, August, and September 2016 for which the Appellant Company issued three separate LCs. The Second Respondent alleged that the LCs provided were not in the proper format as required by the bankers.
- On October 20, 2016, the Appellant Company terminated the PSA and in furtherance of which the Second Respondent deposited one of the cheques issued by the Appellant Company. The cheque was dishonored and accordingly the Second Respondent sent a legal notice to the Appellant Company alleging the commission of offences under Section 138 of the Negotiable Instrument Act. The Appellant Company replied to the legal notice stating that the cheque was only for deposit and not for encashment.
- On November 2, 2017 a criminal complaint was filed by the Second Respondent against the Appellants seeking issuance of summons and imposition of fine. On November 6, 2017 summons were issued by the Magistrate to the Appellants. The Appellants instituted petitions under Section 482 of the Code of Criminal Procedure, 1973 before the High Court, which were subsequently dismissed, hence the present appeal.

Issue at hand?

- Whether the dishonor of cheque furnished as a 'security' is covered under the provisions of Section 138 of the Negotiable Instruments Act?

Decision of the Court

- The Appellants while relying on *Indus Airways Private Ltd v. Magnum Aviation Private Ltd*[11] had contended that the complaint under Section 138 of the Negotiable Instruments Act would not be maintainable as the cheque was issued for the purpose of security. On the contrary, the Court relied on the judgement of *Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Ltd*[12] and went on to observe that the judgement given in Indus Airways (Supra) was given on the basis of the fact that the cheque had not been issued for discharge of a liability but as an advance for a purchase order which was cancelled. In Sampelly *(Supra)*, the cheque was for the repayment of a loan instalment which had fallen due.
- The Court further went on to observe that Section 138 of the Negotiable Instruments Act would also be attracted in situations where a debt becomes due after the drawing of the cheque. If such situations are excluded from the ambit of Section 138, it would defeat the very purpose for the enactment of the said provision. The term 'or other liability' mentioned under Section 138 of the Negotiable Instruments Act should be construed widely in order to further the intention of the Legislature.
- In furtherance of thee above observations, the complaint under Section 138 of the Negotiable Instruments Act was held to be maintainable.

HSA
Viewpoint

The Court has rightly interpreted Section 138 of the Negotiable Instruments Act. Very often the amount is secured by a party by giving a cheque so that if a debt becomes due and payable after the issuance of a cheque, payee will have the option to recover the amount by way of said cheque. If the cheque is dishonoured, the payee will have a recourse under Section 138 of the Negotiable Instruments Act. Inclusion of these situations under the ambit of Section 138 of the Negotiable Instruments Act will provide clarity to parties to such transactions.

M/s B.E. Billimoria & Co Ltd v. Union of India & Anr

Arbitration Appeal No. 21 of 2012

Background facts

- In the instant case, a tender for execution of electrification works was awarded by the Respondents to the Appellant. Subsequently, the parties entered into an agreement and the Appellant executed the work. However, while drawing the final bills of the work done, certain claims of the Appellant were disregarded by the Respondents and, thus, the Appellant referred the dispute to arbitration.

[11] (2014) 12 SCC 539
[12] (2016) 10 SCC 458

- During the arbitral proceedings, the Respondents contended that as per Clause 3.1.10 of MES Standard Schedule of Rates (**SSR**), such claims i.e., Claims 9 to 13 and 13A to 13E, were to be decided by Garrison Engineer (**GE**) and the same were therefore not arbitrable.
- However, the Arbitrator disregarded the submissions of the Respondent on the ground that the materials on record did not disclose that the GE had taken a decision regarding classification of the strata of soil and, therefore, the disputes related to the said claims were arbitrable. Subsequently, the Arbitrator allowed few claims (Claims 9 to 13 and 13A to 13E) of the Appellant in part, while he proceeded to reject Claim No. 1 and 2.
- Aggrieved by this, the Respondent challenged the said Award under Section 34 of the Arbitration and Conciliation Act, 1996 (the **Act**) in the Additional District Court.
- The Additional District Court accepted the submissions of the Respondents and set aside the award in respect of the claims which were allowed by the Arbitrator. According to the Court, there was a decision by the GE with regard to the classification of the strata of the soil during the course of the excavation works, and even if there was no such decision, the disputes relating to Claim Nos. 9 to 13 and 13A to 13E being disputes covered by Clause 3.1.10 of SSR are not arbitrable, being 'excepted matters' (**Impugned Order**).
- Discontented by this, the Appellant filed an Arbitration Appeal before the Kerala High Court, thereby challenging the impugned Order passed by the Additional District Court.

Issues at hand?

- Whether there is any infirmity in the award of the Arbitrator insofar as it relates to Claim Nos. 1, 2, 9 to 13 and 13A to 13E of the Appellant?
- Whether the dispute which is required to be adjudicated by the GE in terms of the contract, if not adjudicated by the GE, would become arbitrable?

Decision of the Court

- At the very outset, the Hon'ble High Court referred to the principles laid down by the Apex Court in *MMTC Limited v. Vedanta Ltd*[13] to underscore the narrow scope of interference by the Courts under Section 34 of the Act and stated that a decision which is contrary to the terms of a contract would be covered under the head 'patent illegality'. The Court also expressed that the Additional District Court acted beyond the scope of Section 34 of the Act by reversing the finding rendered by the Arbitrator, and hence the same would be legally unsustainable.
- With regards to the first issue, as far as Claim Nos. 1 and 2 were concerned, the Court held that Regulation 424 of MES Regulation does not confer any rights on a contractor to profess for a higher rate on the ground that the rates quoted by him earlier were not workable, after securing the work in a competitive bidding process. If the Regulation 424 is interpreted in a contrary manner, the same would overthrow the very aim of competitive bidding and if after bagging a contract, the contractor was still able to claim a better rate for the work, which if he had quoted initially, he should not have been awarded the work. Therefore, the Court held that there was no infirmity in the decision of the Arbitrator as regard the Claim Nos. 1 and 2.
- On the second issue, the Court placed reliance on the judgement of the Apex Court in *General Manager, Northern Railway and Another v. Sarvesh Chopra*[14] to emphasize that if the parties have consented to allow their disputes to be adjudicated upon by an authority/person other than an Arbitrator and have agreed to accept the decision of that authority/person as final and binding, that would be an excepted matter and will not be arbitrable.
- Furthermore, the Hon'ble High Court studied the Clause 3.1.10 of SSR as well as the arbitration clause in the Agreement and held that it was apparent that if the dispute fell under Clause 3.1.10 of SSR and was not decided by the GE, then the Appellant would be deprived of their legitimate dues which they would have been entitled to, had the decision of the GE been favorable to them. The Court clarified this further by reiterating the law laid down by the Apex Court in *Madnani Construction Corporation Pvt Ltd v. Union of India*[15] wherein it was held that to bring the claims of the contractor within the umbrella of the excepted matters, the procedure prescribed for bringing those claims under excepted matters must be thoroughly followed.
- Therefore, the Court concluded that in the absence of a decision by the GE on a dispute covered by Clause 3.1.10 of SSR, the dispute would become arbitrable. There was, therefore, no infirmity in the decision of the Arbitrator as regard the Claim Nos.9 to 13 and 13A to 13E.
- The Appeal was allowed in part and the Impugned Order, insofar as it relates to Claim No. 9 to 13 and 13A to 13E of the Appellant, was set aside, thereby restoring the award of the Arbitrator.

HSA
Viewpoint

The decision of the Hon'ble High Court in the present matter has remarkably secured the rights of the contractor, who would otherwise be left remediless if there is no determination at all on part of the authority in cases of excepted matters. The judgment has rightly kept the window of arbitration open for such contractors. Thus, the judgement serves as a guiding precedent for Courts while deciding the cases of excepted matters ousting arbitration.

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[13] (2019) 4 SCC 163
[14] (2002) 4 SCC 45
[15] (2020) 1 SCC 549

Featured Topic | Bar on claiming pendente-lite interest and interest on delayed payment

Part I - Bar on claiming pendente-lite interest

- The award of interest under Indian law is primarily governed by Section 34 of the Code of Civil Procedure, 1908 (**CPC**) which provides that the grant of interest on a decree of money is not a matter of right but at the discretion of the Court. Therefore, if a decree is silent with respect to payment of interest on the principal sum, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie.
- Where parties seek to resolve disputes through arbitration, the concept of interest (including pendente lite interest and future interest) is governed by Section 31(7) of the Arbitration and Conciliation Act, 1996 (**Arbitration Act, 1996**), which states that an Arbitrator has jurisdiction to award pre-reference of pendente lite interest, unless there is an agreement to the contrary. Thus, if the parties have expressly barred the award of interest, then the arbitrator would be bound by such terms contractually agreed between the parties. This has been confirmed and upheld by the Supreme Court in the case of *Chittaranjan Maity v Union of India*[16]
- Chittaranjan Maity v. Union of India

(2017) 9 SCC 611.

In this matter, it was held that if the parties have agreed under the terms of their agreement that pre-reference or pendente lite interest shall not be payable, the Arbitrator cannot award interest between the date on which the cause of action arose till date of the award.

Background facts

- The Respondent floated a tender for execution of balance of earth work for formation of banks for laying railway line, roads, platforms, and miscellaneous work at the South-Eastern Railway at Sankrail in Howrah District (**Project Work**). The Appellant won the bid and was awarded the project. An agreement dated August 22, 1991 was executed between the Respondent and the Appellant for the Project Work (**Agreement**).
- Clause 16(2) of the Agreement prohibited interest payable upon earnest money or the security deposit or amounts payable to the contractor under the Agreement.
- Disputes arose between the parties regarding execution of work which led to abandonment of the works by the Appellant. After failing to amicably resolve the matter, the dispute was ultimately referred to arbitration when the Appellant filed an application for appointment of arbitrator before High Court of Calcutta, wherein the Court directed the Respondent to appoint an Arbitrator in accordance with the procedure laid out in the Agreement.
- The Arbitral Tribunal passed an award on September 20, 2006 in favor of the Appellant. The amount awarded by the arbitrator included pendente lite interest at the rate of 12%. The Respondent challenged the award under Section 34 of Arbitration Act,1996.
- The application was dismissed by a Single Bench of the High Court of Calcutta. The Respondent then appealed before the Division Bench on various grounds, including that in view of Clause 16(2) of the GCC of the Agreement, no interest could have been awarded to the Appellant. The Division Bench held in favor of the Respondent that the Arbitrator could not award pendent lite interest to the Appellant since the same was barred under the Agreement. The decision of the Division Bench was appealed by the Appellant.

Decision of the Court

- When the matter reached the Supreme Court (**SC**), the SC compared the law regarding the award of interest under the Indian Arbitration and Conciliation Act 1940 (**Arbitration Act, 1940**) and the Arbitration Act, 1996 and observed that while the Arbitration Act, 1940 was silent on the powers of the Arbitrator to award interest, Section 31(7) has been created under the Arbitration Act 1996 which prohibits the Arbitrator from awarding interest if so agreed between the parties.
- In view of the foregoing, it was observed that the intention of the legislature was to give party autonomy preference and thereby ensure that the powers of the Arbitrator are derived from the contract itself. The decision of the Supreme Court of upholding the contractual bar on the Arbitrator to award pendente lite interest was reaffirmed in the case of *Jaiprakash Associates Ltd vs Tehri Hydro Development Corporation India Ltd* [17]where the arbitral tribunal while passing the award on the claims made in the said matter also granted interest @ 10% per annum from the date when the arbitration was invoked, along with future interest @ 18% per annum till the date of payment. When the award was challenged, the award of interest on the amount due was quashed based on the clauses in the agreement which prohibited the award of interest payable to the contractor.

Part II - Bar on claiming interest on delayed payment

- North Delhi Municipal Corporation v. Varinderjeet Singh

RFA 434/2017 & CM APPLs.15984/2017

Background facts

- These were a batch of appeals before the High Court of Delhi which arose out of disputes between the Contractors and the North Delhi Municipal Corporation (**NDMC**) and East Delhi Municipal Corporation (**EDMC**) (collectively referred to **Corporations**). The facts in each appeal were

[16] (2017) 9 SCC 611

[17] Civil Appeal No. 1539 of 2019

different. Having said that, briefly these cases pertain to various work orders issued by the Corporations on the Contractors. The works were executed by the Contractors and thereafter, the Engineer-in-Charge passed the final bills. The Corporations failed in making the payments to the Contractors.

- Suits for recovery were filed by the Contractors and the same were decreed in their favor. Aggrieved by the decree passed by the Trial Court, the Corporations filed the appeals while relying on Clause 7 and Clause 9 of the General Conditions of the contracts/work orders.
- Clause 7 of the GCC deals with the payment on the basis of intermediate certificates as advance payments and Clause 9 of the GCC related to payment of final bills. In both cases, the Engineer-in-Charge has to certify the payments. Having said that, after the final bills are passed, Clause 7 provides that the amount so certified shall be paid by the 30th working day should the Corporations have funds available with it under the specific head of account. Furthermore, Clause 9 of the GCC prescribes the actual limit of making of payment i.e., 6 months and 9 months. The clauses also expressly bar the Contractors to claim interest of the delayed payments for a period up to 3 years.

Decision of the Court

- While analyzing the clauses on which the Corporation placed reliance to file the appeals, the Court observed that the Corporation cannot postpone the payment to the Contractor indefinitely. The Court held that to ask the Contractor to wait endlessly for his payment is arbitrary. Even if such a clause has been signed and accepted by the Contractor, it does not make the clause valid in as much as it would render a fundamental condition of contract being hit by the provisions of the Indian Contract Act, 1872.
- Every contract to be valid must have consideration and the indefinite postponement of the consideration would be unconscionable. In view of the foregoing, the Court held that these clauses in effect leave the Contractor remediless and would be contrary to law. Furthermore, it was held that Corporation which form part of the State as envisaged under Article 12 of the Constitution of India must conduct their activities in accordance with law and public policy.
- The combined effect of the clauses is that if the Corporation does not procure funds, it is not liable to even pay the Contractor any interest and the Contractor has no remedy. This by itself would mean that such a clause could be read as leading to a contract without consideration and hence unlawful under Section 23 of the Contract Act. From a reading of the provisions of the Contract Act, it is clear that an open-ended clause which in effect says that payment shall be made at an undetermined time in the future, is unreasonable and such a term would be unfair.

Conclusion

According to the decisions of the Court as enumerated above, a Court or an Arbitrator cannot interfere with the contractual provisions mutually agreed between the parties, so long as these contractual provisions do not leave a party remediless and/or are illegal and invalid ab initio. The Courts continue to strike a balance between party autonomy and enforceability of contracts.

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