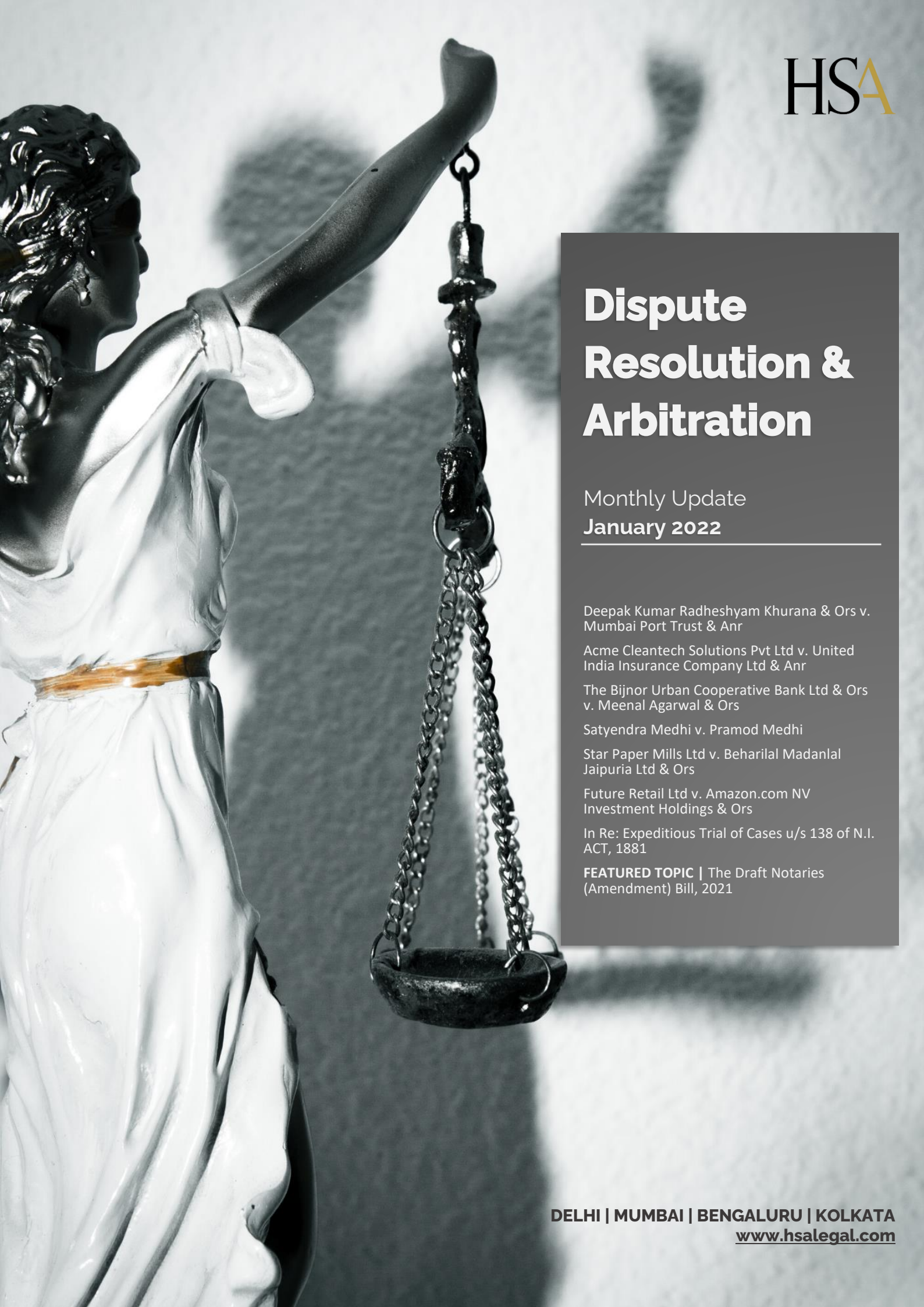

HSA

Dispute Resolution & Arbitration

Monthly Update

January 2022

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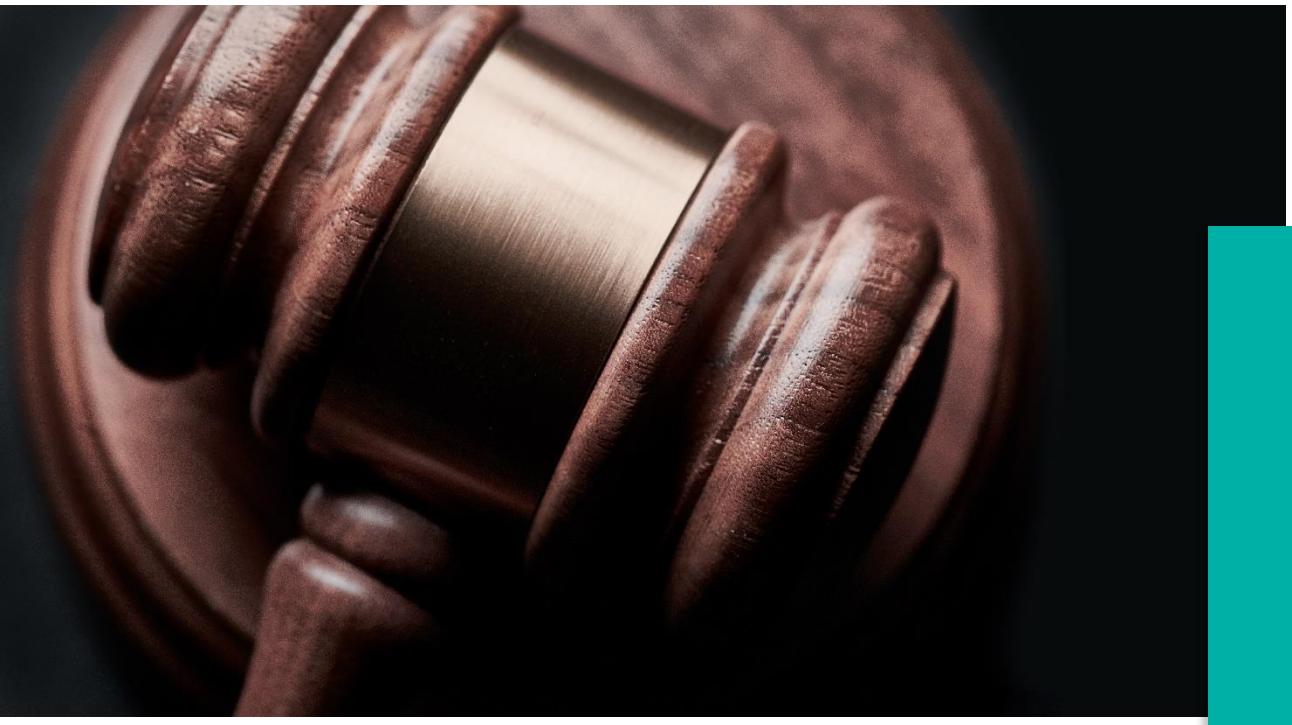
DISPUTE RESOLUTION AND ARBITRATION UPDATE



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Deepak Kumar Radheshyam Khurana & Ors v. Mumbai Port Trust & Anr

Writ Petition (L) No. 17132 of 2021 | **Mumbai Port Trust was represented by HSA team comprising of Rahul Jain, Associate Counsel and Aasiya Khan, Associate from the Firm's Mumbai office.**

Background facts

- In the instant case, Mr. Deepak Kumar Radheshyam Khurana & Others (**Petitioners**) are the employees of the Mumbai Port Trust (**MPT**) (**Respondent No.1**), which is an autonomous corporation of Union of India (**Respondent No.2)**.
- Vide an office circular dated June 15, 2021, the Respondent No. 1 inter alia stipulated that its employees who were not vaccinated must produce RT-PCR test certificates to attend office, every ten days. Furthermore, the Respondent No.1 also specified in the circular that it will not bear the treatment costs of the employees who refused to vaccinate themselves as they were effectively insisting on placing themselves at a much higher risk of contracting Covid-19.
- In view of this, the Petitioners filed a Writ Petition before the Hon'ble Bombay High Court, on the following grounds:
  - Vaccination is a voluntary act, and the Respondents cannot compel the Petitioners to get vaccinated.
  - Unvaccinated employees were on par with the vaccinated employees as far as the transmission of the disease was concerned, and therefore, the periodic RT-PCR tests must be performed free of cost in Respondent No.1's hospital.

Issue at hand?

- Whether the requirement of mandatorily producing RT-PCR reports of the Petitioners of the Respondents, every ten days, was reasonable or not?

Decision of the Court

- The Hon'ble High Court remarked that the contention of the Petitioners of being compelled to get vaccinated, does not hold water as the Respondents have evidently provided an alternative of producing periodical RT-PCR reports. Therefore, the High Court stated that the only issue which is to be riddled out is the mandatory production of the RT-PCR report.
- Subsequently, the High Court analyzed the Order of the Gauhati High Court in *Re Dintar Incident vs. State of Mizoram & Ors*[1], the Interim Order of the Gauhati High Court in *Madan Mili vs. Union of India & Ors*[2], Order of the Meghalaya High Court in *Registrar General, High Court of Meghalaya vs. State of Meghalaya*[3] , the Interim Order of the Manipur High Court in *Osbert Khaling vs State of Manipur & Ors*[4] and the Interim Order of the Gauhati High Court in the case of *Dr. Aniruddha Babar vs State of Nagaland & Anr*[5], which were heavily relied on by the Petitioners.
- After juxtaposing and scrutinizing all the aforesaid decisions and Interim Orders of various High Courts, the Bombay High Court advanced a noteworthy observation that, in the present case, Respondent No.1 has not imposed any forceful restrictions which would effectively forbid the unvaccinated employees from working. In this backdrop, the High Court also expressed that the aforementioned decisions and Interim Orders do little to no help to the Petitioners' case.
- Furthermore, the High Court perused the medical material published by the World Health Organization (**WHO**) and the Technical Paper of the Department of Health & Family Welfare, Government of Kerala to arrive at the conclusion that international and state agencies and Governments across the world consider Covid-19 vaccination not only an immense protection against contracting the disease and but effectively reduces the risk of its transmission. Continuing in this vein, the High Court expounded the following, '*Given that unvaccinated persons pose a greater risk of transmission of Covid-19 than vaccinated persons, it is reasonable for a large organization such as the MPT to require a higher degree of checking and monitoring of the Covid-19 status of unvaccinated persons*.'. Therefore, the High Court deduced that the argument of the Petitioners' pitched upon the ground that vaccinated and unvaccinated employees stand on the same footing as far as the transmission of the disease was concerned, was ill-conceived and untenable.
- Lastly, the High Court highlighted that the Petitioners' choice to not take the vaccination was well respected; however, that did not signify that they were ipso facto entitled to an equal treatment as that given to vaccinated persons by Respondent No.1.
- In light of the above, the High Court answered the issue in the affirmative and dismissed the Petition.

HSA
Viewpoint

The Bombay High Court's decision – that the mandate by MPT to produce periodic RT-PCR reports by the employees who refused to get vaccinated was reasonable – rightly serves as a guiding precedent for Courts while deciding whether any restrictions on the basis of vaccination status/furnishing of periodic negative Covid-19 test results, falls within the umbrella of reasonable restriction on the fundamental rights or not. While studying various decisions of the other High Courts, which took action on the basis that even vaccinated persons could be infected with Covid-19 and could transmit the disease to others, the High Court has looked beyond the obvious, by pointing that the risk of such infections occurring was greatly reduced in vaccinated persons and was significantly higher in unvaccinated persons. The decision is indeed laudable in trying to balance the individual's personal choice in getting the Covid vaccination against the health/safety concerns of the larger workforce.

Acme Cleantech Solutions Pvt Ltd v. United India Insurance Company Ltd & Anr

Civil Appeal Nos 4476-4477 of 2021

Background facts

- In the present case, M/s Acme Cleantech Solutions Pvt Ltd (**Appellant**) filed a consumer complaint in the National Consumer Disputes Redressal Commission (**NCDRC**) on the ground that M/s United India Insurance Company Ltd (**First Respondent**) failed to settle the insurance claims of the Appellant.
- Accordingly, the complaint was inter alia admitted along with a direction to the Appellant to issue a notice under Section 13(2) of the Consumer Protection Act, 1986 (**Act**) to the First Respondent to file its Written Statement. However, the First Respondent failed to file the Written Statement within the stipulated time.
- Thereafter, the First Respondent issued a letter on March 6, 2020 to the Appellant, whereby the insurance claims of the Appellant were repudiated. Furthermore, on the same day, the First Respondent filed an Interim Application seeking the dismissal of the consumer complaint filed in the NCDRC on the ground that the complaint was rendered infructuous, without making any reference to the repudiation of the Appellant's claims in the application.

[1] Order dated 2nd July 2021 in WP(C) No.37 of 2020
[2] Order dated 19th July 2021 in PIL No.13 of 2021
[3] Order dated 23rd June 2021 in PIL No.6 of 2021
[4] Order dated 13th July 2021 in PIL No.34 of 2021
[5] Order dated 28th July 2021 in PIL No.6 of 2021

- Consequently, the NCDRC ordered the Appellant to file an amended complaint to challenge the repudiation of insurance claims and granted permission to the First Respondent to file a Written Statement on the amended complaint.
- Aggrieved by this, the Appellant preferred an Appeal in the Supreme Court of India (**SC**) against the aforesaid NCDRC Order to the extent that it directs the Appellant to file an amended complaint and allows the First Respondent to file a Written Statement to the amended complaint on the ground that this is contrary to the provisions of Section 13(2) read with Section 22 of the Act.

Issue at hand?

- Whether the direction of NCDRC to the Appellant to amend the complaint and grant permission the First Respondent to file its Written Statement on the amended complaint, was tenable?

Decision of the Court

- At the outset, the SC firmly opined that the party who approached the forum was *dominus litis* and was solely empowered to decide whether to amend the complaint or pursue the alternative of proceeding with the pleading as it stood. Continuing in this vein, the SC elaborated that in the present case, the Appellant could choose the following three possible courses of action: firstly, to pursue the complaint as it stood, without carrying out any amendments; secondly, to amend the complaint to challenge the letter of repudiation; or thirdly, to withdraw the existing complaint with liberty to institute a fresh complaint to challenge the letter of repudiation.
- In view of this, the Hon'ble Supreme Court detected the glaring error in the order of the NCDRC, which was to mandate the Appellant to amend the complaint, on account of which it allowed the First Respondent to file a written statement to the amended complaint, instead of providing liberty to the Appellant to pick one of the courses of action.
- Moreover, the SC considered the principles laid down by the Constitution Bench in *New India Assurance Company Ltd v Hilli Multipurpose Cold Storage Pvt Ltd*[6] wherein it was conclusively established that the District Forum had no power to extend the time to file the Written Statement to the complaint beyond the period of 45 days, as envisaged under Section 13 of the Act. Therefore, on the basis of the aforesaid judgement, the SC advanced that the Impugned Order passed the NCDRC deprived the Appellant of the advantage of dwelling on the submission that Written Statement could not be filed at that stage and such a deprivation of the right to raise such an objection, would be detrimental to the Appellant's case.
- In light of the above, the Impugned Order passed the NCDRC was set aside to the extent that it mandated the Appellant to amend the complaint and granted permission to the First Respondent to lodge its Written Statement on the amended complaint.

HSA
Viewpoint

The decision of the SC that NCRDC had no authority to compel the Complainant to amend pleadings as the Complainant was *dominus litis* is cardinal in cautioning the Courts to not exceed the jurisdiction conferred upon them. By way of this order, the SC has, as always, demonstrated that it is the custodian of peoples' right by rightfully observing that error in the order of the NCDRC was to compel the Appellant to amend the complaint, as a consequence of which, it granted permission to the First Respondent to file a Written Statement to the amended complaint.

The Bijnor Urban Cooperative Bank Ltd & Ors v. Meenal Agarwal & Ors

Civil Appeal No. 7411 of 2021

Background facts

- In the instant case, Bijnor Urban Cooperative Bank Ltd (**Appellant**) furnished a credit facility of INR 1 crore to Meena Agarwal and her husband (**Respondents**). Due to the failure of Respondents to deposit even a single instalment in the Loan Account, although they were maintaining two other loan accounts regularly, the Appellant declared the said account as a Non-Performing Asset (**NPA**) and initiated proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**).
- Subsequently, the Respondents submitted an application for receiving the benefits of the One Time Settlement (**OTS**) scheme offered by the Appellant, as under the OTS scheme a debtor had to pay a lesser amount than the actual amount due and payable under the Loan Account. However, the Appellant rejected this application on the ground that their Loan Account was declared as an NPA, hence they were not eligible for OTS scheme.
- To come out of NPA eligibility, the Respondents deposited a sum of INR 60 lakh i.e. after rejection of their earlier application on the ground that as the said account is NPA, the same is not eligible for OTS scheme.

[6] (2020) 5 SCC 757

- Aggrieved by the aforesaid rejection, the Respondents filed a Writ Petition in the Allahabad High Court whereby the Appellant was directed to reconsider their application for OTS.
- However, the Appellant rejected their fresh application for the grant of benefit under OTS scheme. Therefore, the Respondents once again approached the High Court by way of another Writ Petition, praying for a Writ of Mandamus, directing the Appellant to allow the benefit of OTS scheme to the Respondents. Subsequently, the Court allowed the Petition and issued the Writ of Mandamus.
- Discontented by the Impugned Order, the Appellant preferred an Appeal in the Supreme Court of India (**SC**) to quash and set aside the Impugned Order passed by the High Court.

Issues at hand?

- Whether benefit under the OTS scheme can be prayed as a matter of right?
- Whether the High Court in exercise of powers under Article 226 of the Constitution of India can issue a Writ of Mandamus directing the Appellant to positively consider the grant of benefit under the scheme and that too de hors the eligibility criteria mentioned under the scheme?

Decision of the Court

- With regards the first issue, the SC analyzed the guidelines of the OTS scheme for comprehending the ineligibility criteria set for the defaulters of loan repayment and noted that a willful defaulter in repayment of loan was a person who had not paid even a single instalment after taking the loan and a person whose account was declared as NPA was not eligible for grant of benefit under the OTS scheme.
- Furthermore, the SC remarked that as per the guidelines, the Settlement Advisory Committee was rightly constituted for the purpose of examining the application of the Respondents and only then a conscious decision was taken by the Appellant that the Respondents were fairly financially stable and the secured assets were sufficient and in case any recovery was to be made by auctioning the mortgaged property, the Appellant could recover the entire loan amount.
- The SC also held that if the submissions of the Respondents were accepted that the borrower can, as a matter of right, pray for benefit under the OTS scheme, it would be equivalent to giving a premium to a dishonest borrower who, despite having the potential to fully pay and the fact that the bank was able to recover the entire loan amount by selling the mortgaged/secured properties, either from the borrower and/or guarantor. In this backdrop, the SC delineated that such could not be the intention of the bank while offering OTS scheme and that could not be the purpose of the scheme which may promote such a sharp practice. Therefore, the SC expressed that the grant of benefit under the OTS scheme hinged on fulfilment of the eligibility criteria, explicitly mentioned in the exhaustive guidelines, and therefore, it could not be prayed as a matter of right by the Respondents.
- With reference to the second issue, the SC noticed that although the Settlement Advisory Committee provided the opportunity of a personal hearing to the Respondents, the High Court had wrongly concluded that no opportunity of hearing was given. Moreover, the SC paid heed on the submission of the Appellant about the SARFAESI proceedings being already initiated to fully recover the loan amount, to which the Hon'ble High Court had absurdly observed that the proceedings under the SARFAESI Act have remained pending for seven years and the Appellant had been unable to recover its dues and therefore the hope of recovery was illusory. Continuing in this vein, the SC, without mincing words, stated that merely because the proceedings under the SARFAESI Act were pending since seven years, the Appellant could not be held responsible for the same.
- The SC conclusively advanced that no bank could be pressurized to accept a lesser amount under the OTS scheme, irrespective of the fact that the bank was able to recover the entire loan amount by auctioning the secured/mortgaged property.
- In light of the above, the SC arrived at the conclusion that a Writ of Mandamus could not be issued by the High Court in exercise of powers under Article 226 of the Constitution of India, directing a financial institution/bank to positively grant the benefit of OTS to a borrower. Accordingly, the Appeal was allowed, and the Impugned Order passed by the High Court was set aside.

HSA
Viewpoint

The SC's judgement in the present matter upholds the principle that when exhaustive guidelines governing the eligibility criteria are present and a calculated decision has been taken by a bank in not granting the benefits of a scheme to the borrower, without violating any principles of natural justice, then such decision is not open to the judiciary for interference. This decision prevents borrowers, who deliberately avoid paying their debts, from getting their liability reduced by taking recourse to such schemes, in addition to cutting off sham litigations by such borrowers.

Satyendra Medhi v. Pramod Medhi

RSA/17/2016

Background facts

- The Appellant had purchased a plot of land measuring 3 bighas from the father of the Respondent and accordingly, a registered sale deed was executed by them.
- However, in 1996, the Respondent illegally ejected the Appellant of one bigha of land, out of the total land of three bighas.
- The Appellant then filed a Title Suit before the Court of Munsif No. 2 praying for the recovery of possession of the plot of land. Unfortunately, the original sale deed, which was submitted by the Appellant to his Advocate, was lost from the custody of the Advocate and therefore, a certified copy was exhibited as evidence, as per the Section 65 (c) of the Indian Evidence Act, 1872 (**Act**).
- After considerable deliberation, the learned Munsiff ordered that the Appellant failed to prove his title over the land and dismissed the Suit.
- Aggrieved by this, the Appellant preferred an Appeal before the learned Civil Judge at Amingaon, Guwahati but the Appeal was dismissed.
- Discontented by this, the Appellant challenged the Orders given by the First Appellant Court and the Court of Munsif, by filing a regular Second Appeal before the Gauhati High Court.

Issue at hand?

- Whether a certified copy of an original document was admissible in Evidence under Section 65 of the Act?

Decision of the Court

- At the outset, the High Court scrutinized the two judgments of the same Court and one judgment of the Supreme Court (**SC**), which were relied on by the Respondents to justify that under the given circumstances of the case, the act of filing the certified copy of the sale deed by the Appellant, did not fall within Section 65 (c) of the Act.
- In *Chandra Sakhi Singha and Anr v. Bidya Paati Singha (Sinha)*[7], it was conclusively established that to obtain the benefit of Section 65(c) of the Act, burden weighs heavily on a party to convince that the documents have been destroyed, lost, or could not be submitted for some or other reason and that such reason does not originate from the default or neglect of the party concerned. In *Afajuddin v. Abdur Rahman*[8], it was held that as per Illustration (b) to Section 104 of the Act, before proving the contents of a lost document as secondary evidence, the party must first manifest beyond a pale of a doubt prove that the document was lost. In *H. Siddiqui (dead) by LRS v. A. Ramalingam*[9], the SC laid down that the secondary evidence must be authenticated by foundational evidence that the alleged copy is, in fact, a true copy of the original, mere admission of a document in evidence will not amount to its proof.
- The High Court on the strength of the above-mentioned judgments, delineated that the responsibility to prove the loss of a document must be exercised within the cap of 'beyond reasonable doubt'. Furthermore, the High Court noted that the Appellant's Advocate had verified in his evidence that the Appellant had filed a photo state copy of the sale deed, when the parties were required to file documents in the Trial Court, and this evidence of the Advocate remained unchallenged throughout the conduction of cross-examination by the Respondents. Moreover, the High Court observed that the Junior Assistant in the office of the Sub-Registrar, Guwahati, affirmed in his evidence that the father of the Respondent had executed a registered sale deed in favor of the Appellant and Certified Copy was a true copy of the original sale deed.
- Thus, cantered on the evidence of the Appellant's Advocate and the Junior Assistant in the office of the Sub-Registrar, Guwahati, the High Court firmly opined that it was proved beyond any shadow of a doubt, that the original sale deed executed by the father of the Respondent in favor of the Appellant, was not lost, due to any faults or negligence on part of the Appellant.
- In light of the above, the High Court answered the issue in affirmative and in favor of the Appellant.

HSA
Viewpoint

The High Court's decision that when the original sale deed was not lost because of any fault or negligence of the Appellant, a certified copy of the sale deed was admissible as evidence, is significant in offering recourse to an innocent party who has lost the original document, not coming to light due to his own carelessness, by permitting the party to adduce secondary evidence under Section 65 of the Act. The Hon'ble High Court has captured the true essence of Section 65 of the Act, by laying the criterion which must be complied, for obtaining the benefit of Section 65(c) of the Act, i.e., by proving beyond a reasonable doubt that the original document was lost solely due to the force of circumstances and not by any personal shortcomings.

[7] 2014 SCC OnLine Gau 161
[8] 2017 (5) GLT 615
[9] (2011) 4 SCC 240

Star Paper Mills Ltd v. Beharilal Madanlal Jaipuria Ltd & Ors

Civil Appeal No. 4102 of 2013

Background facts

- In the instant case, M/s Star Paper Mills Ltd (**Appellant**) is a paper manufacturing company which sells its products to customers through wholesalers either by direct payment mode or payment against hundies payable on due date with the bank. The Appellant supplied goods to M/s. Beharilal Madanlal Jaipuria Ltd (**Respondent No. 1**), the wholesale dealer of the Appellant, from the Delhi sales office of the Appellant and from the mills situated at Saharanpur. When any goods were sold by the Appellant to the Respondent No. 1, the sale was made through limited credit of 45-60 days as well as hundies and the payment had to be made within 15 days from the date of delivery after which an interest at 21% p.a. was charged with a further penal interest of 3% till the date of payment.
- The Appellant claimed that the Respondents defaulted in making payments for any stock from November, 1985 to January,1986 against 189 consignments worth INR 72,27,079. The receipts of the goods showed the signature of Respondent No. 1 and its director (**Respondents**). Further, hundies for 9 consignments worth INR 2,99,480 were also dishonored. Therefore, the Appellant claimed for INR 96,41,765.31 comprising of INR 71,82,266 as the principal amount and INR 24,59,499.31 as interest on the said principal amount. On the other hand, the Respondents claimed that these bills were signed under duress and thus the transactions were void ab initio.
- Accordingly, when this matter was brought before the Single Bench of the Delhi High Court, the suit of the Appellant was decreed with a direction for the Respondents to pay INR 96,41,765.31 to the Appellant.
- Aggrieved by the decision of Single Bench, the Respondents preferred an Appeal before the Division Bench of the Delhi High Court. The Division Bench vide its Order dated May 28, 2012 (**Impugned Order**), allowed the Appeal and set aside the judgement of the Single Bench holding that the Appellant was unable to prove its registration as a dealer with the Sales Tax Authorities in Delhi and therefore, it had to pay the Central Sales Taxes. The Division Bench noted that the documents which were produced by the Appellant had been signed in the absence of the witnesses who supported its validity.
- Aggrieved by the Impugned Order, the Appellant filed an Appeal before the Hon'ble Supreme Court (**SC**).

Issue at hand?

- Whether the bills produced by the Appellant were a result of fictitious and fraudulent transactions?

Decision of the Court

- Upon perusal of the Impugned Order and the arguments advanced by the parties, the SC observed that the invoices along with the debit notes and ST-1 Form were signed and stamped by the Respondents, which was admitted in the Court by the witness of the Respondents in cross examination. The SC noted that signature on a number of documents over the course of three months cannot be an exercise of duress. Moreover, it was observed that the Respondents had no evidence of duress apart from their own statement, which can be false.
- With regards to the Appellant's registration as a dealer, the SC observed that a certificate indicating its registration as a re-seller dealer under Section 14 of the Delhi Sales Tax Act, 1975, was filed. The SC also considered that all the invoices produced by the Appellant had the Sales Tax registration number which further proved its dealership.
- Additionally, SC emphasized that the validity of all the documents submitted by the Appellant was proved by a witness whose presence was not required while those documents were signed. The SC also held that since it was the Respondents who questioned the authenticity of the documents, it was their responsibility to prove them wrong, which they have failed to do so.
- Further, on the Respondents reliance upon the judgment of *Subhra Mukherjee and Another v. Bharat Coking Coal Ltd and Ors*[10], to contend that the onus of proof whether transactions were genuine and bona-fide has to be discharged by the Appellant, the SC held that the party questioning the validity of the document had to prove it before the court and the same shall be followed in the instant case as well.

HSA
Viewpoint

The SC has rightly held that the examination of the author of a document is not required, if they had not denied their signature on the document, but only pleaded duress in execution of the same. In the instance case, the Respondents failed to prove their point through proper evidence and witnesses while questioning the validity of the document produced in the Court. The decision serves as a guiding precedent on the burden of proof where the validity of any document is questioned by a party.

[10] (2000) 3 SCC 312

- Furthermore, on the Respondents reliance upon the judgment of *Ishwar Dass Jain v. Sohan Lal*[11] to contend that the appellant has not produced account books but only extracts which are not admissible in evidence and hence suit was rightly dismissed by the High Court in Appeal, the SC observed that in that case, the relationship between the parties were that of the mortgagee and the mortgagor, while in the present case it was that of the landlord and the tenant, and despite the Respondents denial on the receipt of goods, its receipt is proved by numerous documents stamped and signed by the Respondents.
- The SC concluded that the examination of the author of a document becomes irrelevant when the document is signed by the author, whether or not under duress. In view of the above and considering that all the evidence like the entries in the account books, invoices, debit notes, and the Form ST-1 were in favor of the Appellant, the SC allowed the appeal and directed the Respondents to pay a sum of INR 96,41,765.31, along with future interest on the principal amount of INR 71,82,266 at 9% p.a. from the date of filing the suit till the date of realization.

Future Retail Ltd v. Amazon.com NV Investment Holdings & Ors

CM(M) 2/2022 & CM(M) 3/2022

Background facts

- The petitions were filed under Article 227 of the Constitution of India arising out of the arbitration proceedings tilted as *Amazon.com NV Investment Holdings LLC v. Future Coupons Private Ltd*[12] involving Amazon.com NV Investment Holdings LLC (**Amazon**), Future Coupons Private Ltd (**FCPL**) and Future Retail Ltd (**FRL**).
- Both the petitions had been filed challenging the impugned orders passed by the Arbitral Tribunal and further to declare the continuation of the arbitration proceedings as contrary to law and to direct the Arbitral Tribunal to decide the termination applications filed by the petitioners on before continuing with the arbitration proceedings.
- The Arbitral Tribunal in the Impugned Order dated 29 December 2021 (**Order I**) has stated/observed that it is not clear whether or not the order by the Competition Commission of India (**CCI**) is appealable and hence, cannot form the basis for termination of the arbitration proceedings.
- The Arbitral Tribunal in the impugned order dated 30 December 2021 (**Order II**) has stated/observed that the Arbitral Tribunal has not taken any decision with regard to implications of the CCI order on the continuation of the said arbitration. What was expressed in Order I was only the preliminary view of the Arbitral Tribunal so that the parties can address submissions accordingly.
- The Impugned Order dated December 31, 2021 was an email from the Arbitral Tribunal to the counsel for FCPL clarifying that the impugned order/email sent by the Arbitral Tribunal on 30 December 2021 to FRL be also taken as a response to FCPL.

Issues at hand?

- In Order I and II, no date has been fixed for a hearing on the termination applications.
- Whether the hearing of the termination applications should have taken priority over the hearings of the expert witnesses?
- Whether in exercise of jurisdiction under Article 227 of the Constitution of India, the High Court can interfere with Order I & II which are mere procedural in nature?

Decision of the Court

- The High Court held that the grievance of the Petitioners stands redressed by the email dated January 1, 2022. A perusal of the aforesaid email amply demonstrates that the Arbitral Tribunal has been accommodating towards all parties. This is evident from the fact that the Arbitral Tribunal has cut short the scheduled four days' hearing of the expert witnesses to three days and the fourth day i.e., January 8, 2022, has been fixed for oral hearing on the termination applications filed by the petitioners.
- The High Court did not find any merit in this issue placed by the Petitioners. The High Court held that just because the hearing of the termination applications is scheduled for a date after the hearings of the expert witnesses does not mean that the Arbitral Tribunal is not willing to consider the said applications on merits or is discounting the merits of the said applications. It is

Present Status

The Future Group filed an appeal against the judgment passed by the Ld. Single Judge. The Division Bench of the High Court of Delhi vide its order dated 5 January 2022 stayed the further proceedings before the Arbitral Tribunal in *Amazon.com NV Investment Holdings LLC v. Future Coupons Private Ltd* as well as the impugned judgment passed by the learned Single Judge, till the next date of hearing. The Division Bench observed that there is a prima facie case in favour of the Future group companies in view of the Competition Commission of India order dated December 17, 2021 whereby it held that Amazon had failed to disclose true and complete details of the purpose of the Combination and suppressed relevant and material documents amounting to misrepresentation. Pursuant to the stay order by the Division Bench of the Hight Court of Delhi, SIAC terminated the arbitration proceedings that was to be held from January 5, 2022 to January 8, 2022.

[11] (2000) 1 SCC 434
[12] (SIAC Arbitration No.960 of 2020)

in the sole discretion of the Arbitral Tribunal to decide whether the termination applications should be heard before or after the hearings of the expert witnesses.

- The High Court noted that Article 227 of the Constitution of India is a constitutional remedy, there cannot be a complete bar to the petitions being filed under Article 227. However, there is only a very small window for interference with orders passed by the Arbitral Tribunal while exercising jurisdiction under Article 227. The said window becomes even narrower where the orders passed by the Arbitral Tribunal are procedural in nature. Therefore, this window cannot be used for impugning case management orders passed by the Arbitral Tribunal, which are in the nature of procedural orders. Reference was made to Section 5 of the Arbitration & Conciliation Act, 1996 and the judgement of the SC in *Deep Industries Ltd vs. Oil and Natural Gas Corporation Ltd and Anr*[13]. The Court held that such procedural orders are completely in the domain and discretion of the Arbitral Tribunal and include orders relating to the scheduling of the arbitration proceedings or the order in which applications filed by the parties are to be considered or the timelines in relation to the arbitration proceedings.
- The Court observed that under the provisions of the Arbitration and Conciliation Act, 1996, the Arbitral Tribunal is the sole master of the procedures. Reference in this regard was made to the judgment passed by the High Court in the case of *Ambienccourte Projects & Infrastructure Pvt. Ltd vs. Neeraj Bindal*[14].
- The Court observed that Arbitrators have far greater flexibility in adopting procedure to conduct the arbitration proceedings as compared to the Civil Court. The Arbitral Tribunal is not bound by the procedure of the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. This flexibility would also vest the discretion in the Arbitral Tribunal to decide the manner in which the proceedings are to be conducted, including the order in which the applications filed by the parties are to be considered.

In Re: Expeditious Trial of Cases u/s 138 of N.I. ACT, 1881

2021 SCC Online SC 325

Background facts

- SLP(Criminal) No. 5464 of 2016 pertaining to dishonor of two cheques for an amount of INR 1,70,000 remained pending for the past 16 years. Alarmed with the large number of pending cases filed under Section 138 of the Negotiable Instruments Act, 1881 at various levels, a Division Bench of the Supreme Court (**SC**) decided to examine the reasons for the delay in disposal of these cases.
- Consequently, the Registry was directed to register a Suo Motu Writ Petition (Criminal) and Mr. Sidharth Luthra was appointed as Amicus Curiae. Notices were issued to the Union of India, Registrar Generals of the High Courts, Director Generals of Police of the States and Union Territories, Member Secretary of the National Legal Services Authority, Reserve Bank of India and Indian Banks' Association, Mumbai as the representative of banking institutions.
- The preliminary report submitted by the Amici Curiae showed that as on December 31, 2019, the total number of criminal cases pending was INR 2.31 crores, out of which INR 35.16 lakh pertained to Section 138 of the Act. The reasons for the backlog of cases, according to the Amici Curiae, is that while there is a steady increase in the institution of complaints every year, the rate of disposal does not match the rate of institution of complaints. The matter was further referred to a larger bench in view of the important issues that arose for determination before this Court. The Bench after examining the reasons for the delay in disposal of the cases has issued seven important guidelines to expedite the hearing and disposal of the cases under Section 138 of Negotiable Instruments Act, 1881 (**N.I. Act**).

Issues at hand?

- The Amici Curiae identified seven major issues as under:
  - Service of summons
  - Statutory amendment to Section 219 of the Code
  - Summary trials
  - Attachment of bank accounts
  - Applicability of Section 202 of the Code
  - Mediation
  - Inherent jurisdiction of the Magistrate

[13] (2020) 15 SCC 706
[14] (CM(M) 525/2021)

Decision of the Court

- The Supreme Court's decision in 'In Re: Expeditious Trial of Cases under Section 138 of N.I. ACT, 1881' pointed towards speedy disposal of cases relating to offences under Section 138 of N.I. Act.
- **No mechanical conversion**
  - First guideline issued by the Apex Court is that '*there should not be no mechanical conversion of summary trial to summons trial*'. Section 143 of N.I Act empowers the trial court to try the cases summarily as per Sections 262 to 265 of Cr.P.C. and if the case is tried summarily, it shall be lawful for the trial court to pass a sentence of imprisonment for a term not exceeding 1 year. If the Magistrate is of the opinion that it may be necessary to pass a sentence for a term exceeding one year, then the case shall be tried as a summons trial.
  - SC observed that '*from the responses of various High Courts, it is clear that the conversion by the Trial Courts of complaints under Section 138 from summary trial to summons trial is being done mechanically without reasons being recorded. The result of such conversion has been contributing to the delay in disposal of the cases. Further, the second proviso to Section 143 mandates that the Magistrate has to record an order spelling out the reasons for such conversion. The discretion conferred on the Magistrate by the second proviso to Section 143 is to be exercised with due care and caution, after recording reasons for converting the trial of the complaint from summary trial to summons trial. The High Courts may issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 from summary trial to summons trial*'.
- **Recording of reasons before issuing of summons**
  - The second guideline is 'where accused resides beyond the territorial jurisdiction of the trial court, an inquiry shall be conducted under Section 202 of Cr.P.C. and shall record reasons before issuing summons'. Under Section 202 of Cr.P.C the Magistrate shall conduct an inquiry before issue of process, in a case where the accused resides beyond the territorial jurisdiction of the court. Since divergence of opinion among the various High Courts relating to the applicability of Section 202 of Cr.P.C relating to complaints filed under Section 138 of the Act the Hon'ble SC has opined that 'in view of the judgments of this Court in *Vijay Dhanuka & Ors. v. Najima Mamtaj & Ors*[15], *Abhijit Pawar v. Hemant Madhukar Nimbalkar and Anr*[16] and *Birla Corporation Ltd v. Adventz Investments and Holdings Ltd & Ors*[17] the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with'. The main aim behind this is to protect the innocent accused person from harassment in light of false complaints and hence, the trial court must provide reasons and not issue summons mechanically.
- **Evidence of witnesses be taken on affidavit**
  - The third guideline issued by the Hon'ble SC is 'evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit'. In this regard the SC held that 'in view of section 145 of N.I Act, Section 202 (2) of the Code is inapplicable to complaints under Section 138 in respect of examination of witnesses on oath. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses'. Therefore, Magistrate can take evidence of the witnesses via the affidavits and thus obviates the physical presence of witnesses in respect of complaints under Section 138 of N.I Act.
- **One trial for multiple offences**
  - The next guideline issued by the Apex Court is 'suitable amendments be made to the N.I Act for provision of one trial against a person for multiple offences under Section 138 of the Act committed within a period of 12 months'. As per Section 219 of the Cr.P.C when an accused commits more than one offence of the same kind within a period of 12 months, he may be charged with, and tried at one trial for a maximum of three such offences. In *Vani Agro Enterprises v. State of Gujarat & Ors*[18] , SC held that the Judgment is good in law and needs no clarification. In the said case the Court directed the Trial Court to fix all the four cases on one date. The SC observed that 'to reduce the burden on the docket of the criminal courts, we recommend that a provision be made in the Act to the effect that a person can be tried in one trial for offences of the same kind under Section 138 in the space of 12 months, notwithstanding the restriction in Section 219 of the Code'

[15] (2014) 14 SCC 638
[16] (2017) 3 SCC 528
[17] (2019) 16 SCC 610
[18] 9 2019 (10) SCJ 238

- **Deemed service of summons**
  - Fifth guideline is to treat service of summons in one complaint pertaining to a transaction as deemed service for all complaints in relation to the said transaction. The Apex Court has observed that 'the High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonor of cheques issued as part of the said transaction'.
- **No inherent power to review or recall of issue of summons**
  - In *K. M. Mathew v. State of Kerala & Anr*[19]. SC held that there is no requirement of a specific provision for the Magistrate to drop the proceedings and as the order issuing the process is an interim order and not a judgment, it can be varied or recalled.
  - But subsequently in *Adalat Prasad v. Rooplal Jindal and Ors*[20] the SC reversed its earlier order and held that the order taking cognizance can only be subject matter of a proceeding under Section 482 of the Code as subordinate criminal courts have no inherent power and that there exist no power of review conferred on the trial courts by the Cr.P.C, and further held that 'as there is no specific provision for recalling an erroneous order by the trial court, the judgment in the case of K. M. Mathew does not lay down correct law'. Therefore, trial court has no power to review or recall its order of issue of summons and this power is vested only on High Courts under Section 482 of Cr.P.C.
  - The decision in Adalat Prasad was reaffirmed by the SC in *Subramanium Sethuraman v. State of Maharashtra & Anr*[21] , wherein it was held that: Discharge, Review, Re-Consideration, recall of order of issue of process under Section 204 of the Cr.P.C. is not contemplated in a Summons Case under Cr.P.C. Once the accused has been summoned, the trial court has to record the plea of the accused (under Section 251 of the CrPC) and the matter has to be taken to trial to its logical conclusion and there is no provision which permits a dropping of proceedings, along the way.
  - In *Bhushan Kumar v. State (NCT of Delhi)*[22] ruled that the Magistrate has the power to discharge an accused in a Summons Case. The relevant observations of the Court are as under: 'It is inherent in Section 251 CrPC that when an accused appears before the trial court pursuant to summons issued under Section 204 in a Summons Trial case, it is the bounden duty of the trial court to carefully go through the allegations made in the charge-sheet or complaint and consider the evidence to come to a conclusion, whether or not, commission of any offence is disclosed and if the answer is in the affirmative, the Magistrate shall explain the substance of the accusation to the accused and ask him whether he pleads guilty otherwise, he is bound to discharge the accused as per Section 239 of the CrPC'
  - The SC in the case of *Amit Sibal v. Arvind Kejriwal*[23], held that the trial court has no power to drop proceedings/discharge in a Summons Trial. This also appears to be in sync with the settled judicial view and also the scheme of CrPC, wherein separate and distinct procedures have been laid down for Warrants, as opposed to Summons Cases.
  - However, the SC in the present case observed that 'this does not affect the power of the Trial Court under Section 322 of the Code to revisit the order of issue of process in case it is brought to the court's notice that it lacks jurisdiction to try the complaint'.
- **No power to discharge the accused**
  - In this guideline issued by the SC, it held that 'trial Court has no power to discharge the accused if the complainant is compensated to the satisfaction of the court'. In *Meters and Instruments Private Ltd and Another v. Kanchan Mehta*[24] it was held by the SC that Section 143 of the Act confers implied power on the Magistrate to discharge the accused if the complainant is compensated to the satisfaction of the court, in case the accused tenders the cheque amount with interest and reasonable cost of litigation as assessed by the court. But in the present case SC held that that the judgment in Meters and Instruments conferring power on the Trial Court to discharge an accused is not good in law.
  - As a result, Section 258 of the Cr.P.C is not applicable to complaints under Section 138 of the Act in so far as it confers power on the Magistrate to stop the proceedings at any stage for reasons to be recorded in writing and pronounce a judgment of acquittal in any summons case instituted otherwise than upon complaint.

HSA
Viewpoint

This is a landmark judgment and a step in the right direction in terms of reducing the large number of pending cases filed under Section 138 of the Negotiable Instruments Act, 1881 at various levels. In the matter, the SC further requested the High Courts including SC to identify the pending cases under Section 138 of the N.I. Act and refer them to mediation which is an experimental method under criminal law and but highly appreciative given the nature of Section 138. Further, the SC instituted the formation of a Committee under Justice R.C. Chavan, former Judge of the Bombay High Court, to consider various suggestions to reduce the backlog of cases and their speedy disposal. the above guidelines are issued by the SC under Article 141 of the Indian Constitution and are bound to be followed by courts throughout India which will help expedite the trial cases under Section 138 of N.I. Act.

[19] (1992) 1 SCC 217
[20] (2004) 7 SCC 338
[21] (2004) 13 SCC 324
[22] (2012) 5 SCC 424
[23] 2016 SCC Online SC 1516
[24] (2018) 1 SCC 560

FEATURED TOPIC | The Draft Notaries (Amendment) Bill, 2021

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On December 07, 2021, the Ministry of Law and Justice notified the Draft Notaries (Amendment) Bill, 2021 (**Draft Bill**) in the public domain for stakeholders' consultation as a part of the pre-legislative consultation process, to be submitted latest by December 15, 2021. The Draft Bill aims to amend the Notaries Act, 1952 (**Act**) in a manner to grant opportunities to young eligible practitioners aspiring to serve as a Notary Public, which may help them to build up their professional excellence by which they can provide legal services in a more effective manner.

Salient features of the Draft Bill

- **Renewal of certificate of practice**
  - The Draft Bill recommends the addition of new provisos after sub-Section (2) of Section 5 of the Act, which deals with entry of names in the Register and issue or renewal of certificates of practice.
  - As per the existing provisions of the Act, the number of terms of renewal of a certificate of practice of a Notary is unrestricted after the initial appointment. The amendment proposes to restrict the overall term of Notaries for a period up to fifteen years i.e., the initial term of five years and two renewal terms of five years each, by curtailing renewals of unlimited terms and, thus, providing an opportunity for young lawyers to serve as a Notary.
  - The Draft Bill clarifies that the applications received for successive renewal of certificates of practice for third or more terms and whose validity expires prior to coming into force of the Notaries (Amendment) Act, 2021, will be considered for renewal.
  - The Draft Bill further clarifies that the certificates of renewal granted prior to the amendment will not be affected.
- **Digitization of Notarial work**
  - The Draft Bill proposes the insertion of Section 8A after Section 8 of the Act and provides that the records of Notarial work shall also be maintained and preserved by the Notary in digital format, in the manner as prescribed, in order to prevent misconduct in respect of notarization and safeguard the interest of the general public.
  - The Draft Bill also provides the addition of Clause (ha) after Clause (h) of sub-Section (2) of Section 15 which deals with the Central Government's power to make rules. The additional clause gives power to the Central Government to make rules pertaining to maintenance of the format and manner in which the digital records of notarial work undertaken by the Notaries, under Section 8A of the Act.
- **Power to suspend the certificate of practice**
  - The Draft Bill inserts Section 9A after Section 9 of the Act, empowering the appropriate government to suspend the certificate of practice of any Notary Public against whom a complaint has been received or otherwise, for professional or other misconduct, for such period as deemed fit for conduct of inquiry.
  - It also stipulates that before suspending the certificate of practice, a reasonable opportunity of hearing may be given to such a Notary.
  - As per the existing provisions of the Act, there is no provision for suspension of a certificate of practice till the completion of inquiry. However, Section 10 of the Act provides that the appropriate government can remove the name of the Notary Public from the register maintained by it if it is found guilty of professional or other misconduct.

HSA
Viewpoint

By introducing the digitization of the Notarial records, the Draft Bill proposes to address the foremost problem of accountability and record-keeping mechanisms followed by the Notary. In the era of increasing electronic transactions, such an amendment, if passed by the Parliament, will restrict falsification of records and frauds to a significant extent. Further, the limitation of the term of a Notary Public is a marked shift from the existing law and will pave way for young legal candidates to take up the role and responsibility of a Notary.

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