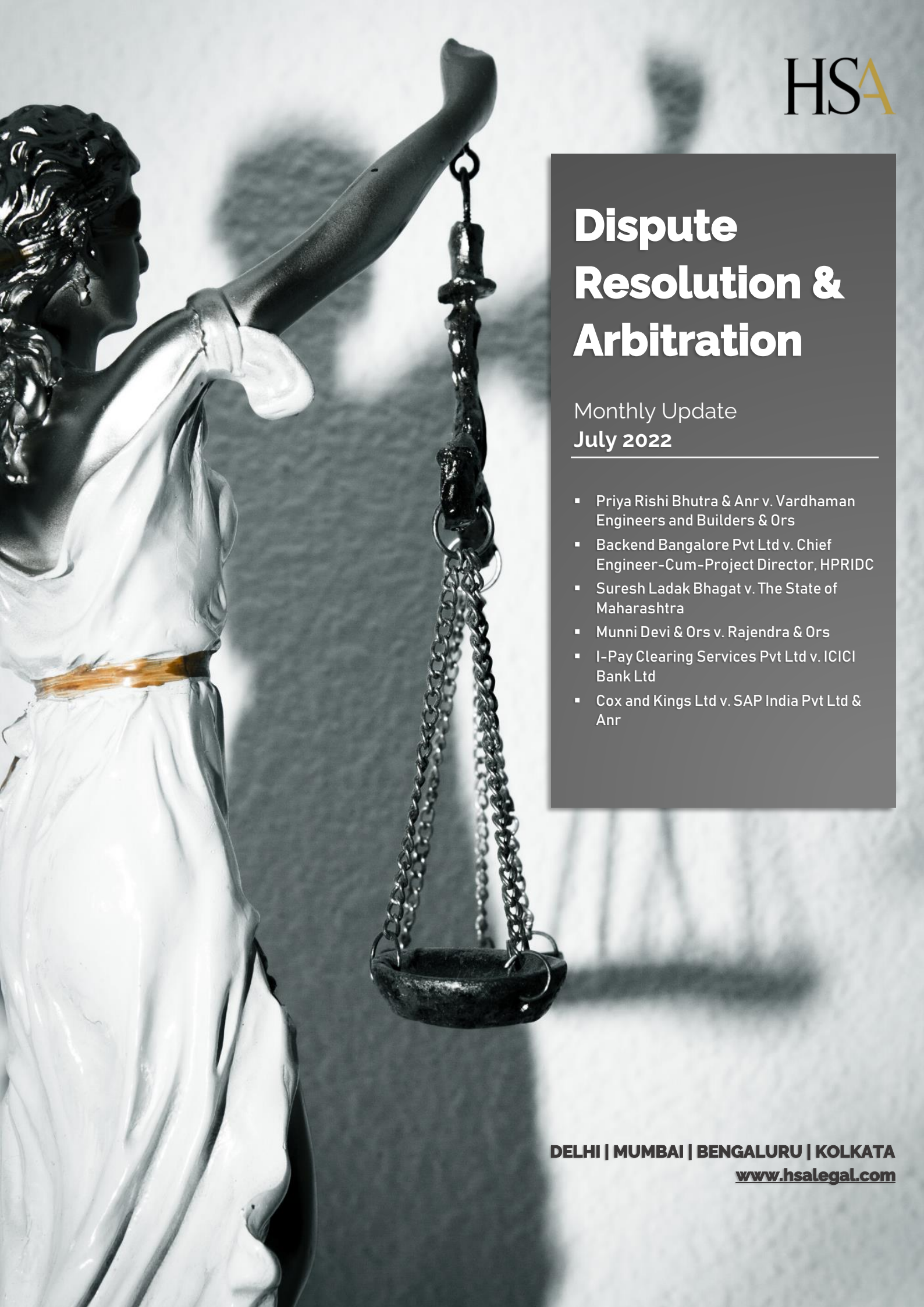

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Dispute Resolution & Arbitration

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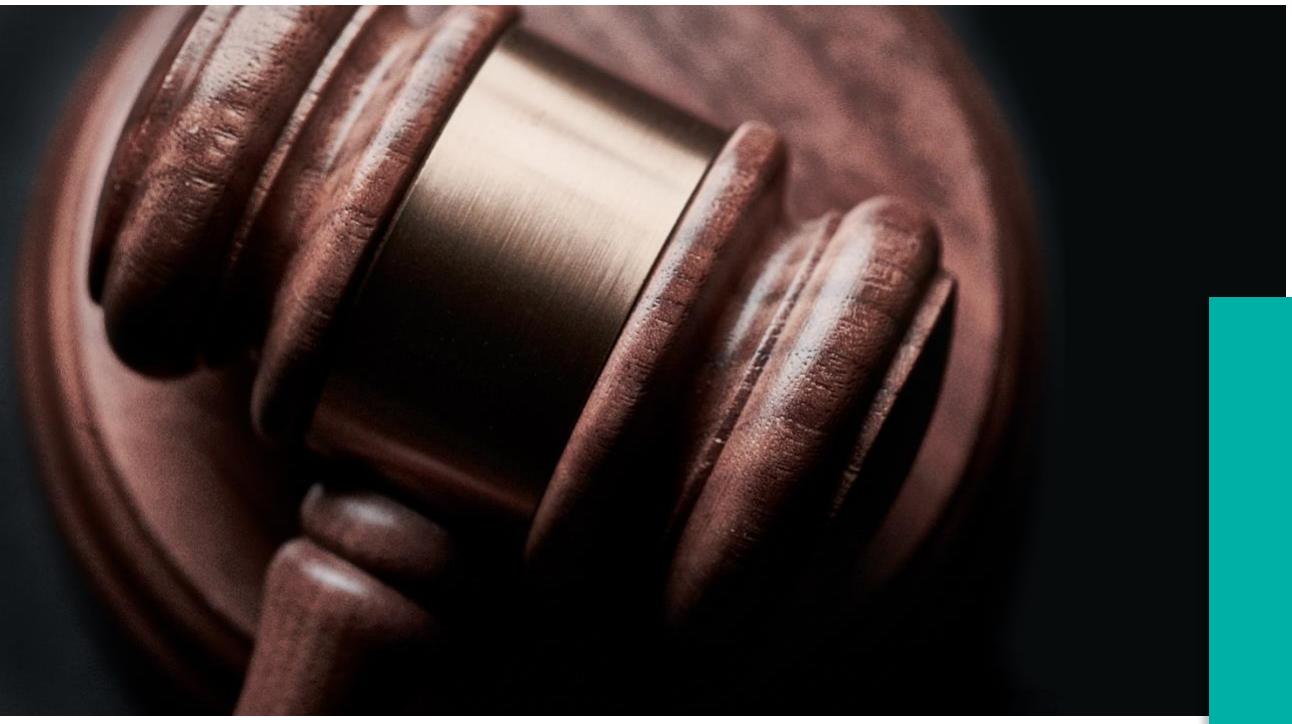
DISPUTE RESOLUTION AND ARBITRATION UPDATE



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Priya Rishi Bhutra & Anr v. Vardhaman Engineers and Builders & Ors

Arbitration Application No 149 of 2021 with Commercial Arbitration Petition No 410 of 2021 (along with 3 other applications)

Background facts

- In the present case, four applications under Section 11 of the Arbitration and Conciliation Act, 1996 (Act) were heard together. The Applicants are the daughters of the erstwhile Partner of a Partnership firm i.e. the Respondent No. 1, which was reconstituted by a Partnership Deed dated March 12, 2012 (**First Deed**). Clauses 17 and 19 of the said deed provided for passing on of interest in the firm, upon death of a partner, to his/her heirs, and for referring disputes to arbitration, respectively.
- The parents of the Applicants passed away in October 2018, and their respective shares in the partnership firm were distributed between the brothers of the Applicants, namely Respondent No. 2 and Respondent No. 3 vide a Deed of Retirement-cum-Partnership on January 17, 2019 (**Second Deed**). Clauses 17 and 19 of this deed were similar to the First Deed. Further changes were made to the Partnership vide a 'Deed of Retirement-cum-Partnership' dated May 23, 2019 (**Third Deed**), but Clauses 17 and 19 still remained the same.
- The Applicants filed a Civil Suit before the present Court inter alia against Respondent No. 2 and Respondent No. 3 for administration and partition of the estate of their deceased parents. The Applicants also invoked the arbitration agreement contained in Clause 19 of the First Deed, claiming that upon their parents' death, they were entitled to their parents' interest in the firm under Clause 17 thereof.
- The Applicants asserted that they had the locus as the legal heirs of deceased partners to invoke the arbitration agreement contained in Clause 19 of the First Deed, and that under Clause 17, the legal heirs of a deceased partner were to be inducted as partners in the firm. It was stipulated that only when a deceased partner had no legal heir, the share of the deceased partner could go to the existing partners; thus, the usurpation of their parents' share by their brothers (Respondent No. 2 and 3) who were already partners in the firm, violates clause 17. The Applicants also claimed that the civil suit filed by them was different in subject matter to the dispute pertaining to the partnership firms.

- In response, the Respondents contended that the Applicants were not parties to the Arbitration Agreement contained in Clause 19 of the First Deed and thus could not invoke arbitration. It was also contended that the civil suit filed by the Applicants effectively bars them from seeking reference to arbitration.

Issue at hand?

- Whether the applicants have any arbitral interest to invoke the arbitration agreement as contained in the First Deed?

Decision of the Court

- The HC noted that the legal heirs of deceased partners were referred to as partners in the firm in the opening paragraph of the Partnership Deed. Furthermore, it was noted that Clause 17 of the First Deed states that in the event of the death of a partner, the legal heir of that partner would be inducted as the new partner and Clause 19 thereof also recognizes the right of a legal heir of a partner to bring any dispute to arbitration for the purpose of having it resolved.
- Upon analyzing the provisions of the First Deed, the HC determined that the Applicants, are recognized by the First Deed, who are conferred an interest in the partnership firm in the capacity as legal heirs. The HC held that such a right is recognized under three different provisions of the partnership agreement, namely the introductory paragraph, Clause 17, and Clause 19 of the First Deed. Therefore, upon a cohesive reading of all the aforesaid 3 clauses, the HC stated that it is clear that the legal heir of a deceased partner may invoke the arbitration clause for the resolution of any dispute or disagreement by virtue of the First Deed. Furthermore, relying on Section 40 of the Act, the HC affirmed that arbitration agreements can be enforced by their legal heirs in the event of a party's death.
- Thereafter, the HC determined that the subject matter of the Civil Suit was completely different from the subject matter of the current Application, and that the Civil Suit and the current Application were for the enforcement of different sets of the Applicants' rights. As a result, rejecting the Respondents' argument, the Hon'ble Court held that the Applicants would not be barred from seeking reference to arbitration even if they had filed a Civil Suit, because the Applicants' rights as legal heirs of their deceased parents' estate are entirely distinct from the legal heirs' rights recognized by the First Deed.
- The HC ruled that the Petitioner's filing of a Civil Suit over the same dispute could not be an absolute bar to the appointment of an arbitrator. In view of the above, the HC allowed the present Applications as the right of the Applicants to take recourse to arbitration is clearly relatable and recognized under Clause 19 read with Clause 17 of the First Deed and, therefore, appointed a Sole Arbitrator to adjudicate upon the disputes which had arisen between the parties.

HSA
Viewpoint

Section 40 of the Act clearly states that an arbitration agreement does not come to an end on the death of any of the parties to it and may be enforced by the legal representatives of the deceased. Furthermore, Section 8(1) of the Act states that a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. The Hon'ble Court has rightly taken into consideration the provisions of the Act in its true letter and spirit and has thereby upheld the rights of the Applicant to seek reference to arbitration as legal representatives of the deceased. The Court was correct in differentiating between the subject matter of the Arbitration Application and the pending Civil Suit, because even though the rights sought to be enforced in the two matters were between the same parties, they arose from different legal positions held by the parties.

Backend Bangalore Pvt Ltd v. Chief Engineer-Cum-Project Director, Himachal Pradesh Road and Infrastructure Development Corporation Ltd

Arbitration Case No 61 of 2020

Background facts

- An agreement was entered into between Backend Bangalore Pvt Ltd (**Petitioner**) and Chief Engineer-Cum-Project Director, Himachal Pradesh Road and Infrastructure Development Corporation Ltd (**Respondent**) for development of a web-based project management software for the Respondent.
- For the purposes of the said services, the Petitioner raised three invoices, against which part payments were made for two invoices, whereas the Respondent failed to make any payment towards the due amount. Despite repeated follow ups, the Respondent defaulted in making the payments and instead gave assurances that the payments would be released, basis which the Petitioner continued to render the work under the Agreement.
- To the utter shock of the Petitioner, the Respondent issued a notice for termination of the Agreement under its Clause 2.6.1, on the grounds that the Petitioner had failed to execute the complete works as was agreed between the parties. Subsequently, the Respondent proceeded arbitrarily to invoke the performance bank guarantee.
- Aggrieved by the termination of the agreement and encashment of the performance bank guarantee, the Petitioner invoked the dispute resolution clause and issued a notice of arbitration to the Respondent. In response to this, the Respondent replied and did not concur with the name proposed by the Petitioner. In the said reply, the Respondent further contended that the

reference to arbitration is pre-mature as the agreement provides for pre-arbitration reference to Adjudicator.

- Thereafter, the Petitioner filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (**Act**) for appointment of the Arbitrator before the Hon'ble Himachal Pradesh High Court (**HC**).

Issue at hand?

- Whether pre-arbitration reference to Adjudicator is a bar to the appointment of Arbitrator?

Decision of the Court

- At the outset, the HC examined Clause 8 of the agreement which provided detailed procedure for settlement of disputes between the parties by reference to the Adjudicator within 14 days of the notice of disagreement of one party to the other. Accordingly, the HC opined that either of the parties could have taken the dispute to the Arbitrator since Clause 8 of the Agreement does not specifically provide for the Petitioner or the Respondent alone to approach the Adjudicator.
- The HC opined that even if the named Adjudicator was not unilaterally proposed by the Respondent, the condition of referring the dispute first to the Adjudicator, cannot be taken as a bar for the Petitioner to raise the demand for referring the dispute to the Arbitrator, as in the facts of the case such a Clause can only be taken as directory in nature. Thus, the HC held that reference of dispute to the Adjudicator cannot be taken as condition precedent for making a reference to the Arbitrator, for two reasons i.e., the Respondent itself failed to refer the dispute to the Adjudicator, and secondly, it has strenuously contested the matter even before the HC on merits, which remained pending for more than one and a half years.
- The HC then applied the analogy of the decisions in *VISA International Ltd v. Continental Resources (USA) Ltd*[1] and *Haldiram Manufacturing Company Pvt Ltd v. DLF Commercial Complexes Ltd*[2] and noted that the notice invoking the arbitration clause was pre-mature since the Respondent relied upon the said clause in its reply to the notice instead of referring the dispute to the Adjudicator and rather alleged that the Petitioner failed to refer the dispute to the Adjudicator. Thus, the HC held that the Respondent cannot be allowed to argue to exercise the option of terminating the agreement and that the compulsion would be on the Petition to refer the dispute after the Respondent's own failure to avail the opportunity to refer the dispute to the Adjudicator when it could also have within 14 days of the notification of disagreement i.e., when the Respondent declined to release the payments as claimed by the Petitioner.
- The HC placed reliance on the judgments of *Ravindra Kumar Verma v. BPTP & Anr*[3] and *Sarvesh Security Services Pvt Ltd v. Managing Director, DSIIDC*[4] and held that the arbitration clause providing that the dispute is referred firstly to the Adjudicator and then to the Arbitrator has to be taken as only directory and not mandatory.
- In light of the above, the HC held that the requirement of pre-arbitration reference cannot be held to be a mandatory condition for the invocation of arbitration and that such a stipulation in a contract is only directory. The HC further held that the Respondent could object to the maintainability of the Petition merely on the ground that pre-condition of reference to adjudicator was not complied with, if it had made efforts to settle the dispute, but instead, proceeded to terminate the agreement. The HC further held that the petition is pending for more than 1.5 years, and therefore no useful purpose would be served by relegating the parties to adjudication, and, thus, the HC allowed the Petition and appointed a sole Arbitrator.

HSA
Viewpoint

This decision of the HC sheds light on the proposition that a pre-arbitration reference to an Adjudicator is only directory and not a bar to the appointment of an Arbitrator. The HC held that in the event, the parties are disputing and are unable to arrive at a decision to resolve their disputes, if an Application has been made to the HC for appointment of Arbitrator then it cannot be contested by the other party since such other party has failed to make any efforts to resolve the disputes by first referring to the Adjudicator. The disputing party failing to refer the matter to the Adjudicator cannot then raise an objection to the appointment of an Arbitrator made by the other party since there is an alternate option of appointing an Adjudicator first. Thus, this decision reiterates the legal position that pre-arbitration procedures are not mandatory. This decision makes it clear that when there is a contract which clearly provides the name of an Arbitrator containing the sign of the parties, then the appointment of an Arbitrator is not bad in law.

Suresh Ladak Bhagat v. The State of Maharashtra

Criminal Appeal No. 9 of 2014

Background facts

- In the Additional Sessions Court, the Accused/Appellant herein was convicted for the offence of murder of his wife against which the Appeal has been preferred by the Accused.
- On October 18, 2010, Laxman Daji Bhoye (**Prosecutor Witness 1** or **PW-1**) lodged a report at Kasa Police Station alleging that on October 18, 2010, in the afternoon at about 12.00 noon, he was informed that:

[1] (2009) 2 SCC 55
[2] 193 (2012) DLT 410
[3] 2015 (147) DRJ 175
[4] Arbitration Petition No 181/2014 of Delhi High Court

  - On October 17, 2010 at night Suresh Bhagat (accused & the present appellant) killed his wife (deceased). PW-1 went to the spot to verify the same and saw accused seated beside the dead body of his wife who was lying in a pool of blood.
  - The accused disclosed to PW-1 that when he returned home from the house of his relatives after watching television, he knocked on the door to which there was no response. Accused therefore entered the house through the window and noticed that his wife was in deep sleep. He assaulted on her head and back and thereafter paid no attention to her.
  - In the morning, at about 6.00 am, accused realized that his wife had passed away.
- PW-1 informed the Police about the above details as narrated by the accused to PW-1 and on the basis of the said FIR, Crime No 79 of 2010 was registered against accused for the offence punishable under Section 302 of the Indian Penal Code.
- The prosecution in Additional Sessions Court examined 05 witnesses to prove the guilt of the accused. Their case mainly rests on the evidence of PW-1 as according to the prosecution, this was an extra-judicial confession by the accused.
- PW-1 stated before the Additional Sessions Court that on the day of incident, he was at his home when the villagers informed him that the accused killed his wife. PW-1 visited the house of the accused. He saw that accused seated next to his dead wife. PW-1 did not refer to the extra-judicial confession made by the accused and has instead deposed before the Court that upon inquiry with the accused, the accused told him that his wife was dead.
- PW-1 was therefore declared hostile. However, he admitted to have stated the contents of the FIR before the Police which essential to support the main case of the prosecution, i.e. extra-judicial confession by the accused.

Issue at hand?

- Can the extra-judicial confession by the accused to the PW-1 be enough to lead to a necessary inference that the accused caused the death of his wife?

Decision of the Court

- The High Court referred to Section 3 of the Evidence Act, 1872 and observed that an accused can be convicted only in the eventuality that the investigation places on record such material which could be converted into admissible evidence and can be read in evidence. In the present case, in view of the nature of the evidence adduced by the prosecution, it would be difficult to act upon the supposition that the accused caused the homicidal death of the deceased.
- The learned Assistant Public Prosecutor (**APP**) inter alia submitted that there is an extra-judicial confession by the accused before PW-1 which goes to the root of the matter and points towards the culpability of the accused. The High Court observed that as far as the extra-judicial confession is concerned, the same is not reliable for the simple reason that the person to whom the purported extra-judicial confession was made, has resiled from his earlier statement and has been declared hostile by the prosecution. Even if he has admitted having stated so before the Police, it was incumbent upon the prosecution to establish that a reliable extrajudicial confession was rather made to PW-1.
- The High Court further observed that an extra-judicial confession is a weak piece of evidence and can be relied upon provided it is voluntary and is made in a fit state of mind. The Court then referred to the judgment of the Supreme Court in the case of *State of Rajasthan v. Rajaram*[5], wherein the Apex Court held that 'an extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence depends on the reliability of the witness who gives the evidence.'
- The Court answered the question as to whether extra-judicial confession made to P.W.1 is proved in accordance with law, in negative and accordingly set aside the judgment and order of the Additional Sessions Court and acquitted the accused.

HSA
Viewpoint

The decision of the Court upheld the legal principle of 'let hundred guilty be acquitted but no innocent should be convicted'. It is established in the criminal jurisprudence that an extra-judicial confession, although admissible in the Court of law as evidence, must not be treated as gospel truth. The veracity of the witness must be taken into prime consideration while dealing with extra-judicial confessions. In the present instance, the Court has rightly construed from the conduct of the PW-1 that PW-1 is not a credible witness and the extra-judicial confession which the Accused may have confided in him cannot be relied in evidence.

Munni Devi & Ors v. Rajendra & Ors

2022 SCC OnLine SC 643

Background facts

- The present Appeal was filed in the Supreme Court by Munni Devi, the legal representative of Late Shri Daulaji, against the legal representatives of Late Smt Bhonri Devi with regards to the

[5] (2003) 8 SCC 180

suit property located in Jaipur which belonged to the grandfather of Respondent No. 1, Ganeshnarayanji and his siblings.

- The suit property located in Jaipur was an ancestral property in the hands of Harinarayanji and Ganeshnarayanji. Bhonri Devi was staying in the suit property before the death of Harinarayanji and Ganeshnarayanji, and after their death she was in possession and in charge of the said property and was maintaining herself by collecting rent from the tenants who were occupying part of the suit property.
- Daulalji claimed that after the death of Harinarayanji, him being the only male member in the family as well as the legatee under the Will of Harinarayanji, had become the sole owner of the suit property and, therefore, was entitled to recover the possession of the suit property from Bhonri Devi.
- The Rajasthan High Court held that after the death of Shri Ganeshnarayanji in 1938, a limited right in the suit property was created in favor of Bhonri Devi and that she had a right of maintenance even under the old Shastric Law, which had fructified into a full right under Section 14(1) of the Hindu Succession Act, 1956.

Issue at hand?

- Whether Bhonri Devi had become an absolute owner on commencement of Hindu Succession Act, 1956?

Decision of the Court

- At the outset, the Supreme Court was of the opinion that the Hindu Women's Rights to Property Act, 1937 conferred right on Hindu widow to the property of her husband, who died after the commencement of the said Act of 1937 and not prior thereto.
- Bhonri Devi's husband Dhannalalji died in the year 1936 and, therefore, Hindu Women's Right to Property Act of 1937 was held not be applicable to facts of the case. However, it was held by the Court that even prior to the Hindu Women's Right to Property Act, 1937, the right to maintenance of Hindu widow was recognized in Shastric law.
- The SC while placing reliance upon *Raghubar Singh & Ors v. Gulab Singh & Ors*[6] observed that, 'there remains no shadow of doubt that a Hindu woman's right to maintenance was not and is not an empty formality or an illusory claim being conceded as a matter of grace and generosity. It is a tangible right against the property, which flows from the spiritual relationship between the husband and the wife. The said right was recognized and enjoined by pure Shastric Hindu Law, which existed even before the passing of the 1937 or the 1946 Acts. Those Acts merely gave statutory backing recognizing the position as was existing under the Shastric Hindu Law. Where a Hindu widow is in possession of the property of her husband or of the husband's Hindu Undivided Family, she has a right to be maintained out of the said property. She is entitled to retain the possession of that property in lieu of her right to maintenance. Section 14(1) and the Explanation thereto envisages liberal construction in favor of the females, with the object of advancing and promoting the socio-economic ends sought to be achieved by the said legislation.'
- The SC further placing reliance upon *V Tulasamma and other v. Sesha Reddy (Dead)*[7] and observed that the words 'possessed by' used in Section 14(1) of Hindu Succession Act, 1956 are of the widest possible amplitude and include the state of owning a property, even though the Hindu woman is not in actual or physical possession of the same.
- Based on this, the SC observed that Bhonri Devi was in possession of the suit house before and after the death of Harinarayanji in 1953 and had continued to remain in possession thereafter and was collecting rent from the tenants who were in occupation of part of the suit premises since 1955, till the date of filing of the Suit in 1965 by the plaintiff Daulalji at the Trial Court.
- The SC held that Bhonri Devi's pre-existing right to maintenance, coupled with her settled legal possession of the property, would be sufficient to create a presumption that she had a vestige of right or claim in the property, though no document was executed, or specific charge was created in her favor recognizing her right to maintenance in the property.
- In light of the above, the SC, while dismissing the Appeal, held that a Hindu woman's right to maintenance is a tangible right against the property which flows from the spiritual relationship between the husband and the wife. Where a Hindu widow is found to be in exclusive settled legal possession of the Hindu Undivided Family Property, that itself would create a presumption that such property was earmarked for realization of her pre-existing right of maintenance, more particularly when the surviving co-parcener did not earmark any alternative property for recognizing her pre-existing right of maintenance. The word 'possessed by' and 'acquired' used

HSA
Viewpoint

The Supreme Court's decision that HUF Property is presumed to be for the widow's maintenance when she has its settled and has exclusive possession, removes all the legal issues with regards to widow's maintenance from HUF property as per Section 14(1) of Hindu Succession Act, 1956. This judgement clarifies the proposition of law that in the event a widow has exclusive possession of late husband's HUF property, then such HUF property can be said to have been earmarked for realization of the widow's right to maintenance in order to sustain herself. This decision is in consonance with the legislative intent of empowering the women's legal rights with regards to their claim in the HUF property.

[6] (1998) 6 SCC 314
[7] (1977) 3 SCC 99

in Section 14(1) are of the widest amplitude and include the state of owning a property. It is by virtue of Section 14(1) of Hindu Succession Act, 1956, that the Hindu widow's limited interest gets automatically enlarged into an absolute right, when such property is possessed by her whether acquired before or after the commencement of the said 1956 Act in lieu of her right to maintenance.

I-Pay Clearing Services Pvt Ltd v. ICICI Bank Ltd

Civil Appeal No 107 of 2022 [Arising out of SLP (C) No 24278 of 2019]

Background facts

- A Service Provider Agreement dated November 04, 2002 (**Service Agreement**) was entered into between I-Pay Clearing Service Pvt Ltd (**Appellant**) and ICICI Bank Ltd (**Respondent**) to provide technology and manage the operations and processing of the smart card-based loyalty programs for Hindustan Petroleum Corporation Limited (**HPCL**). Subsequently, another agreement dated February 04, 2003 was entered into between the Appellant and the Respondent to develop a software for post-paid Smart Card Loyalty Program. By letter dated December 10, 2003, the Respondent requested the Appellant to extend the Service Agreement in order to develop a management solution for the fleet industry and to treat the said letter as an extension for the Service Agreement.
- The Appellant contented that the Respondent abruptly and illegally terminated the Service Agreement which led to a loss of over INR 50 crore on account of sudden halt of the operations, loss of jobs, loss on account of employee retrenchment compensation, etc. In view thereof, the Appellant claimed an amount of INR 95 crore against the Respondent.
- The dispute was referred to a Sole Arbitrator, who passed an Award dated November 13, 2017 (**Award**) awarding the Appellant an amount of INR 50 crore together with interest @18% p.a. from the date of award till payment along with INR 50,000 towards costs.
- Aggrieved by the Award, the Respondent filed an Application under Section 34(1) Arbitration & Conciliation Act, 1996 (**Act**), being a Commercial Arbitration Petition No. 190 of 2018 (**Arbitration Petition**) before the High Court of Judicature at Bombay, for setting aside the Award.
- Two Notices of Motion bearing Nos. 550 of 2018 and 1549 of 2019 (**Motions**) were preferred under the Arbitration Petition filed by the Respondent. The Notice of Motion No. 550 of 2018 was preferred by the Respondent under Section 34(1) of the Act for seeking interim order to stay the effect of the Award and the Notice of Motion No. 1549 of 2019 was preferred by the Appellant under Section 34(4) of the Act for adjourning the proceedings for a period of three (3) months and to direct the Arbitrator to issue appropriate directions/instructions/additional reasons and/or to take necessary actions.
- In the present Appeal, the common order dated July 16, 2019 (**Impugned Order**) arising out of the Arbitration Petition and the Motions has been challenged before the Hon'ble Supreme Court. By way of the Impugned Order, the Notice of Motion moved by the Appellant for remitting the matter to the Sole Arbitrator under Section 34(4) of the Act was rejected. The Court was of the view that the defect in the Award was not curable and there is no merit in the Application filed by the Appellant under Section 34(4) of the Act.
- **Submissions of the parties before the High Court:**
  - Before the High Court, the Appellant's case was that though the Arbitrator has awarded compensation/damages in view of the case of the Appellant, the Arbitrator has failed to record detailed reasons on the said point and, therefore, the Court must remit it to the Arbitrator to fill in the gaps for lack of reasoning in the Award. It was contended by the Appellant that the language of Section 34(4) of the Act is couched in very wide terms and provides for remission of the matter to enable the Arbitrator to take such steps, as may be necessary to eliminate grounds for setting aside of the Award. It was further submitted that the power to remit was conceived as an alternate to setting aside of the Award. Thus, all defects in the Arbitral Award, which are capable of being remedied, ought to be addressed in the remission proceedings, if an application under Section 34(4) of the Act has been filed.
  - It was the Respondent's case that termination of the Service Agreement was in furtherance of a full 'accord and satisfaction' between the parties and, therefore, the Appellant is not entitled for any compensation/damages as claimed for. It was also contended by the Respondent that the Arbitrator has passed the Award by ignoring important and relevant evidence on record and it suffers from perversity and patent illegality, which cannot be cured on remittal under Section 34(4) of the Act by the Arbitrator. It was further contended that under the guise of adding reasons, the Arbitrator cannot take a contrary view against the Award itself. The Respondent further stated that in spite of sufficient evidence on record

to prove that there was full 'accord and satisfaction' between the parties, the Arbitrator has proceeded on the premise that there was no 'accord and satisfaction' without considering the evidence on record and passed the Award in favor of the Appellant and even if the remittal is allowed and the Arbitrator is to hold that there was full 'accord and satisfaction' and there was no abrupt and illegal termination of the Service Agreement, the Arbitrator cannot do so, since he cannot change his own Award.

Issue at hand?

- When can the Court remit a case to the Arbitral Tribunal under Section 34 of the Arbitration & Conciliation Act, 1996?

Decision of the Court

- The Supreme Court opined that Section 34(4) of the Act can be resorted to record reasons on the finding already given in the award or to fill up the gaps in the reasoning of the award.
- The Court also noted that there is a difference between 'finding' and 'reasoning' – a finding is a decision on an issue and reasons are the links between the materials on which certain conclusions are based. Given the factual circumstances and the reading of the Award, the Court noted that it cannot be said that it is a case where additional reasons are to be given or gaps in the reasoning are to be filled viz., the abrupt and illegal termination of the Service Agreement.
- The Supreme Court also noted that Section 34(4) of the Act itself makes it clear that it is the discretion vested with the Court for remitting the matter to the Arbitral Tribunal to give an opportunity to resume the proceedings or not and it is not obligatory upon the Court to remit the matter to the Arbitral Tribunal if an application under Section 34(4) of the Act is merely filed.
- The Court further held that under the guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the Arbitrator, where there are no findings on the contentious issues in the award. If there are no findings on the contentious issues in the Award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the Award itself.
- Finally, while dismissing the Civil Appeal, the Court noted that in the absence of any finding on the contentious issue, no amount of reasons can cure the defect in the Award. Further, the Court can only give an opportunity to the arbitrator to resume the arbitral proceedings for giving reasons or to fill up gaps in the reasoning in support of the finding which is already rendered in the Award.

HSA
Viewpoint

By way of the aforesaid judgment, the Supreme Court has emphasized that under Section 34(4) of the Act, it is the discretion of the Court to remit the matter to the Arbitrator for giving reasons to fill up the gaps in the reasoning already rendered in the Award and not for the purpose of giving additional reasons on an issue where there are no findings. It is important to note that the Court has hinted that the scope of an Application under Section 34(4) of the Act is very limited and must only be exercised where curable defects can be rectified, or actions be taken by the arbitral tribunal so as to eliminate grounds for setting aside the Award.

Cox and Kings Ltd v. SAP India Pvt Ltd & Anr

2022 SCC OnLine SC 570 (decided on May 06, 2022)

Background facts

- On December 14, 2010, Cox and Kings Ltd (**Cox & Kings**) executed an agreement with SAP India Pvt Ltd (**SAP**) for providing software related services. The agreement was divided into 3 transactions. Till August 2016, Cox & Kings listed out various issues in the implementation of the project by SAP and requested SAP's parent company to intervene. SAP's parent company gave assurances, but the agreement could not be fulfilled even in the extended timeline. On November 15, 2016, one of the contracts was rescinded, and the SAP withdrew its resources from Cox & Kings.
- Since the project could not be completed, Cox & Kings demanded INR 45 crore. SAP's parent company proposed a solution which was rejected by Cox & Kings. The parties tried to amicably resolve the dispute but the matter could not be resolved. On October 29, 2017, SAP invoked arbitration against Cox & Kings, and it did not name its parent company in the arbitration proceedings. Cox & Kings filed an application under Section 16 of the Arbitration & Conciliation Act (**Act**) contending that the 4 agreements executed between them form part of a composite transaction and the same should be treated as a single proceeding.
- While the arbitration was ongoing, on October 22, 2019 insolvency proceedings were initiated against Cox & Kings. Therefore, the NCLT directed that the arbitration proceedings against Cox & Kings be kept in abeyance. On November 07, 2019, Cox & Kings sent a fresh notice invoking arbitration against SAP and its parent company. SAP and its parent company neither responded to the notice nor appointed their nominees. Accordingly, Cox & Kings approached the Supreme Court for appointment of Arbitrator in an International Commercial Arbitration.

Issue at hand?

- The Supreme Court was tasked to examine the 'Group of Companies' doctrine. In particular, the Court had to examine whether the principles of party autonomy under arbitration law and

corporate personality in company law have been adequately safeguarded in outlining the scope and applicability of the doctrine.

Decision of the Court

- In order to answer the question, the Court analyzed the settled line of judgments and the ambit of '*Group of Companies*' doctrine. The Court was of the view ever since the doctrine was expounded in Chloro *Controls*[8] it has been utilized in a varied manner. The Court observed that the doctrine originated in *Dow Chemicals*[9] but it was a situation where the non-signatories did not resist, rather it wanted to participate in the proceedings.
- In *Sukanya H*oldings[10], the Court, while dealing with Section 8 of the Act, expressed its view that the cause of action cannot be bifurcated and non-parties to the arbitration agreement cannot be included in the arbitration.
- The Court then analyzed Chloro Controls where the wordings of Section 45 and Section 8 of the Act were compared and, in that context, it was discussed that non-signatories could be said to be bound by the arbitration agreement. The Supreme Court criticized Chloro Controls and said that the Court seems to have adopted contrary positions in terms of when a third party may be bound to the arbitration agreement. On one hand the Court emphasized on the intention of the parties to include the non-signatory party but, on the other hand it went on to say that non-signatories may be added to the arbitration proceedings without their consent in exceptional cases.
- Following the decision of Chloro Controls, the 246th law commission report recommended adding the words '… any person claiming or through or under such party …' in Sections 2 and 8 of the Act. In 2015, Section 8 of the Act was amended to incorporate the above words but, Section 2 of the Act remained same.
- The Supreme Court said that the impact of not amending Section 2 of the Act will need to be examined. This is because it has created an anomalous situation that the party claiming through or under could be referred to arbitration but would not have the right to seek interim relief under Section 9 of the Act.
- Later, the interpretation of *Chloro Controls* was expanded in *Cheran Properties*[11] where the Court interpreted Section 35 of the Act to enforce the award against a non-signatory, even though it did not participate.
- The Supreme Court then looked at *Reckitt Benckiser*[12] and *MTNL*[13] judgments and concluded that all earlier cases have been decided by the Supreme Court without referring to ambit of the phrase 'claiming through or under' as mentioned in Section 8 of the Act. The areas which were left open in *Chloro Controls* have created broad based understanding of the doctrine which may not be suitable and would clearly go against the distinct legal identities of companies and party autonomy. In fact, *Vidya Droliya*[14] pre-dominantly dealt with the scope of judicial interference at the referral stage, and it did not have the opportunity to explore the doctrine of Group Companies.
- Therefore, the doctrine must be applied with caution and there is clear need to re-look at the doctrinal ingredients concerning the Group of Companies doctrine. Accordingly, the Supreme Court has referred the matter to large bench to decide the following issues:
  - Whether the phrase 'claiming through or under' in Sections 8 and 11 could be interpreted to include the 'Group of Companies' Doctrine?
  - Whether the 'Group of companies' Doctrine as expounded by *Chloro Control* Case and subsequent judgments are valid in law?
  - Whether the Group of Companies Doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of any statutory provisions?
  - Whether the Group of Companies Doctrine should continue to be invoked on the basis of the principles of 'single economic reality'?
  - Whether the Group of Companies Doctrine should be construed as a means of interpreting the implied consent or intent to arbitrate between the parties?
  - Whether the principal of alter ego and/or piercing of corporate veil can alone justify pressing the Group of Companies Doctrine into operation even in the absence of implied consent?

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Viewpoint

It will be interesting to see how the larger bench of the Supreme Court would interpret the words 'claiming through or under' in Sections 8 and 11 of the Act and if the ambit of Group of Companies Doctrine would be narrowed down.

[8] (2013) 1 SCC 641
[9] ICC Case number 4131
[10] (2003) 5 SCC 531
[11] (2018) 16 SCC 413
[12] (2019) 7 SCC 62
[13] (2020) 12 SCC 767
[14] (2021) 2 SCC 1

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