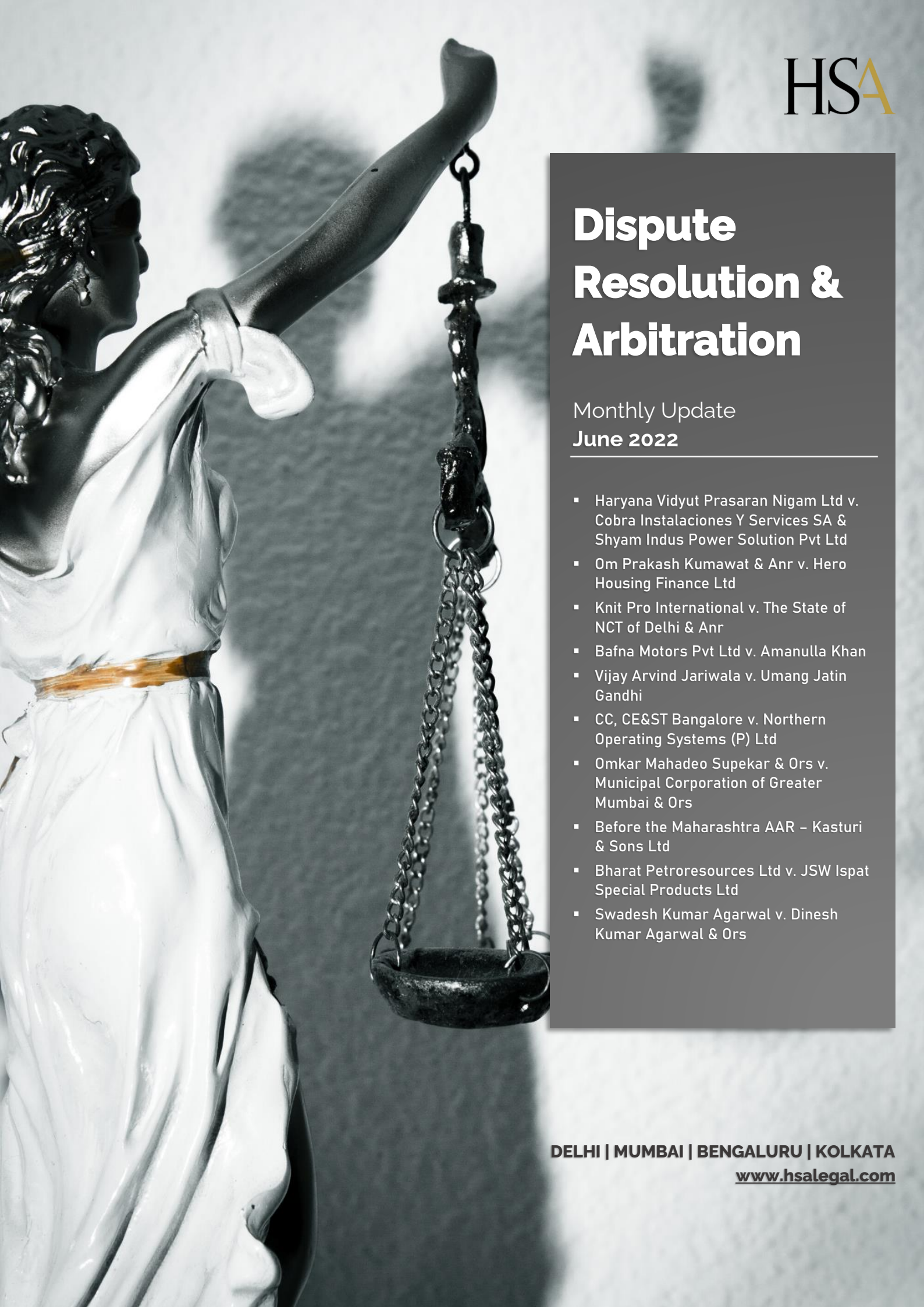

HSA

Dispute Resolution & Arbitration

Monthly Update

June 2022

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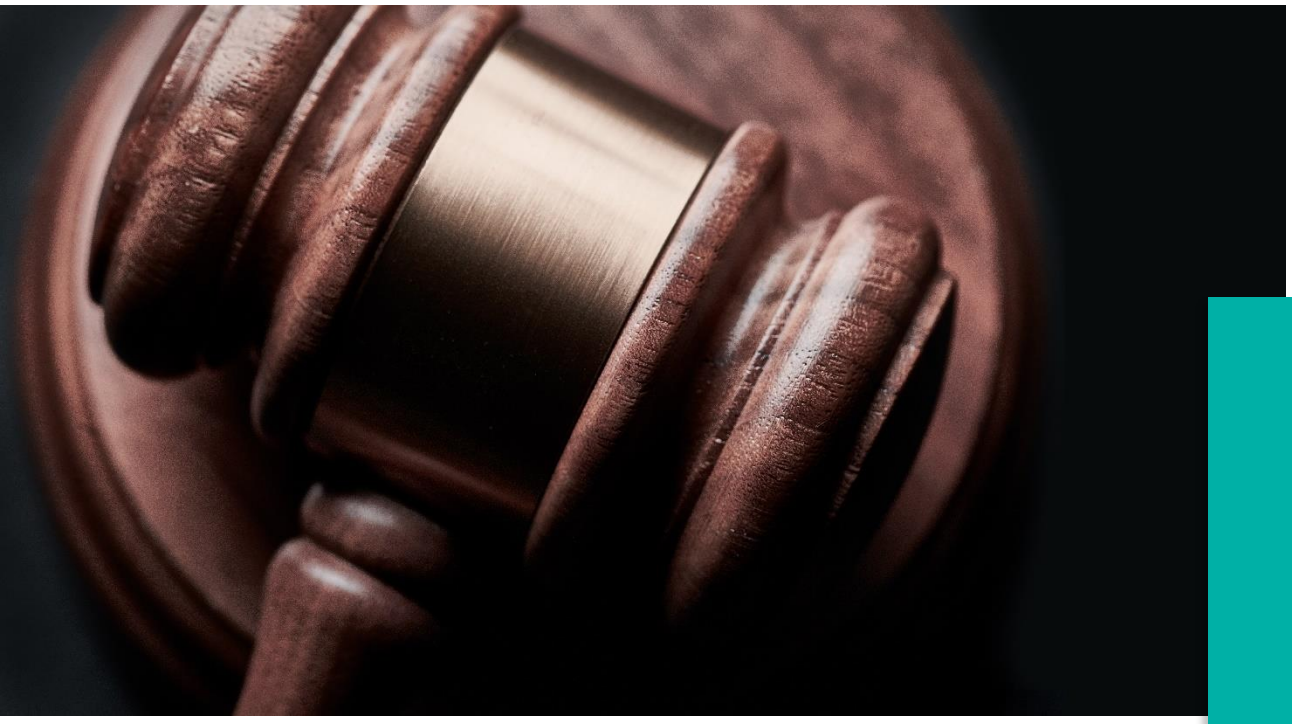
DISPUTE RESOLUTION AND ARBITRATION UPDATE



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Haryana Vidyut Prasaran Nigam Ltd v. Cobra Instalaciones Y Services SA & Shyam Indus Power Solution Pvt Ltd

O.M.P. (COMM.) 8 of 2021

Background facts

- The parties entered into an agreement for executing the work related to 'procurement of plant, design, supply and installation of Package G-09'. The agreement provided for imposition of liquidated damages for delay in execution of the work.
- Another contract for the construction of transmission lines was awarded to Hythro which was later blacklisted, and the work was given to some other party. There was a substantial delay in the completion of the work related to transmission lines.
- The completion of the work got delayed. Accordingly, the Petitioner intimated the Respondent that it would impose liquidated damages for the delayed period as provided for in the contract. The Respondent requested several extensions of times which were allowed by the Petitioner. The Petitioner, accordingly, deducted liquidated damages from the running account bills.
- The Respondent's request for the release of deducted money was declined by the Petitioner. Accordingly, the dispute was referred to a Sole Arbitrator.
- The Arbitral Tribunal partially allowed the claims of the Respondent. It directed the Petitioner to return 50% of the liquidated damages along with interest on the ground that there were some losses that the Petitioner could have reasonably quantified and on its failure to do so, the Respondent was entitled to the return of the half the amount. The Tribunal made a guesswork on the quantum of liquidated damages which could actually be proved and directed the Petitioner to refund 50% amount of the liquidated damages.
- **Submissions of the Petitioner:**
  - The arbitrator erred in reducing the amount of liquidated damages to 50% on guesswork.
  - The arbitrator also erred in allowing the claims of the Respondent in respect of ward and watch and the extension of Bank Guarantee.

  - The arbitrator rightly observed that the Petitioner is engaged in the business of providing utilities and the loss of same is not quantifiable. However, the tribunal wrongly directed it to refund 50% liquidated damages to the Respondent on the assumption that some element of the loss was quantifiable.
  - The Petitioner suffered losses in various forms including, but not limited to, cost overrun as Interest During Construction (**IDC**), loss due to foreign exchange variation (in terms of foreign currency loan), loss in the form of reduced tariff allowed by the HERC due to non-allowance of depreciation and return on equity.
- **Submissions of the Respondent:**
  - The Petitioner did not suffer any loss due to the delay in the execution of the project.
  - The Respondent was not responsible for the delay for the reason that its work was dependent upon the completion of the work related to the transmission lines and the same was delayed and therefore no fault could be attributed to it.
  - Even assuming that the Petitioner had suffered any loss, it was incumbent upon it to prove it to levy liquidated damages.
  - The Tribunal erred in overlooking the evidence on record, especially the findings of the Superintendent Engineer, Project Manager, and Assistant Project Manager who recommended that no liquidated damages should be levied as no loss was suffered by the Petitioner.
  - The heads under which the Petitioner claimed to have suffered losses were clearly quantifiable and it could not recover any damages without establishing the exact loss suffered by it.
  - The affidavits of evidence furnished by witnesses for the Petitioner also did not mention the quantum of loss suffered under those heads. Further, the said loss was not informed to the Respondent at any prior point in time.

Issue at hand?

- Whether an Arbitral Tribunal can reduce the liquidated damages if it finds that it is a genuine pre-estimate of damages and it is not possible to quantify the damages.

Decision of the Court

- The Arbitrator rightly concluded that since the Petitioner had suffered a substantial loss due to the delay in execution of the work, so it was justified in imposing liquidated damages on the Respondent. The Court agreed with the finding of the Tribunal that the Respondent could not avoid its obligation to pay liquidated damages and take garb under the excuse that its work got delayed as the transmission lines were not laid down.
- Since it is not disputed that the Respondent had delayed the performance of its obligations, which were a vital part of the works to be executed for commissioning the project, it cannot be absolved of its liability for the delay on the ground that some other contractor had also delayed execution of the works and it may not be apposite to mathematically determine, which of the contractors' work was, in essence, the vital link that had resulted in the overall delay in commissioning the project.
- The contract in question was to augment the infrastructure for the distribution of electricity – a vital utility – and the loss caused due to the delay in augmenting utilities is a loss, which is impossible to compute in precise monetary terms. As such, the Tribunal was right in holding that the Petitioner was entitled to liquidated damages.
- The Arbitral Tribunal cannot reduce the liquidated damages on guesswork if it finds that they are pre-estimated damages, and it is not possible to quantify the damages.
- Once the Arbitrator finds that the employer has suffered substantial losses due to the fault of the contractor and the contract provides for liquidated damages which were genuine pre-estimate of the loss as the quantification of the claim was not possible, the Arbitrator cannot reduce the amount of the damages on a guesswork for the reason that only some of the losses could be quantified.
- The Court partially set aside the award on the ground that the Arbitrator has taken inconsistent views regarding the imposition of liquidated damages and made a guesswork without there being any material on record to make an educated guess as to the quantum of damages payable.
- The Court did not interfere with the reasoning of the Tribunal with respect to other claims on the ground that the claims were decided on the construction of the terms of the agreement which is purely in the domain of the arbitrator and the court cannot substitute its view with that of the Tribunal.

HSA
Viewpoint

The Court laid down the legal position that the Arbitrator cannot reduce the amount of the damages on guesswork, once he finds that the employer has suffered substantial losses due to the fault of the contractor and the contract provides for liquidated damages which were genuine pre-estimate of the loss as the quantification of the claim is not possible.

Om Prakash Kumawat & Anr v. Hero Housing Finance Ltd

S.B. Civil Writ Petition No. 6199/2022

Background facts

- The Petitioners being the borrowers filed a Writ Petition praying for quashing the order dated March 15, 2022 passed by the Chief Metropolitan Magistrate, Jaipur Metropolitan-I in Civil Miscellaneous Case No.164/2022 (CIS No.168/2022) under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**).
- **Submissions of the Petitioners:**
  - Petitioner submitted that the Writ Petition was maintainable despite availability of an efficacious and alternative remedy under the provisions of the SARFAESI Act and relied on the judgment of *Harshad Govardhan Sondagar v. International Assets Reconstruction Company Limited & Ors*[1] wherein the Apex Court held that remedy of appeal is not available against an order passed under Section 14 of the SARFAESI Act.
  - In view of existence of an arbitration clause in the loan agreement and filing of an application under Section 9 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) by the Respondent, the Respondent could not have resorted to the provisions of Section 14 of the SARFAESI Act. Petitioner relied on the judgment of *SBP & Co v. Patel Engineering Ltd & Anr*[2] and *Vidya Drolia & Ors v. Durga Trading Corporation*[3].
- **Submissions of the Respondents:**
  - Writ Petition is not maintainable as the Petitioners have an alternative and efficacious remedy under Section 17 of the SARFAESI Act. Reliance was placed on the *Shree Balaji Enterprises v. Authorized Officer of the Co-ordinate Bench of the Rajasthan High Court*[4] wherein the Writ Petitions were dismissed on account of availability of alternative and efficacious statutory remedy under the SARFAESI Act and the same was upheld by a Division Bench of te Court vide its Order dated February 21, 2022. Reliance was further placed on the judgments of the Supreme Court of India in the matters of *MD Frozen Foods Exports Pvt Ltd & Ors v. Hero Fincorp Ltd*[5] & *Indiabulls Housing Finance Ltd v.Deccan Chronicle Holdings Limited & Ors*[6].

Issue at hand?

- Whether a petition under writ jurisdiction of a court is maintainable when an efficacious and alternative remedy is available under the provisions of the SARFAESI Act?

Decision of the Court

- The issue of availability of an alternative statutory remedy is no more *res integra* and stands decided against the Petitioner.
- The Petitioner's reliance on Apex Court's judgment in the matter of *Harshad Govardhan Sondagar* (*supra*) is misplaced since the issue in the matter was right of the Petitioner, a lessee, in the mortgaged property, in the light of the provisions of Sections 105 & 111 of the Transfer of Property Act, 1882.
- The Court held that arbitration proceedings and proceedings under the SARFAESI Act can be resorted to simultaneously while placing reliance on the judgments of the Apex Court in the matters of *M.D. Frozen Foods Exports Pvt Ltd & Ors* (supra) and *Indiabulls Housing Finance Limited* (supra).
- The Petitioner's reliance on the Apex Court's judgments in the matters of *SBP & Co* (supra) as also in case of *Vidya Drolia* (supra) is misplaced since the provisions of the SARFAESI Act were not involved in any of these judgments for consideration by the Apex Court.

HSA
Viewpoint

The Court reiterated the legal position on maintainability of a petition under writ jurisdiction of a court when an efficacious and alternative remedy is available under the provisions of the SARFAESI Act. The Court further re-iterated arbitration proceedings and proceedings under the SARFAESI Act can be resorted to simultaneously.

[1] (2014) 6 SCC 1
[2] 2005) 8 SCC 618
[3] 2021 (1) WLC (SC) Civil 257
[4] S.B. Civil Writ Petition No. 9054/2021
[5] Civil Appeal No.15147/2017
[6] Civil Appeal No.18/2018 dated 23.02.2018

Knit Pro International v. The State of NCT of Delhi & Anr

Criminal Appeal No. 807 of 2022

Background facts

- The Appellant had filed an Application under Section 156(3) of the Code of Criminal Procedure (**CrPC**), whereby directions were sought from the Chief Metropolitan Magistrate (**CMM**) for the registration of FIR against the Respondent No. 2 being the Original Accused, for the offences under Sections 51, 63 and 64 of the Copyright Act, 1957 (**Act**) read with Section 420 of the Indian Penal Code (**IPC**).
- On October 23, 2018, the CMM allowed this Application and directed the concerned Station House Officer (**SHO**) to register an FIR under the appropriate provisions of law.
- In furtherance of the said Order, an FIR bearing No. 431 of 2018 was registered with PS Bawana and thereafter Respondent No. 2 filed a Petition before the High Court of New Delhi (**HC**), praying for the criminal proceedings to be quashed on various grounds. However, at the time of hearing, the Respondent No. 2 (being the Petitioner therein) prayed to quash the criminal proceedings on the sole ground that the offence under Section 63 of the Act is not a cognizable and a non-bailable offence.
- By way of an Order dated November 25, 2019, the HC allowed the Writ Petition and quashed the FIR filed against Respondent No. 2 for the offences under Sections 63 and 65 of the Act, by holding that the offence under Section 63 is non-cognizable offence (**Impugned Order**).
- Aggrieved by the same, the Appellant preferred an Appeal against the decision of the HC before the Supreme Court (**SC**).

Issue at hand?

- Whether the offence under Section 63 of the Act is a cognizable offence as considered by the CMM or a non-cognizable offence as observed and held by the HC?

Decision of the Court

- SC examined Section 63 of the Act as well as Part II of the First Schedule of the CrPC, and concluded that the punishment provided for the offence under Section 63 of the Act is imprisonment for a term which shall not be less than 6 months, but which may extend to 3 years, and a fine. Therefore, the maximum punishment which can be imposed would be 3 years.
- Accordingly, the SC held that the CMM is empowered to sentence the accused only for a period of 3 years.
- The SC stated that considering Part II of the First Schedule of the CrPC, if the offence is punishable with imprisonment for 3 years and onwards but not more than 7 years, the offence is a cognizable offence. Only in a case where the offence is punishable for imprisonment for less than 3 years or with fine, the offence can be said to be non-cognizable.
- In view of the above clear position of law, the decision in the case of *Rakesh Kumar Paul v. State of Assam*[7], which was relied upon by Respondent No. 2, would not be applicable to the facts of the case on hand. The SC observed that the language of the provision in Part II of First Schedule is very clear and there is no ambiguity whatsoever.
- The SC held and observed in clear terms that an offence under Section 63 of the Act is a cognizable and non-bailable offence.
- Subsequently, the SC held that the HC has committed a grave error in holding that the offence under Section 63 of the Act is a non-cognizable offence and quashing criminal proceedings and the FIR. It was also directed that the criminal proceedings against Respondent No. 2 for the offence under Sections 63 & 64 of the Act now shall be proceeded further in accordance with law and on its own merits, treating the same as a cognizable and non-bailable offence.
- Therefore, the impugned Order passed by the HC was quashed and set aside by the SC.

HSA
Viewpoint

While the Court's analysis in the present judgment is succinct and objective, for the longest time there were conflicting viewpoints of various Courts as to whether copyright infringement under Section 63 of the Act is a cognizable offence or not. Therefore, by way of this judgment, the SC has cleared any speculations/doubts and has taken a positive step in deterring infringement of any entity's' copyrighted works.

Bafna Motors Private Ltd v. Amanulla Khan

Arbitration Application No.340 of 2019

Background facts

- The Applicant, upon searching for a premises to operate a workshop, approached the Respondent who is the holder of a leasehold land (**subject premises**).

[7] (2017) 15 SCC 67

- They decided to enter into a Leave and License Agreement (**Agreement**). One of the terms of the Agreement required the Applicant to deposit a sum of INR 12 lakh as a security deposit to enforce due compliance of the said Agreement. This sum of INR 12 lakh was to be returned to the Applicant upon delivery of peaceful and vacant possession of the subject premises, after deductions (arrears of license fee charges or expenses of repair or damages caused by licensee to the subject premises), if any.
- The Agreement also provided for a dispute resolution mechanism whereunder the parties could refer any dispute in connection with the said Agreement to an Arbitrator to be appointed by mutual consent.
- The parties thereafter entered into the Leave and License Agreement dated July 22, 2012.
- Few weeks before the term of the Leave and License Agreement was about to expire, the Applicant demanded the refund of security deposit of INR 12 lakh. Respondent refused to return the security deposit citing damage to the subject premises as the reason.
- Thus, dispute arose between the parties and Applicant served a notice to the Respondent invoking the arbitration clause. The Respondent neither gave consent for appointment of the Arbitrator nor replied to the notice. The Applicant had already delivered the vacant and peaceful possession of the subject premises.
- Applicant thereafter filed the present Application under Section 11 of the Arbitration and Conciliation Act, 1996 (**1996 Act**) before the High Court of Bombay for appointment of an Arbitrator.

Issue at hand?

- Whether the dispute relating to the refund of security deposit in a Leave and License Agreement be subject to arbitration or will the Court of Small Causes have its exclusive jurisdiction?

Decision of the Court

- **Stand of the Applicant:** The Applicant by virtue of the Application under Section 11 of the 1996 Act sought appointment of an Arbitrator to arbitrate all the disputes and differences (more specifically relating to refund of security deposit) that have arisen between the parties in relation to the Leave and License Agreement dated July 22, 2012.
- **Stand of the Respondent:** Respondent resisted the Application by assailing the invocation of the arbitration, as the disputes arising out of Leave and License Agreement were exclusively amenable to the jurisdiction of Court of Small Causes, Mumbai under Section 41 of the Presidency Small Cause Courts Act, 1882 (**1882 Act**), thus claiming that the arbitration clause in the Leave and License Agreement was invalid and inoperative.
- The Court referred to the following judgments:
  - *RMC Readymix (I) Pvt Ltd v. Kanayo Khubchand Motwani*[8] wherein a single Judge of the Bombay High Court repelled the challenge to the tenability of a Summary Suit to recover the security deposit by opining that a claim for refund of security deposit is not covered by the expression 'relating to recovery of possession' as mentioned in Section 41 of 1882 Act. The provision of Section 41 applies in cases where the suit is related to 'recovery of possession' of premises or for 'demand of compensation' under the Leave and License Agreement.
  - *A.S. Patel Trust and Ors v. Wall Street Finance Ltd*[9] wherein a single Judge of the Bombay High Court observed that the proceeding filed by the licensor for recovery of the balance amount of security deposit was not action *in rem* but an action *in personam*. Thus, Section 41 of the 1882 Act was not at all attracted to such a case.
  - *Brainvisa Technologies Pvt Ltd v. Subhash Gaikwad (HUF)*[10] wherein it was held that a suit for the recovery of security deposit does not constitute a suit for the recovery of 'license fee or charges or rent therefor'. The expression 'charges' must receive meaning from the terms with which it occurs in context. License fees, charges and rent are periodical payments made for use and occupation. A security deposit is a form of security which the landlord as licensor obtains from the licensee to whom the premises are licensed for occupation. A claim for recovery of security deposit and seeking damages/compensation would not fall within the exclusive jurisdiction of the Court of Small Causes. The application under Section 11(6) was, therefore, maintainable.
- **Decision:**
  - The aforesaid pronouncements indicate that the Court has consistently held that a dispute over the refund of security deposit does not fall within the ambit of the exclusive jurisdiction

HSA
Viewpoint

In the instant case, the dispute is only relating to the refund of the security deposit and whether the subject premises actually suffered any damage so that the security deposit could be withheld by the Respondent. The term 'Security Deposit' is not a term exclusive to the leave and license agreement, but it is a term which is generally used in most of the commercial contracts that too with exactly the same intent and purpose and it is also for that reason, the Court of Small Cause ought not to have the exclusive jurisdiction over the disputes pertaining to it. In this case the subject premises was also handed over back to the Respondent. Therefore, in the existence of an arbitration agreement, Section 41 of the Presidency Small Cause Courts Act would not apply and the parties can resolve their dispute before the Arbitral Tribunal..

[8] 2006 SCC OnLine Bom 307
[9] 2019 SCC OnLine Bom 1328
[10] 2012 SCC OnLine Bom 2003

of the Court of Small Causes conferred by Section 41 of the 1882 Act. A suit to recover the said amount in the jurisdictional Court and, in cases where the parties are governed by an arbitration agreement, shall be determined through arbitration and is legally in order.

- In the present case, the Respondent professes to withhold the security deposit on the ground that the Applicant is liable to pay damages. Considering the facts, the Court came to a conclusion that a claim for refund of security deposit does not fall within the exclusive jurisdiction of the Court of Small Causes and is amenable to arbitration.
- Thereafter the Court proceeded to appoint an Arbitrator to arbitrate the dispute relating to the refund of security deposit between the parties and allowed the Application.

Vijay Arvind Jariwala v. Umang Jatin Gandhi

R/Special Civil Application No. 3254 of 2021

Background facts

- In the present case, a Special Civil Application was filed by Umang Jatin Gandhi (**Applicant/Respondent**), one of the partners of a partnership firm, named Blue Feathers Infracon, against another partner namely Mr Vijay Arvind Jariwala (**Petitioner**).
- A partnership firm in the name of Blue Feathers Infracon was created by a deed in 2012, which consisted of partners Sandip Balwantrai Naik, Umang Jatin Gandhi (respondents herein) Vijay Arvindlal Jariwala and Sandip Balwantrai Naik in capacity of partner of another firm named called Blue Feathers Incorporation.
- In the year 2014, two partners Sandip Naik in his individual capacity and Sandip Naik in capacity of partner of Blue Feather Incorporation separated from the firm and a retirement deed was executed.
- The petitioner and the respondent herein remained two partners of the firm with profit sharing ratio of 50% each. The rest of the conditions of original partnership deed remained unchanged.
- The Petitioner under Section 9 of Arbitration and Conciliation Act, 1996 (**Act**) alleged that the Respondent was being non-cooperative in the project, that he was not giving signatures, was not allowing the execution of signatures of agreement to sale, etc. This caused delay in completing the construction projects leading to grave financial loss to the firm.
- The Respondent had filed an Interim Application under Order I Rule 10 of CPC to join the two parties as respondents to the proceedings under Section 9 of the Act, to implead two parties as respondents – one Falguni Sandip Naik as Respondent No. 2 and Sandip Balwantrai Naik as Respondent No. 3 pleading that they were necessary and proper parties as the Company had to recover money from them.
- The Respondent, during the proceedings of Section 9, issued notice through his advocate demanding the money to be recovered from Falguni Naik. The Respondent in capacity of partner of Blue Feathers Infracon filed criminal complaint under Section 138 of the Negotiable Instruments Act, 1882 and also instituted Special Civil Suit No. 135 of 2021 against the said Falguni Naik.
- The Respondent had filed a Civil Miscellaneous Application No. 20 of 2021 to implead two respondents to the arbitration proceedings, which was dismissed by the Commercial Court on the grounds that the partnership firm may have to recover money or have some disputes with the proposed parties, such aspect would not made out a case for joining them in the proceedings of Section 9 of the Act.
- Aggrieved by the same, the Respondent filed the present Special Civil Application before the High Court of Bombay.

Issue at hand?

- Whether a third party, who is not a party to the arbitration agreement, can be impleaded as a party in the arbitration proceedings?

Decision of the Court

- At the outset, the High Court (**HC**) advanced that Section 9 enables a party to seek interim reliefs which are intended to balance the rights between the parties who subject themselves to arbitral proceedings. The HC also made reference to Section 2(h) of the Act, wherein 'party' was defined as a party to arbitration agreement.
- In this regard, the HC compared parties to proceedings under Sections 9 of the Act with the parties to proceedings under Sections 7 and 11 of the Act and concluded that a person who is not a party to the arbitration agreement cannot be impleaded as party in the Petition under Sections 7 and 11 of the Act.

- Furthermore, the HC stated that a stranger to the arbitration agreement has no locus standi to invoke the provisions of Section 9 and therefore, applying the same principle, it stated that a third party who is not a party to the arbitration agreement cannot have any role to play in any of the proceedings under Section 9 of the Act, even if such third party has been impleaded as a party by the Applicant.
- In view of the above, the HC conclusively determined that the provision of Section 9 is intended to operate between the parties to the arbitration agreement and an award that shall be passed would only operate between the parties to the arbitration agreement, and therefore, if a non-party is joined as a party under Section 9 of the Act in order to obtain an interim award, it would lead to a chaotic situation, since such third party would not be amenable to the final resolutions of the disputes.
- As a result, the HC placed reliance upon judgements of the Apex Court in *Deutsche Post Bank Home Finance Limited v. Taduri Sridhar and Another*[11], wherein the Apex Court held that the lender was not party to the arbitration agreement and could not have been impleaded. As well as in *Firm Ashok Traders v. Gurukul Das Saluja*[12], wherein the Apex Court had held that a person who is not a party to the arbitration agreement cannot enter the Court for the protection under Section 9 of the Act.
- In light of the above, the HC averred that no list is created in the proceedings of Section 9 of the Act for a third party to the Act and held that the wife of the retired partner was not associated with the firm in any manner even as the partner himself had retired. Merely because the partnership firm had to recover money from the parties, would not make the parties the necessary and proper parties for a Section 9 proceeding.
- The HC, while dismissing the Application, held that a third party cannot be a party in the proceedings under Section 9 of the Act for interim measures wherein by the very nature of the proceedings, third party cannot be said to have a legal participatory right.

HSA
Viewpoint

The HC's decision clarifies that a third party who is not a party to the arbitration agreement cannot be impleaded as a party in the arbitration proceedings under Section 9 of the Act. The decision of the HC makes it crystal clear that only parties to an arbitration agreement can be impleaded as parties to the arbitration proceedings at an interim stage. The HC while arriving at its decision has clearly laid down the benchmark to be followed while impleading parties at the interim stage.

CC, CE&ST Bangalore v. Northern Operating Systems (P) Ltd

Civil Appeal No. 2289-2293 of 2021

Background facts

- In the instant case, Northern Operating Systems Pvt Ltd (**Assesse Company**) was registered with the Revenue as a service provider under various categories, one of which was 'Manpower Recruitment Agency Service'.
- Following an audit of the records by the Revenue officials, proceedings were initiated against the Assesse Company alleging non-payment of service tax concerning agreements entered into by it with its group of companies located in USA, UK, Dublin, etc. to provide general back-office and operational support to such group of companies.
- The Revenue issued show cause notices alleging that the Assesse Company failed to discharge service tax under the category of manpower recruitment or supply agency service with regard to certain employees who were seconded to the Assesse Company by the foreign group companies.
- By way of two Orders dated March 3, 2014 and March 4, 2014, the Commissioner confirmed the proposals in the notice (except the demand for the period from April, 2006 to September, 2006) accepting the fact that part of the demand has been raised at rate 12.3% instead of 10.3%. The Commissioner confirmed the demand, holding that firstly, providing skilled manpower on secondment basis is manpower recruitment or supply agency service in the meaning of Section 65(68) read with Section 65(105)(k) of the Income Tax Act, 1961 (**Act**).
- Aggrieved by the Order, the Assesse Company filed two appeals before the CESTAT. In the meanwhile, Revenue issued 2 more show cause notices demanding service tax for the period April, 2012 to September, 2014. The Commissioner, Bangalore, dropped the demands under these two show cause notices.
- Assailing the same, the Revenue also approached the CESTAT, which opined that neither the subject matter of contract between the Assesse Company and the group companies were for supply of manpower, nor the group companies were engaged in supply of manpower. Therefore, it held that the Assesse Company was not a service recipient. Accordingly, the Assesse Company's appeals were allowed by the CESTAT, and the Revenue's appeals were rejected.

[11] (2011) 11 SCC 375
[12] (2004) SCC 155

Issue at hand?

- Whether the secondment, for the purpose of completion of the Assesse Company's job, amounts to manpower supply?

Decision of the Court

- Supreme Court (**SC**) took note regarding secondment of the employees and stated that typically, the arrangement of the seconded employee is of such nature that they are under the supervision of the host entity and to meet statutory mandates, the salary is paid by the overseas entity, which is claimed as reimbursement from the host. The Court observed that if the overseas entity is treated as the employer, the arrangement would be treated as service and be taxed.
- SC also referred to the case of *Sushilaben Indravadan Gandhi v. New India Assurance Co Ltd*[13], wherein it had applied various tests in order to reach conclusion upon the issue whether a contract was one for service or one of service. It observed that only one test of universal application cannot yield correct result, and therefore, conglomerates of tests are to be applied to the fact and circumstances of each case to determine the nature of the contract.
- After perusing the letter of understanding between the Assesse Company and employees, the Court observed that nowhere was it mentioned that the seconded employees would be treated as employees of the Assesse Company. Upon such a finding, the Court came to a conclusion that there was no employer-employee relationship between the Indian Company and the employees who were seconded, and the company was a service recipient of manpower supply.
- Subsequently, SC held that Assesse Company was, for the relevant period, service recipient of the overseas group company concerned, which can be said to have provided manpower supply service, or a taxable service and therefore, set aside the Order passed by the CESTAT.

HSA
Viewpoint

The Supreme Court's decision that Indian companies are liable to service tax on secondment of employees from overseas group entities as recipient of manpower supply, removes all ambiguity with regards to levying service tax upon seconded employees. The essence of the issue is answering the question as to whether employer-employee relationship could be said to have been established between the Indian company and seconded employee of overseas group entity. If an employer-employee relationship could not be established, only then can service tax be levied and vice-versa.

Omkar Mahadeo Supekar and Ors v. Municipal Corporation of Greater Mumbai and Ors

Public Interest Litigation (L) No.23928 of 2021

Background facts

- The Municipal Corporation of Greater Mumbai (**MCGM/Respondent**) was building a cycling track around the Powai Lake. In doing so, the Respondent MCGM began the reclamation of the Powai Lake Wetland and was carrying out construction activities by uprooting the trees, digging the ground, dumping the stones and crushed sand over the water body.
- There were 2 construction sites: Site no. 1 being the reclamation of the water body adjacent to the Renaissance Hotel compound wall inside the Powai Lake Riparian Area, besides the Pipeline Road, Powai; and Site no. 2 being the area known as the Deer Park, besides the Ambedkar Udyan, Powai. Respondent No. 1 began the exploitation of Site no. 1 since July, 2021 and around 100 meters of the area had been constructed over a natural water body.
- The wetland area between Site no. 1 and 2 had been used by crocodiles as a basking site since a long time and were seen to rest there during night time. This area is also the 'zone of influence' i.e., part of the catchment area of the wetland or wetland complex where developmental activities could induce adverse changes in ecosystem structure and ecosystem services.
- This project was therefore opposed by the Omkar Mahadeo Supekar and other IITians (**Petitioners**), for which they filed the PILs to protect, conserve and restore the extremely vulnerable Powai Lake wetland from reclamation and ongoing construction activities carried out by the Respondents and Maharashtra Tourism Development Corporation Ltd (**MTDCL**).

Issues at hand?

- Whether Powai Lake is a protected wetland under Clause (3)(b) of Notification dated September 26, 2017 issued by Ministry of Environment, Forest and Climate Change, Government of India, New Delhi?
- Whether the work of construction of the cycling and jogging track carried out by the Respondents around the periphery of Powai Lake is legal?

Decision of the Court

- **1st issue: Powai Lake termed as wetland**

[13] (2021) 7 SCC 151

- The Court referred to a Notification dated September 26, 2017 issued by Ministry of Environment, Forest and Climate Change, Government of India and observed that Clause (3) of the said Notification provides that the said rules apply to:
  - Wetlands categorized as 'wetlands of international importance' under the Ramsar Convention
  - Wetlands as notified by the Central Government, State Government and Union Territory Administration.
- The Court thus observed that there was no notification placed on record to establish whether the Powai Lake could be termed as wetland.

- **2nd issue: Provisions of Part VII of DPCR 2034, which provides for 'Land Use Classification and Uses Permitted'.**
  - Under Part VII of Sub-Regulation 3.3 of Regulation 34, a specific regulation for protection and preservation of Powai and Vihar lakes, provides as follows:

    '(VII) Periphery of Vihar and Powai Lake: In order to prevent erosion of soil and silting in lakes, an exclusive green belt of 100 m shall be provided around the periphery of Vihar and Powai Lake, in which no construction whatsoever shall be allowed. If within 100 m from the periphery of Vihar and Powai Lake there exists Municipal/Public Road, then buffer of green belt beyond Municipal/Public Road may not be insisted.'
- The Court observed that a simple reading of the above regulation shows that there should be a 100 meter green belt around the edges of Vihar and Powai Lakes, and that no construction of any kind should be permitted to prevent soil erosion and silting up of the lakes.
- The Respondents argued that they were using Gabion Technology, and the same cannot be termed as construction or reclamation of land, nor that it would impede the flow of water. The Court was therefore constrained to interpret the term construction and observed that construction is not defined in DPCR 2034, and therefore the plain and natural meaning of the same will have to be considered, concluding that the term construction means the 'act to build' or 'erect'.
- The Court observed that no material was placed by the Respondents on record to establish that Gabion Technology was scientifically backed by studies. Based on the contentions of the Petitioners, Court discarded the claims of effectiveness of Gabion Technology and the claim of MCGM that no construction was proposed as contemplated in the DPCR 2034 which prohibits construction.
- The Court also noted from images of the construction work around the lake area, which depicted land filing/reclamation, raising of metallic frames on water bodies for dumping stones, and laying of tar roads along the lake perimeter, etc. The Court ruled that the authenticity of the images produced on record were not contested by MCGM and further observed that these activities contradicted the Respondents' claims that the project was meant to 'rejuvenate and reinvigorate' Powai Lake's natural ecology.
- The Court thus held that the Respondent-MCGM in the present case had induced itself to undertake the reclamation under the garb of use of Gabion Technology.
- **Conclusion**
  - Noting the concern for the ecological stability of Powai Lake, the Court allowed the PIL and held that the Respondent's construction of a cycle and jogging track was illegal, and thus would be prohibited from reclaiming land or constructing projects in Powai Lake, Mumbai, and its catchment area. It directed the Respondents to immediately restore all reclaimed sites to their original state at its cost and remove any and all construction carried out in furtherance of the project.

HSA
Viewpoint

This verdict of the Bombay High Court was delivered within a considerably short span of about 6 months. It is heartening to note that when it comes to protection, preservation and restoration of the eco-system, biodiversity, wildlife, natural flora, and fauna etc., from the very authorities who are supposed to act as custodians and protectors, the Courts have always come to the rescue of the citizens, and countless number of species and living beings who have no voice, but yet, have right to co-exist.

Before the Maharashtra Authority for Advance Rulings (AAR) – Kasturi & Sons Ltd

Advance Ruling No. GST-ARA-67/2020-21/B-72

Background facts

- The Applicant is the owner of properties containing 22 residential apartments and had fixed rentals/license fee for residential apartments at INR 145 per sq. ft.
- The Applicant has let out, on leave and license basis, the said residential apartments to Life Insurance Corporation of India for residential purpose of their staff members and claims that GST shall not be levied upon the license fees for leasing of residential properties as per Sl. No. 12 of the Notification No. 12/2017-CT (Rate) dated June 28, 2017.

Issue at hand?

- Whether the Applicant is eligible for the exemption from payment of GST on the monthly license fee to be received by them on the proposed letting out on leave and license basis of its residential flat for the purpose of their staff as per Sl. NO. 12 of the Notification No. 12/2017-CT(Rate) dated June 28, 2017 and corresponding Sl. No. 12 of Notification No. 12/2017-ST(Rate) under Maharashtra Goods and Services Tax Act, 2017?

Decision of the Court

- Authority for Advance Ruling (**AAR**) stated that the supply of service pertains to the real estate sector and can be categorized under real estate services (9972), i.e. renting/leasing own residential property, where the owner is supplying real estate service involving its own property.
- The AAR observed that as per the said schedule entry of Notification No. 12/2017-CT (Rate) dated June 28, 2017, the residential dwelling/property must be given on rent for use as a residence. The entry does not mention as to whom the said services are to be supplied. Thus, the exemption given in Sr. No. 12 of the said notification is qua the supply of service and not qua the recipient of the supply.
- The AAR therefore agreed with the contention of Applicant that Serial No. 12 of Notification No. 12/2017-CT (Rate) and the corresponding Notification under MGST Act, 2017, is very clear wherein it gives exemption to the nature of the property and its usage and not by the status of recipient.
- Further, the AAR also observed that as per the said allotment letter, employees of LIC shall use the premises only for residential purpose and they will stay there till the transfer of location of the employee/resignation/retirement.
- Upon such findings, the Authority held that services provided by the Applicant will be covered under the above mentioned Sr. No. 12 of Notification No.12/2017-CT (Rate) dated June 28, 2017 as amended and iterated that if a residential property was either used or let out for commercial purposes, then it would be classified as a service provided and attract GST. Only property let out for residential purposes will be exempt from the GST ambit. The GST applicability is not decided by the nature of the property but by the purpose for which it is used.

HSA
Viewpoint

The Maharashtra Authority for Advance Ruling's decision that GST is not payable on license fee for leasing of residential building for residence, can be said to be a necessary reiteration of law with regards to whether GST is to be levied on license fee for leasing residential properties or not. This decision in a way removes all doubts with regards to the circumstances under which GST is to be levied on license fee for leasing a property.

Bharat Petroresources Ltd v. JSW Ispat Special Products Ltd

Arbitration Petition 1154 of 2021

Background facts

- The parties entered into a Production Sharing Contract (**PSC**) with the Government of India. Subsequently, the members of the consortium entered into an agreement for carrying out activities under PSC and the Petitioner was selected as the lead operator to carry out the joint operations.
- The activities under the PSC were required to be conducted in conformity with an approved work program and within the approved budget. The finances for the operations were to be provided by the consortium partners including the Respondent.
- The Petitioner raised various cash calls on the Respondent; however, the Respondent failed to comply with the cash calls, and a dispute arose between the parties. The Petitioner issued a Default Notice dated July 15, 2016 declaring the Respondent as defaulting partner and called upon it to cure the default.
- In the meantime, the Respondent was admitted to CIRP under the IBC. The Petitioner also filed its claim with the Interim Resolution Professional (**IRP**). The IRP rejected the Petitioner's claims qua the defaults that happened after the Insolvency Commencement Date (**ICD**).
- Subsequently, the Petitioner raised more cash calls on the Respondent. The Committee of Creditors (**CoC**) approved the final resolution plan on April 09, 2018 and was also approved by the Adjudicating Authority.
- The Petitioner filed an appeal against the order of the Adjudicating Authority which was rejected by the Appellate Authority.
- Accordingly, the Petitioner issued a notice under Section 21 of the Arbitration and Conciliation Act, 1996 (**Act**) on the Respondent to appoint its nominee Arbitrator to decide on the claims that were rejected by the IRP and those which arose subsequently.
- The Respondent replied to the notice and denied its liability to pay the amount claimed by the Petitioner. The Respondent contended that post the approval of the resolution plan, the liability of the Respondent stands extinguished.

- As such, the Petitioner filed the present application under Section 11(6) of the Act.
- **Submissions of the Respondents:**
  - The Respondent objected to the maintainability of the application on the following grounds:
    - In terms of Clause 1(e)(ii) of the Resolution Plan, all the existing and future claims against the Respondent company, which were not included in the resolution plan, stand extinguished.
    - The resolution plan is approved by the Adjudicating Authority; therefore, it is binding on all the parties and no such claims survive.
    - The default qua the claims happened before the ICD.
    - The Appeal preferred by the Petitioner against the order of the adjudicating authority has been dismissed.
    - The Apex Court has in various judgments held that claims not included in the resolution plan cannot be pursued independently and the court has given explicit recognition to the theory of 'Clean-Slate' that postulates that not only all claims but also all causes of action against the company admitted to CIRP would stand extinguished on approval of the resolution plan.
- **Submissions of the Petitioners:**
  - The Petitioner countered the objections raised by the Respondent on the following grounds:
    - The issue of extinguishment of claims not made part of the resolution plan is a contentious issue; therefore, it is outside the scope of Section 11 of the Act which is confined to the examination of the existence of the Act.
    - The order of the Adjudicating Authority expressly notes that only the claims that arose before the ICD and not made part of the resolution plan stood extinguished; however, it did not preclude the creditor to pursue the claims that became due after the ICD.
    - The order of the Appellate Authority also does not state that the claims of the Petitioner that became due after the ICD would stand extinguished, therefore, the reliance on the same is misplaced.
    - The forfeiture of the participating right in the consortium did not absolve the Respondent of its liability.

Issue at hand?

- Whether an Arbitral Tribunal can reduce the liquidated damages if it finds that it is a genuine pre-estimate of damages and it is not possible to quantify the damages?

Decision of the Court

- The Court proceeded on the premise that the scope of examination under Section 11 is confined to the examination of the existence of the arbitration agreement and the Court is bound to appoint the Arbitrator when there is an arbitration agreement between the parties unless it is a case of clear deadwood.
- The Court relied on the decision of the NCLAT in *Andhra Bank v. F.M. Hammerle Textiles*[14] to observe that the claims arising after the ICD would not be automatically extinguished.
- The Court held that extinguishment of claims that arose after the ICD is a contentious issue that falls outside the standards of examination under Section 11 of the Act and, therefore, it is to be decided by the arbitrator when the parties have an arbitration agreement.

HSA
Viewpoint

The Court re-iterated the now settled legal position that the Court's power under Section 11 of the Act is circumscribed to ascertain the existence of the Act and nothing beyond.

Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal & Ors

Civil Appeal No. 2935-2938 of 2022

Background facts

- The present dispute was primarily in the nature of a family dispute for partition of property, wherein a Sole Arbitrator was appointed by the parties on August 04, 2008.
- Thereafter, the Respondents, who were also the parties to the arbitration proceedings, revoked the mandate of the Sole Arbitrator vide letters dated July 11, 2009. Further, the Respondent No. 1 (Dinesh Kumar Agarwal) and Respondent No. 3 (Rakesh Kumar Agarwal) filed applications under Section 14(1)(a) of the Arbitration and Conciliation Act, 1996 (**Act**) before the concerned District Court to terminate the mandate of the Sole Arbitrator on the ground of delay in concluding the arbitration proceedings.

[14] Company Appeal (AT) (Insolvency) No. 61 of 2018

- The Appellant (Swadesh Kumar Agarwal) filed an Application under Order VII Rule 11 of the Code for Civil Procedure, 1908 (**CPC**) for dismissal of the said applications under Section 14 of Act.
- The District Court vide its order dated July 15, 2010 dismissed the Application filed by the Appellant under Order VII Rule 11 of CPC. Being aggrieved, the Appellant filed Writ Petitions bearing Nos. 11258 of 2010 and 11259 of 2010 before the High Court of Madhya Pradesh at Jabalpur (**HC**).
- Thereafter, Respondent No. 1 filed a Petition under Section 11(6) of the Act before the HC for appointment of a fresh arbitrator and also requested to terminate the mandate of the Sole Arbitrator.
- Vide the Common Judgment and Order dated September 07, 2017, the HC allowed the Arbitration Petition under Section 11(6) of the Act and observed that there was undue and unreasonable delay on the part of the Sole Arbitrator in concluding the arbitral proceedings and thus the mandate stood terminated under Section 14(1)(a) of the Act. Further, the Court appointed a fresh arbitrator and dismissed the writ petitions filed by the Appellant herein.
- That the Appellant has filed the present Appeals before the Supreme Court against the Common Judgment and Order dated September 09, 2017.

Issues at hand?

- Whether the High Court in exercise of its powers under Section 11(6) of the Act, 1996, can terminate the mandate of the Sole Arbitrator?
- Whether in the absence of any written contract containing the arbitration agreement, the application under Section 11(6) of the Act, would be maintainable?
- Is there any difference and distinction between Sub-Section (5) and Section 11 and Sub-Section (6) of Section 11 of the Act, 1996?
- Whether the application under Sub-Section (6) of Section 11 shall be maintainable in a case where the parties themselves have appointed a Sole Arbitrator with mutual consent?
- Whether in the facts and circumstances of the case, the High Court was justified in terminating the mandate of the Sole Arbitrator on the ground that there was undue delay on the part of the Sole Arbitrator in concluding the arbitration proceedings which would lead to the termination of his mandate, in an application under Section 11(6) of the Act, 1996?
- Whether in the facts and circumstances of the case, the District/Trial Court was justified in dismissing the application submitted by the Appellant, submitted to reject the application under Section 14(2) of the Act, 1996 in exercise of powers under Order VII Rule 11 of CPC?

Decision of the Court

- The Supreme Court (**SC**), after considering the pleadings /submissions as advanced by the parties, noted that there is a difference and distinction between Section 11(5) and Section 11(6) of the Act.
- Sub-Section (5) of Section 11 of the Act shall be attracted in a case where there is no procedure for appointment of an arbitrator agreed upon as per Sub-Section (2) of Section 11 of the Act, and Sub-Section (6) of Section 11 shall be applicable in a case where there is a contract containing an arbitration agreement and the appointment procedure is agreed upon. By virtue of the said observation the Court observed that while referring the matter for arbitration, there need not be any written contract containing any arbitration agreement and the parties can refer the dispute to the Sole Arbitrator by mutual consent.
- In the present case, the Sole Arbitrator was appointed by the parties themselves and therefore an Application under Section 11(6) of the Act, in the absence of any written agreement containing arbitration agreement, was not maintainable at all. It was held that once a dispute is referred to arbitration and the Sole Arbitrator is appointed by the parties by mutual consent and the arbitrator(s) are so appointed, the arbitration agreement cannot be invoked for the second time.
- On a conjoint reading of Sections 13, 14 and 15 of the Act, if the challenge to the Arbitrator is made on any of the grounds mentioned in Section 12 of the Act, the party aggrieved has to submit an appropriate application before the Arbitral Tribunal itself. Further it was observed that in case of any of the eventualities mentioned in Section 14(1)(a), the aggrieved party has to approach the concerned 'Court' as defined under Section 2(e) of the Act, 1996. The legislation has deliberately provided for the dispute with respect to termination of the mandate of the arbitrator under Section 14(1)(a) to be raised before the concerned Court and pursuant to the decision of the concerned Court, as defined under Section 2(e) of the Act, the Arbitrator is to be substituted according to the rules that were applicable to the initial appointment of the Arbitrator.

HSA
Viewpoint

The Supreme Court has cogently dealt with the issues raised with respect to termination of the mandate of an Arbitrator. The Court has rightly observed the intent of the legislation considering the termination under Section 14(1)(a) of the Act and the difference in approach when the termination is requested/raised by virtue of other sections available under the Act. Further, the Apex Court has correctly directed the parties to resolve the issue of 'termination of the mandate' before the concerned Court and has rightly revived the applications under Section 14(2) of the Act in the interest of justice.

- SC held that it is a settled position of law that at the stage of deciding the application under Order VII Rule 11 of CPC only the averments and allegations in the Application/Plaint are to be considered and no other pleadings are to be considered at this stage. In light of the facts and circumstances of the present case, the SC held that the District/Trial Court has rightly dismissed the application under Order VII Rule 11 of CPC.
- In view of the aforesaid observations and findings of the Supreme Court, it was held that the Impugned Judgment and Order dated September 07, 2017 is unsustainable and the same deserves to be quashed and set aside. It was held that the mandate of the Sole Arbitrator has to be considered by the Court on an application filed under Section 14(2) and hence the previous application of the Respondents filed under Section 14(2) was directed to be revived. The Appeals arising out of the said Impugned Judgment and Order were accordingly allowed.

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AT A GLANCE

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