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NOTABLE JUDGEMENTS

(May 2018 to June 2020)

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ARBITRATION & CONCILIATION ACT

1996

QUIPPO CONSTRUCTION EQUIPMENT LTD. V JANARDAN NIRMA PVT. LTD.

Date : 29.04.2020

Citation : Supreme Court [Civil Appeal No. 2378 of 2020]

SYNOPSIS

Waiver of right to object to the venue in domestic arbitration if no objections are made before the arbitrator before the passing of the award.

FACTS

The respondent had entered into four different agreements to secure construction related equipment from the appellant on a rental basis. Disputes arose between the parties and arbitration was invoked by the appellant. Three agreements stated Delhi as the venue for arbitration and the remaining one designated Kolkata as the venue. Eventually, the arbitrator was appointed in Delhi and award was passed ex-parte in favour of the appellant.

The respondent filed an appeal u/s 37 before the Calcutta High Court against the order of the district court of Alipore, which had dismissed its application u/s 34 to set aside the award for want of jurisdiction, stating that the setting aside petition must be filed before the courts in Delhi. The High Court held that it was evident from the cause title itself that the respondent was amenable to the jurisdiction of the court of Alipore and thus, restored the petition u/s 34 back to the district court. Hence, an appeal was filed before the Supreme Court.

ISSUES

Whether the respondent is deemed to have waived its right to raise objection on the grounds of jurisdiction after passing of the award?

HELD

It was noted that though each of the four agreements provided for arbitration, the award rendered by the arbitrator was a common award and no objections were raised by the respondent at any stage before the arbitrator. Furthermore, the respondent let the arbitral proceedings conclude and culminate in an ex-parte award. In the present case, the arbitration in question was a domestic and an institutional arbitration, where the Construction Industry Arbitration Association had nominated the arbitrator. It was not as if there were completely different mechanisms for appointment of arbitrator in each of the four agreements.

Furthermore, the place of arbitration was significant in case of an International arbitration to determine the applicability of the curial law. However, in the present case, the applicable substantive law as well as the curial law would have been the same. The respondent had ample opportunities to object to the arbitration proceedings which were being held in Delhi, contrary to the terms of one of the four agreements. In light of the above facts, the Supreme Court held that the respondent must be precluded from any submission or objection as to the venue of arbitration since it had failed to participate in the arbitration proceedings and was deemed to have waived its right of objection.

NATIONAL AGRICULTURAL CO-OPERATIVE MARKETING FEDERATION OF INDIA V ALIMENTA S.A.

Date : 22.04.2020

Citation : Supreme Court [Civil Appeal No. 667 of 2012]

SYNOPSIS

Foreign awards cannot be enforced in India if it is against public policy.

FACTS

The appellant and the respondent had entered into a contract for supply of 5000 metric tonnes (**"MT"**) of groundnut. However, only 1900 MT could be shipped due to damage caused to the crop by a cyclone. The appellant had permission from Government of India (**"GOI"**) to export between 1977 to 1980 but had no permission under the export control order to carry forward the exports for the season 1979-80 to the year 1980-81. The permission for carrying forward the previous year's commitment of remaining supply of 3100 MT to the subsequent year was denied by

the GOI due to the restricted export policy and quota ceiling. Thus, arbitration proceedings were initiated and the award was delivered in favour of the respondent. The respondent filed for the enforcement of the foreign award before the High Court, which allowed the application and rejected the objection to the award on grounds of public policy. Aggrieved by the order, an appeal was filed before the Supreme Court.

ISSUES
Whether enforcement of the award is against the public policy of India.

HELD
It was apparent from clause 14 that the contract would be rendered unenforceable in the event of prohibition of export by any executive or legislative act by the government of either country. Reference was made to Section 32 of the Indian Contract Act, 1882, which stated that the performance of a contract could not be carried out upon the happening of the contingencies, which the agreement itself provided for. Thus, it was justified that the appellant couldn't make the supply as permission was not given to it by the GOI to carry forward the quantity of the previous year to the next year and the same would have been in violation of the export control order.

It was noted that the effect of the stipulation in clause 14 was based upon the law as applicable in India and was based on export restrictions, which was within the realm of public policy. Enforcement of an award in violation of the export policy and the order of GOI would be against the public policy as given u/s 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961.

The appellant was incapable of performance of contract due to lack of consent of GOI, but that didn't shift the liability on it to pay the damages under the contract. Relying on various judgments, it was held that the enforcement of the foreign award in the present case would be against the fundamental policy of Indian law and the basic concept of justice. Thus, the appeal was allowed.

M/S DYNA TECHNOLOGIES PVT. LTD. V M/S CROMPTON GREAVES LTD.

Date : 18.12. 2019

Citation : Supreme Court [Civil Appeal No. 2153 of 2010]

SYNOPSIS
Awards without adequate reasoning can be set aside.

FACTS
The appellant and the respondent had entered into an agreement for construction of ponds and associated works. The respondent issued a work-stop notice to the appellants and terminated the contract. Consequently, the appellant claimed compensation for premature termination and the dispute was referred to arbitration, which delivered the award in favour of the appellant.

However, the appellants' claim pertaining to unproductive use of machineries, which was accepted by the arbitral tribunal, was set aside by the High Court due to lack of proper reasoning, on an appeal made by the respondent u/s 34. Aggrieved by the decision, an appeal was filed before the Supreme Court.

ISSUES
Whether the award passed by the Tribunal could be set aside for inadequate reasoning.

HELD
It was observed that the mandate for an award under Section 31(3) was to have reasoning which was intelligible and adequate and, which could be in appropriate cases be even implied by the courts from a fair reading of the award and the documents referred to. Furthermore, a reasoned award should be proper. If the reasoning in the order were improper, then they reveal a flaw in the decision making process.

If the challenge to an award was based on impropriety or perversity in the reasoning, then it could be challenged strictly on the grounds provided u/s 34, which deals with the grounds for setting aside the award. If the challenge to an award was based on the ground that

the same was unintelligible, the same would be equivalent to providing no reasons at all. Also, the court while exercising jurisdiction had to adjudicate the validity of such an award based on the degree of particularity of reasoning required, having regard to the nature of the issues falling for consideration. But, unintelligible awards could be set aside, subject to party autonomy to do away with the reasoned award.

Therefore, the courts were also required to be careful while distinguishing between inadequacy of awards and unintelligible awards. In the instant case, it was noted that although the tribunal had dealt with the claims separately under different sub-headings, the award was confusing and had jumbled the contentions, facts and reasoning, without appropriate distinction. In spite of its independent application of mind, based on the documents relied upon, it could not sustain the award in its existing form as there was a requirement of legal reasoning to supplement the conclusion made by the award. It held that the award was unintelligible and could not be sustained due to inadequate reasoning and the fact that the award was based on the approval of the respondent rendered it inappropriate.

BGS SGS SOMA JV V NHPC LTD.

Date : 10.12. 2019

Citation : Supreme Court [Civil Appeal No. 9307 of 2019]

SYNOPSIS

Test to determine the seat of arbitration.

FACTS

The petitioner was awarded a contract for construction of a hydropower project. Dispute arose between the parties and pursuant to arbitration proceedings that took place in New Delhi, the tribunal delivered its unanimous award. The respondent filed a setting aside petition u/s 34 before the District Court in Faridabad.

The petitioner filed an application seeking return of the setting aside petition for presentation before the appropriate court at New Delhi and/or the District Court at Assam. The said application was allowed and aggrieved by this transfer order, the respondent filed an appeal with the High Court of Punjab and Haryana, which held that the appeal was maintainable and Faridabad would have jurisdiction as cause of action arose at Faridabad. Thus, appeal was filed by the petitioner before the Supreme Court.

ISSUES

A. Whether appeal u/s 37 is maintainable against order that transferred proceedings u/s 34 to another court.
B. What would be the juridical seat of arbitration?
C. Whether designated place of arbitration confers exclusive jurisdiction upon the courts of the said place.

HELD

Section 37 is the only provision that sets out the parameters as to when an appeal would be maintainable and states that an appeal can lie against the setting aside order of award or refusing to set aside award u/s 34. An appeal may be filed on any of the grounds as set out u/s 34. However, an order transferring the proceedings from one court to another doesn't amount to refusal to set aside the award. Thus, it was held that the appeal filed by the respondent u/s 37 was not maintainable.

The arbitration clause didn't specify the seat of arbitration, but only made a reference to the venue of arbitration. Placing reliance on the judgment in Roger Shashoua v Mukesh Sharma, it was held that the venue of arbitration would be the juridical seat where the seat of arbitration isn't designated and in the absence of any other intention to the contrary.

It was observed that the phrase "shall be held" was a fair indication that New Delhi, which was the venue of the arbitration proceedings would also be the juridical seat. It was noted that there were no other significant contrary indicia that stated that the venue was merely a "venue" and not the "seat" of the arbitral proceedings. Thus, the moment a seat is designated by agreement between the parties, it would

be akin to an exclusive jurisdiction clause, that would vest the courts at the "seat" with exclusive jurisdiction. Since the proceedings were held in New Delhi and the award was also signed in New Delhi, it was held that courts in New Delhi would have exclusive jurisdiction over the arbitral proceedings.

HINDUSTAN CONSTRUCTION COMPANY LIMITED & ANR. V UNION OF INDIA & ORS.

Date : 10.12. 2019

Citation : Supreme Court [Civil Appeal No. 9307 of 2019]

SYNOPSIS

No automatic stay on enforcement of arbitral awards if challenged.

FACTS

A set of writ petitions were filed, which challenged the constitutional validity of Section 87 of the Arbitration and Conciliation Act, 1996 (**"Arbitration Act, 1996"**) and also challenged the repeal of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 (**"Amendment Act, 2015"**) by Section 15 of the Arbitration and Conciliation (Amendment) Act, 2019.

ISSUES

A. Whether Section 87 was arbitrary and in violation of Article 14 of the Constitution of India.
B. Whether repeal of Section 26 was valid.

HELD

The Supreme Court observed that to form a view that an award cannot be executed, till the time for making an application to set aside the award u/s 34 had not expired or where such an application had been filed, would result in an automatic stay on the enforcement of the award, was an incorrect interpretation of Section 36.

It noted that its earlier position as stated in some of its previous judgments, that filing a setting aside petition would inadvertently mean a stay on the enforcement of award was incorrect in law. The Amendment Act, 2015 by amending provision u/s 36 removed the automatic stay and stated that the filing of such an application would not by itself render the award unenforceable, unless the Court granted an order of stay on the operation of the award, on a separate application made by the award debtor for that purpose.

The Srikrishna Committee Report (**"Report"**) recommended the introduction of Section 87 owing to the fact that there were conflicting judgments of the High Court on the applicability of Amendment Act, 2015 i.e. whether it was applicable retrospectively or prospectively. Additionally, the Report came before this point in law was clarified in the case of BCCI v Kochi Cricket Pvt. Ltd. (**"BCCI"**), which held that while the Amendment Act, 2015 was prospective in nature, the change brought about in Section 36 was retrospectively applicable. It was observed that Section 87 nullified the effect of the judgment in BCCI to the effect that it restricted the applicability of the Amendment Act, 2015 to arbitrations commenced on or after October 23, 2015.

The legislature referred to the Report but overlooked the judgment of the Supreme Court in BCCI and thus, the incorporation of Section 87 was, manifestly arbitrary, having been enacted unreasonably and without adequately determining the principle. Furthermore, to delete Section 26 and introduce Section 87 in its place was without justification and was contrary to the object sought to be achieved by the Amendment Act, 2015. It was held that the introduction of Section 87 and the repeal of Section 26 of the Amendment Act, 2015 was unconstitutional on the ground of manifest arbitrariness.

M/S UTTARAKHAND PURV SAINIK KALYAN NIGAM LTD. V NORTHERN COAL FIELD LIMITED

Date : 27.11. 2019

Citation : Supreme Court [Special Leave Petition (C) No. 11476 of 2018]

SYNOPSIS

No automatic stay on enforcement of arbitral awards if challenged.

FACTS

The petitioner had entered into an agreement with the respondent to provide security to it. Dispute arose between the parties with respect to payment of dues by the respondent. A legal notice was issued by the petitioner demanding the payment of amounts in 2013 and subsequently, notice of arbitration was issued twice in 2016 to call for the appointment of an arbitrator by the respondent to adjudicate the dispute, which went unanswered.

The petitioner filed an application u/s 11 invoking the default power of the High Court to make the appointment of the sole arbitrator, which was set aside on the ground that the claims of the petitioner was barred by limitation and therefore, an arbitrator could not be appointed. Aggrieved by the aforesaid order, the petitioner filed a Special Leave Petition before the Supreme Court.

ISSUES

Whether High Court was justified in rejecting the application filed u/s 11 for reference to arbitration, on the ground that it was barred by limitation.

HELD

It was observed that the kompetenz-kompetenz principle as enshrined u/s 16 implies that the arbitral tribunal has the power and competence to rule on its own jurisdiction, including all jurisdictional issues, and the existence or validity of the arbitration agreement. The doctrine was intended to minimize judicial intervention at the pre-reference stage, which also reinforced the legislative intent of the act.

Thus, once the arbitrator is appointed, or the tribunal is constituted, all issues and objections are to be decided by the arbitral tribunal. It was further observed that the issue of limitation being a jurisdictional one, would have to be decided by the arbitrator u/s 16 and not by the High Court u/s 11. In view of the aforesaid principle and the legislative policy to restrict the judicial intervention at the pre-reference stage, it was held by the Supreme Court that the issue of limitation was required to be decided by the appointed arbitrator.

PERKINS EASTMAN ARCHITECTS DPC & ANR. V HSCC (INDIA) LTD.

Date : 26.11. 2019

Citation : Supreme Court [Arbitration Application No. 32 of 2019]

SYNOPSIS

Persons interested in the outcome of the dispute cannot have power to appoint sole arbitrator.

FACTS

Perkins Eastman Architects DPC (**"Applicant 1"**) and Edifice Consultants Pvt. Ltd. (**"Applicant 2"**) (collectively as **"Applicants"**) entered into a contract with the respondent whereby the Applicants were appointed as design consultants for a project. Dispute arose between the parties and the Applicants invoked the arbitration clause which gave power to the Chairman & Managing Director (**"CMD"**) of the respondent to appoint a sole arbitrator within 30 days from the date of intimation.

The said clause also stipulated that no person other than the person appointed by the CMD could act as the sole arbitrator. However, the respondent failed to discharge its obligation in terms of the arbitration clause.

Consequently, the Applicants filed an application u/s 11(6) seeking the appointment of a sole arbitrator to adjudicate the dispute between the parties arising under the contract.

ISSUES

A. Whether the arbitration in the present case would be an International Commercial Arbitration or not.
B. Whether a case is made out for exercise of power by the court to make an appointment for an arbitrator.

HELD

While relying upon the decisions of the higher courts, the Supreme Court held that the arbitration in the present case was an "International Commercial Arbitration" based on the fact that the lead member of the consortium agreement was Applicant 1, which

had its registered office in New York and thus, satisfied the requirements u/s 2(1)(f) of the act.

With respect to the second issue, it was noted that any person who has a vested interest in the outcome of the dispute would become ineligible to act as an arbitrator and such a person who is himself disqualified and disentitled would also be devoid of the power to nominate any other person to act as an arbitrator. Where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining the course for dispute resolution. Thus, interest in the outcome of the dispute would always take the shape of bias and the same would arise even more so when unilateral power is vested in a person to appoint a sole arbitrator.

Lastly, the Supreme Court relied on the decision passed in *Walter Bau AG v Municipal Corporation of Greater Mumbai and Anr.* [(2015) 3 SCC 800] to demarcate its own powers u/s 11 and held that courts had the power to intervene and appoint a sole arbitrator if there were justifiable doubts as to the independence and impartiality of the person nominated as the sole arbitrator. Thus, it annulled the effect of the letter issued by the respondent appointing Major General K.T Garia as the sole arbitrator and appointed Dr. Justice A.K. Sikri as the sole arbitrator.

RECKITT BENCKISER PVT. LTD. V REYNDERS LABEL PRINTING INDIA PVT. LTD. AND ORS.

Date : 26.11. 2019

Citation : Supreme Court [Arbitration Application No. 32 of 2019]

SYNOPSIS

Persons interested in the outcome of the dispute cannot have power to appoint sole arbitrator.

FACTS

The petitioner and respondent 1 had entered into an agreement for providing packaging material to the petitioner. During the negotiation stage, the petitioner had circulated a draft of the agreement, along with the code of conduct and the anti-bribery policy of the petitioner. The respondents replied to the same through Mr. Frederik Reynders (**"Mr. Frederik"**). It was contended by the petitioner that Mr. Frederik was the promoter of respondent 2 and he was acting on behalf of it to negotiate the agreement.

An application was filed u/s 11 before the Supreme Court by the petitioner to appoint a sole arbitrator to resolve the disputes that arose between the parties. The petitioner contended that respondent 2 should also be impleaded, despite it being a non-signatory to the arbitration agreement.

ISSUES

Whether a non-signatory affiliate of a party to an arbitration agreement could be impleaded to arbitration proceedings.

HELD

It observed that the thrust of the claim of the petitioner was based on the fact that Mr. Frederik was acting on behalf of respondent 2 and as a result of which, respondent 2 had assented to the agreement. However, this basis was completely demolished by respondent 2 by stating an affidavit that Mr. Frederik was in no way associated with respondent 2 and was an employee of respondent 1 and was acting in the capacity of an employee during the negotiation process. Thus, he was neither the signatory to the arbitration agreement nor did have any causal connections with the process of negotiations, preceding the execution of the agreement.

It noted that the burden was on the petitioner to establish that respondent 2 had an intention to consent to the agreement and be a party thereto, even if it was for the limited purpose of enforcing the indemnity clause in the agreement, which referred to respondent 1. However, it was held that this burden had not been discharged by the petitioner at all and thus, it was necessary to follow that respondent 2 could not be subjected to the proposed arbitration proceedings, even if the respondents belonged to the same group of companies. In light of the fact that there was

no clear intention between the parties to bind both the respondents to the agreement, the Supreme Court held that respondent 2 had not given its assent to the arbitration agreement and therefore, could not be impleaded and subjected to the arbitration proceedings.

GARWARE WALL ROPES LTD. V COASTAL MARINE CONSTRUCTIONS & ENGINEERING LTD.

Date : 10.04. 2019

Citation : Supreme Court [2019 (6) SCJ 450]

SYNOPSIS

Courts cannot appoint an arbitrator where the agreement containing the arbitration clause is unstamped/ inadequately stamped.

FACTS

The appellant had entered into a contract with the respondent on which adequate stamp duty was not paid by the parties. Dispute arose between the parties, pursuant to which the said contract was terminated by the appellant. The respondent issued notice of arbitration and proposed its nominee for the appointment of the sole arbitrator.

This was not accepted by the appellant, stating that invocation of the arbitration clause was premature. The respondent filed an application before the Bombay High Court u/s 11, which was allowed and a sole arbitrator was appointed to adjudicate upon the disputes arising from the contract. Aggrieved by the decision, the appellant filed a Special Leave Petition before the Supreme Court.

ISSUES

What is the effect of an arbitration clause contained in a contract which requires to be stamped?

HELD

The Supreme Court acknowledged the insertion of Section 11(6A), which was introduced by the amendment act of 2015. It observed that while considering any application u/s 11(4) and u/s 11(6), the court was to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator. Relying on its decision in SMS Tea Estates v Chandmari Tea Company Private Limited, it observed that the Indian Stamp Act, 1899 applies to an agreement or conveyance as a whole and therefore, it was not possible to bifurcate the arbitration clause contained in such an agreement or conveyance so as to give it an independent existence.

As a result, the introduction of Section 11(6A) didn't in any manner, deal with or get over the basis of the aforesaid judgment, which continues to apply. The court was only concerned with the arbitration agreement which was in the form of an arbitration clause in a "contract". It noted that under the Indian Stamp Act, an agreement doesn't become a contract since it is not enforceable in law unless it is duly stamped.

Thus, an arbitration clause in an agreement would not exist when it is not enforceable under law. The appeal was allowed and it was held that while proceeding with the Section 11 application, the High Court must impound the instrument first as it didn't bear any stamp duty.

M/S ICOMM TELE LTD. V PUNJAB STATE WATER SUPPLY & SEWERAGE BOARD AND ANOTHER

Date : 11.03. 2019

Citation : Supreme Court [Civil Appeal No. 2713 of 2019]

SYNOPSIS

Arbitration clause requiring a 10% deposit to invoke an arbitration proceeding struck down for being arbitrary.

FACTS

The appellant had entered into a contract with the first respondent for work on sewage treatment plant. The said contract had a detailed arbitration clause, in which, clause 25(viii) provided that it was a pre-requisite for any party invoking the arbitration clause to deposit-at-call, an amount equivalent to 10% of the total amount claimed with a bank, in the name of the arbitrator. In the event the claimant was successful in getting the award

in its favour, the deposit would be refunded to him in proportion to the amount awarded with respect to the amount claimed and the balance, if any, would be forfeited and paid to the other party.

The appellant had entered into similar contracts with the second respondent which contained the same arbitration clause. It had sent notices seeking to waive the 10% deposit fee to the second respondent which went unanswered. Subsequently, it had twice tried to challenge the said clause before the High Court of Punjab and Haryana, but with no success. Aggrieved by the decision, an appeal was filed before the Supreme Court.

ISSUES

Whether clause 25(viii) was invalid on account of being arbitrary and unreasonable.

HELD

It was noted that, albeit the objective of the aforesaid clause was to discourage and deter frivolous claims, such a clause was outright arbitrary since it was unfair, unjust and would not find acceptance by any reasonable man. The 10% deposit had no direct nexus to the filing of the frivolous claims, as it applies to all claims irrespective of whether they are frivolous or not.

Any frivolous claim can be dismissed with exemplary costs, which is a well settled position in law and thus, such a deposit amount was quite unnecessary. As per the said clause, the entire deposit would not be refunded to the claimant even when the arbitral award was in his favour, which made the clause wholly arbitrary on account of being disproportionate and excessive. Lastly, it was observed that arbitration is an important alternative dispute resolution process, which is to be encouraged because of the high pendency of cases in courts and cost of litigation.

Any such pre-requisite of a deposit would discourage arbitration, contrary to the objective of de-clogging the court system and would render the arbitral process ineffective and expensive. Therefore, the appeal was allowed and the said clause was struck down.

JAIPRAKASH ASSOCIATES LTD. V TEHRI HYDRO DEVELOPMENT CORPORATION INDIA LTD.

Date : 07.02. 2019

Citation : Supreme Court [Civil Appeal No. 1539 of 2019]

SYNOPSIS

Arbitrator cannot award interest if it is expressly barred by the agreement.

FACTS

The appellant was awarded a contract by the respondent under which the appellant was to execute certain works. Disputes arose between the parties and the arbitration clause was invoked by the appellant. The award was delivered by the tribunal in favour of the appellant as per which the arbitrators also granted interest at the rate of 10% per annum from the date on which the arbitration was invoked, till 60 days after the award.

Furthermore, a future interest at the rate of 18% per annum was also granted till the date of the payment. This was challenged by the respondent before the single judge of High Court, which quashed the award limited to the interest that was awarded by the arbitrators and held that no interest was payable as per clauses 50 and 51 of the General Conditions of Contract (**"GCC"**). An appeal was filed before the Supreme Court when the division bench upheld the order of the single judge.

ISSUES

Whether the arbitrator has the power to award interest even when the arbitration agreement expressly bars it.

HELD

The Supreme Court analysed its previous judgments which laid down the principles with regard to the power of the arbitral tribunal in granting pre-reference and pendente lite interest.

It was concluded that where the agreement between the parties contained an express bar to the award of pre-reference and/or pendente lite interest, the arbitrator would be constricted from awarding interests in such

cases. The proposition was predicated on the principle that an arbitrator was the creature of the agreement and he was supposed to act and make his award in accordance with the general law of the land and the agreement. It was noted that in the present case, clauses 50 and 51 of the GCC had put a bar on the tribunal to award interest and thus, the tribunal didn't have any jurisdiction to do so.

It was also noted that Section 31(7) of the Act contained a specific provision which reiterated the same principle that if the agreement prohibited the award of interest for the pre-award period, then the arbitrator could not award the interest for the said period. In light of the above facts, it upheld the judgment of the High Court and the appeal was dismissed.

RAJASTHAN SMALL INDUSTRIES CORPORATION LTD. V M/S GANESH CONTAINERS MOVERS SYNDICATE

Date : 23.01. 2019

Citation : Supreme Court [Civil Appeal No. 1039 of 2019]

SYNOPSIS

Substitute arbitrator cannot be appointed due to delay in passing award.

FACTS

The appellant and the respondent had entered into an agreement for handling and transportation of cargo. Dispute arose between the parties and arbitration clause was invoked to appoint a sole arbitrator. However, the said arbitrator was removed since his progress was not satisfactory in disposing the matter and the Managing Director (**"MD"**) of the appellant was appointed in his place.

Due to several reasons, the arbitration proceedings could not be concluded and kept getting adjourned. Thus, an application was filed u/s 11(6) and Section 15 before the High Court to appoint an independent arbitrator for adjudication of dispute.

It was requested by the respondent to adjourn the matter before the arbitrator till the final order of the High Court, but the same was rejected and the arbitrator delivered an ex-parte award. The High Court allowed the application and appointed an arbitrator as it was of the opinion that the arbitrator had hurried up the proceedings to frustrate the arbitration application. Aggrieved by the order, an appeal was filed before the Supreme Court.

ISSUES

Whether an arbitrator could be substituted by the High Court for delay in passing the award.

HELD

It was observed that the respondent having participated in the proceedings before the arbitrator for quite some time and also having expressed faith in the sole arbitrator, was not justified in challenging the appointment of the MD of the appellant as the sole arbitrator.

No material was placed by the respondent which could cast doubts, that the arbitrator had not acted independently or impartially. It was true that there was delay in passing the award but the respondent never filed an application to expedite the proceedings. It was held that the mere neglect of an arbitrator to act or delay in passing the award by itself could not be the ground to appoint another arbitrator in deviation from the terms agreed to by the parties.

The High Court had no mandate to appoint the substitute arbitrator in view of Section 15(2), which stated that the appointment of the substitute arbitrator should be in accordance with the terms of the original agreement. Furthermore, the arbitral tribunal should have waited for the High Court to pass the decision and was wrong in delivering the award ex-parte, even after the repeated prayers by the respondent for adjournment.

Thus, in exercise of its powers under Article 142 of the Constitution of India, the award was set aside and the appeal was allowed. It was directed that the MD would continue as arbitrator and pass the final award within a period of four months, after hearing both the parties.

GOVERNMENT OF HARYANA PWD HARYANA BRANCH V M/S G.F. TOLL ROAD PRIVATE LTD. & ORS.

Date : 03.01. 2019

Citation : Supreme Court [2019 (9) SCJ 131]

SYNOPSIS

Former employee can be appointed as an arbitrator.

FACTS

The appellant and the respondent had entered into a concession agreement for construction related work, which contained an arbitration clause as per which there should have been a board of 3 arbitrators, of whom each party would select one and the third arbitrator would be appointed as per the Rules of Arbitration of the Indian Council of Arbitration (**"ICA"**).

Dispute arose between the parties and the respondent invoked the arbitration clause and requested the ICA to commence arbitration proceedings. Objections were raised by the respondent and the ICA to the appointment of the appellant's nominee arbitrator since he was a former employee of the appellant. The appellant refuted the objections on the ground that there were no rules which prohibited a former employee from being an arbitrator and there could not be any justifiable doubt with respect to his impartiality since he had retired over 10 years ago.

The arguments of the appellant were dismissed and the ICA proceeded to appoint a substitute arbitrator on behalf of the appellant. The appellant's challenge to this appointment, before the District Court and the High Court were both dismissed and thus, the said appeal before the Supreme Court.

ISSUES

Whether a former employee can be appointed as an arbitrator.

HELD

Section 15(2) provides that a substitute arbitrator must be appointed according to the rules that are applicable for the appointment of the arbitrator being replaced. Thus, it was held that the procedure agreed upon by the parties for the appointment of the original arbitrator is equally applicable to the appointment of the substitute arbitrator and thus, the appointment of arbitrator by ICA was unjustified and contrary to rules of the ICA itself.

With respect to the main issue, it was held that the objection raised by ICA with respect to the appointment of the nominee arbitrator of the appellant was wholly unjustified since the test to be applied for bias is whether the circumstances are such as would lead to a fair-minded and informed person to conclude that the arbitrator was in-fact biased. It was pointed out that the present case was governed by the pre-amended act of 1996 and there were no provisions in the said act which disqualified a former employee from being appointed as an arbitrator. The amendment act of 2015 also didn't prohibit any person who was a former employee from acting as an arbitrator, subject to the fact that there were no justifiable doubts as to his independence and impartiality.

It was held that mere allegation of bias without substantial evidence was not a ground for removal of arbitrator, particularly since the nominee was a former employee of the appellant over 10 years ago. Thus, the appeal was allowed.

M/S SIMPLEX INFRASTRUCTURE LTD. V UNION OF INDIA

Date : 05.12. 2018

Citation : Supreme Court [Civil Appeal No.11866 of 2018]

SYNOPSIS

Administrative difficulties cannot be a valid reason to condone a delay above and beyond the statutory period.

FACTS

The appellant had entered into an agreement with the respondent for the construction of permanent shelters. Due to differences with regard to the performance of the construction work, the parties were referred to arbitration

and an award was delivered in favour of the appellant. Aggrieved by the award, the respondent filed an application u/s 34 in 2015 for setting aside the award, which was set aside by the district court for want of jurisdiction. Consequently, the respondent filed the said application before the High Court, along with an application for condonation of delay of 514 days.

The respondent's condonation application was allowed on the ground that sufficient cause was shown to explain the said delay in the filing of the application. Aggrieved by the decision, an appeal was filed before the Supreme Court.

ISSUES

Whether the High Court was justified in condoning a delay of 514 days by the respondent in filing the application u/s 34?

HELD

An assessment was made whether the benefit of Section 5 and Section 14 of the Limitation Act, 1963 (**"Limitation Act"**) could be extended to the respondent, and if so, whether a delay beyond the specific statutory limitation prescribed u/s 34(3) could be condoned.

It was observed that the application for setting aside the award had to be made within a period of 3 months from the date of the receipt of the award. This said period can be extended by another period of 30 days on sufficient cause being shown by the applicant. The intent of the legislature was further emphasized by the use of the words - "but not thereafter". Thus, it was abundantly clear that no application could be made beyond the extension period. Relying on its previous judgment, it was observed that Section 5 of the Limitation Act had no application to a petition challenging an arbitral award u/s 34 because to hold that the court could entertain an application to set aside the award beyond the extended period under the proviso given u/s 34, would render the phrase "but not thereafter" wholly otiose.

It was observed that benefit u/s 14 of the Limitation Act could not be availed by the applicant as there was still a delay of 131 days after computation, which could not be condoned in view of the statutory limitation as prescribed u/s 34(3). The argument of the respondent that the delay was due to the fact that it was a time consuming process for obtaining the requisite permission was rejected, stating that administrative difficulties could not be a valid reason to condone a delay above and beyond the statutory period. Appeal was allowed and the petition was dismissed on the ground that it was barred by limitation.

P.E.C. LTD. V AUSTBULK SHIPPING SDN BHD

Date : 14.11. 2018

Citation : Supreme Court [Civil Appeal No. 4834 of 2007]

SYNOPSIS

Not mandatory to furnish the original copy of the arbitration agreement while filing for the enforcement of the foreign award.

FACTS

The appellant entered into a charter party agreement with the respondent to charter a vessel for transportation work. Dispute arose between the parties due to non-payment of dues and the arbitration clause was invoked by the respondent by way of arbitration notice. The arbitrator delivered the award in favour of the respondent in London. The respondent filed a petition for the enforcement of the award u/s 47 before the Delhi High Court and objections were filed by the appellant against the said enforcement petition. The objections of the appellant were dismissed and the application was allowed. Aggrieved by the order, an appeal was filed before the Supreme Court.

ISSUES

A. Whether an application for enforcement u/s 47 is liable to be dismissed if it is not accompanied by the arbitration agreement.
B. Whether there is a valid arbitration agreement between the parties and what is the effect of a party not signing the charter party agreement?

HELD

The argument that the production of the arbitration agreement at the time of the filing

of the application was mandatory was rejected by the Supreme Court. It opined that the word "shall" appearing in Section 47 relating to the production of the evidence as specified in the provision at the time of the application had to be read as "may". A reference was made to article III of the New York Convention to understand the intention of the legislature, which restricted the imposition of substantial onerous conditions for the enforcement of the arbitral awards.

Thus, non-compliance of the production of documents would not entail in dismissal of the application and the party seeking enforcement could be asked to cure such defect. It was noted that the grounds for rejecting the enforcement of a foreign award were stated u/s 48 and this substantiated that the need to produce documents at the time of the application was not intended to be mandatory. In the present case, the arbitration agreement, although not submitted at the initial stage of the enforcement, was provided by the respondent at a later stage, which satisfied the requirements of Section 47.

It was held that there was no dispute that the contract was governed by the English law under which there was no requirement for the charter party agreement to be signed by the parties to make it binding. The charter party which contained the arbitration agreement was agreed to and entered upon by the parties and the same was supported by the correspondence between the parties. It was observed that the term "agreement in writing" is very wide and an arbitral clause need not necessarily be found in a contract. It could be included in the correspondence between the parties also. Thus, the appeal was rejected.

M/S. SHRIRAM EPC LIMITED V RIOGLASS SOLAR SA

Date : 13.09. 2018

Citation : Supreme Court [Civil Appeal No. 9515 of 2018]

SYNOPSIS
Stamp duty not payable on a foreign award.

FACTS
An arbitral award was delivered in favour of the respondent in London, pursuant to arbitration proceedings between the appellant and the respondent. The appellant had challenged the award u/s 34, which was dismissed on the ground that such a petition was not maintainable as against a foreign award. A petition was filed by the respondent to enforce the award u/s 47, which was allowed without any objections.

Subsequently, an appeal was filed u/s 50 by the appellant, which was held to be non-maintainable by the High Court of Madras. Aggrieved by the order, an appeal was filed before the Supreme Court on the ground that the foreign award was not stamped and therefore, it could not be enforced.

ISSUES
A. Whether the expression "award" in Schedule I of the Indian Stamp Act, 1899 (**"Stamp Act"**) would include a foreign award.
B. Whether a foreign award which is unstamped could be enforced in India.

HELD
The provisions of the Stamp Act and the arbitration law in 1899 as enumerated in the Code of Civil Procedure, 1882 and the Indian Arbitration Act, 1899 were examined by the Supreme Court to see the state of the arbitration law in 1899 and to trace the evolution of the term award to determine whether the expression award would include a "foreign award".

Based on its assessment of the evolution of the law in arbitration and the Stamp Act, it was held that the expression award contained in item 12 of Schedule I of the said act never included a foreign award from its inception, till date.

It was observed that as long as none of the grounds stated u/s 48 were attracted, the enforcement of foreign award could not be challenged and such an award becomes a decree. It dismissed the argument that there were only three things required to produce

before the court u/s 47 to enforce a foreign award and thus, payment of stamp duty wasn't necessary. It also rejected the argument that u/s 48, even if the stamp duty is payable on a foreign award, it would not be contrary to the prevailing public policy. Relying on previous judgments, it was noted that the object of the act of 1996 was to provide that every final arbitral award is enforced in the same manner as if it were the decree of the court.

Furthermore, neither the Stamp Act nor the act of 1996 were amended to include foreign award under the ambit of award and accordingly, no provision was incorporated to make stamp duty payable on a foreign award. In light of above, the Supreme Court rejected the appeal and held that a foreign award which has not been stamped under the Stamp Act would not be rendered unenforceable.

ORIENTAL INSURANCE CO. LTD. V NARBHERAM POWER AND STEEL PRIVATE LTD.

Date : 02.05.2018

Citation : Supreme Court [Civil Appeal No. 2268 of 2018]

SYNOPSIS

Arbitration clause to be construed strictly to analyse if the dispute is arbitrable or not.

FACTS

The appellant had entered into a Fire Industrial All Risk Policy with the respondent for insurance of their factory. The respondent suffered substantial damages due to a cyclone in October, 2013.

Dispute arose between the parties as the insurance claim was not settled, despite a series of correspondences. The arbitration clause was invoked by the respondent by way of an arbitration notice. The appellant repudiated the claim made by the respondent and declined to refer the disputes between the parties for arbitration.

An application was filed u/s 11 by the respondent before the High Court for appointment of an arbitrator to adjudicate the disputes, which was accepted. Aggrieved by the decision, an appeal was filed before the Supreme Court.

ISSUES

Whether the dispute is arbitrable as per the arbitration clause in the insurance policy.

HELD

It was noted that no dispute could be referred to arbitration as per clause 13 of the policy, if the claim was repudiated and the respondent had disputed or not accepted the liability. Only disputes arising with respect to the quantum to be paid under the said policy could be referred for arbitration. The third part of the clause stipulated that no right of action or suit could be initiated upon the policy before an arbitral award was passed with regard to the amount of damages.

It was noted that the dispute raised by the respondent was pertaining to its liability to pay any amount of damage, which was not covered by the arbitration clause. The parties were bound by the clauses enumerated in the policy and the court could not transplant any equity to the same by rewriting a clause. However, the respondent had the right to institute a civil suit for mitigation of grievances, but could not refer the same for arbitration. Thus, the appeal was allowed and the order passed by the High Court was set aside.

BANKING AND FINANCE

GENERAL

A. BANKING REGULATION ACT, 1949

EASTMAN AUTO & POWER LTD. V RBI & ORS.

Date : 27.04.2020

Citation : Delhi High Court [W.P.(C) 2997/2020]

SYNOPSIS

The Court restrained the impleaded Respondent Banks from taking any coercive action against the petitioner, including declassification of the petitioner, for default committed by the petitioner in the Reverse Factoring Facility availed by the petitioner from such respondents.

FACTS

The Petitioner had availed electronic bill discounting facility known as Reverse Factoring Facility through the Trade Receivable Discounting Systems(TReDS) from the various respondents. The petitioner made full payment till 31.03.2020, however due to the restrictions declared because of the COVID-19 pandemic, the petitioner was not able to make payment for servicing of such facility for the period beyond 31.03.2020.

The Petitioner sought extension of such facility on conditions as may be stipulated by the said respondents as other banks had also agreed to extending similar facilities.

ISSUES

Whether such relief is covered by the RBI's notifications dated 27.03.2020 and 17.04.2020

HELD

The Court held that:

A. The object of issuing notifications/circulars dated 27.03.2020 and 17.04.2020 was to provide financial relief to the parties who have availed the term loans and working capital facilities. The Delhi HC in its order dated 06.04.2020 passed in Anant Raj Ltd v Yes Bank Ltd, had considered the abovementioned notifications/ circulars of the RBI and observed that prima facie, the of the intention of the RBI appeared to be maintaining the status quo as on 01.03.2020 with regard to the financial facilities that have been granted to various parties and have fallen due.

B. More so, RBI's Circular dated 30.07.2015 prima facie shows that such factoring facility was to be considered at par with loans and advances extended by the banks.

INTERNET & MOBILE ASSOCIATION OF INDIA V RBI

Date : 04.03.2020

Citation : Supreme Court [(2020) 3 MLJ 541]

SYNOPSIS

The Hon'ble Supreme Court held that the RBI Circular (as described hereinafter), failed the test of proportionality, as it was a pre-emptive measure by the RBI to curtail damage taken by its various regulated bodies.

However, because the stance of the RBI was based on no actual metrics of damage being caused to the regulated bodies. Furthermore, because the RBI states that they had not banned VC's, and the Govt. of India has provided no clear guideline with regards to the same, the action taken by the RBI was not proportional.

FACTS

The Reserve Bank of India issued a Statement on Developmental and Regulatory Policies which directed the entities regulated by RBI not to deal with or provide services to any individual or business entities dealing with or settling virtual currencies and to exit the relationship, if they already have one, with such individuals/business entities, dealing with or settling virtual currencies (VCs).

Following said Statement, RBI also issued a circular, in exercise of the powers conferred by Section 35A r/w Sections 36(1)(a) and 56 of the Banking Regulation Act, 1949 and Sections 45JA and 45L of the Reserve Bank of India Act, 1934 and Section 10(2) r/w Section 18 of the Payment and Settlement Systems Act, 2007, directing the entities regulated by RBI not to deal in virtual currencies nor to provide

services for facilitating any person or entity in dealing with or settling virtual currencies and to exit the relationship with such persons or entities, if they were already providing such services to them. The Petitioner challenging the said Statement and Circular and seeking a direction to the Respondents not to restrict or restrain banks and financial institutions regulated by RBI, from providing access to the banking services, to those engaged in transactions in crypto assets.

ISSUES

The issues identified in the writ petition were as follows:

A. Whether RBI had the power to regulate matters relating to virtual currencies,

B. Whether virtual currencies amounted to "money", and

C. Whether the RBI Circular constituted a proper exercise of power by the RBI?

HELD

The Court held that:

A. The RBI has sufficient power to issue directions to its regulated entities in the interest of depositors, in the interest of banking policy or in the interest of the banking company or public interest.

   If the exercise of power by RBI with a view to achieve one of these objectives incidentally causes a collateral damage to one of the several activities of an entity which did not come within the purview of the statutory authority, the same cannot be assailed as a colourable exercise of power or being vitiated by malice in law.

B. The concern of RBI was and it ought to be, about the entities regulated by it. RBI had not come out with a stand that any of the entities regulated by it namely, the nationalized banks/scheduled commercial banks/cooperative banks/NBFCs had suffered any loss or adverse effect directly or indirectly, on account of the interface that the VC exchanges had with any of them.

   As held by this Court in State of Maharashtra v Indian Hotel and Restaurants Association, there must have been at least some empirical data about the degree of harm the suffered by the regulated entities (after establishing that they were harmed). It was not the case of RBI that any of the entities regulated by it had suffered on account of the provision of banking services to the online platforms running VC exchanges.

C. Due to there being no evidence of harm caused to any of the regulated entities under the RBI, it cannot be said that the action taken by the RBI towards curbing the damage pre-emptively was proportional in nature. More so, it must be noted herein that the RBI maintained that it had not deemed VC's to be invalid, illegal or banned forms of currency.

DHARANI SUGARS & CHEMICALS LTD. V UNION OF INDIA & ORS

Date : 02.04.2019

Citation : Supreme Court [2019 3 AWC 2581 SC]

SYNOPSIS

The Hon'ble Apex Court held that Sections 35AA & 35AB of the Banking Regulation Act, 1949 could not be said to be excessive or manifestly arbitrary and thus upheld their constitutional validity. However, with regards to the circular issued by the RBI, it was held that the circular was not issued with due regard to the scheme of Section 35AA and 45L(3) and thereby was declared ultra-vires as a whole.

FACTS

Through an amendment made to the Banking Regulation Act, Sections 35AA and 35AB were added. Section 35AA permitted the RBI to issue directions for initiation of insolvency in respect of a default on authorization from the Central Government and Section 35AB permitted RBI to issue directions for resolution of stressed assets in general.

The Ministry of Finance, on May 5, 2017, authorised the RBI to issue a circular. The Circular, inter alia required that all debts with aggregate exposure of more than Rs. 2000 Crore be given 180 days to resolve their accounts, failing which, banks would have 15 days to move the National Company Law Tribunal under the Insolvency and Bankruptcy

Code and withdrew all existing restructuring schemes of the RBI. Writ petitions were filed across various HC's challenging the validity of the Circular, which were thereafter clubbed by the Hon'ble SC and taken up.

ISSUES

The issues identified in the writ petition were as follows:

A. Constitutional Validity of Sections 35AA and 35AB of the Banking Regulation Act, 1949 and,

B. Validity of Reserve Bank of India's Circular issued on 12.02.2018, titled "Resolution of Stressed Assets: Revised Framework".

HELD

For brevity, the judgment of the Apex Court may be broken down into two major parts, dealing with the issues aforementioned respectively as follows:

A. Section 35AA & 35AB are in the nature of amendments which confer regulatory powers upon the RBI to carry out its functions under the Banking Regulation Act, and are not different in quality from any of the Sections which have already conferred such power, and cannot be said to be excessive in any way and do not suffer from want of any guiding principle. Section 21 makes it clear that the RBI may control advances made by banking companies in public interest, and in so doing, may not only lay down policy but may also give directions to banking companies either generally or in particular.

   Similarly, under Section 35A, vast powers are given to issue necessary directions to banking companies in public interest, in the interest of banking policy, to prevent the affairs of any banking company being conducted in a manner detrimental to the interest of the depositors or in a manner prejudicial to the interest of the banking company, or to secure the proper management of any banking company. It is clear, therefore, **that these provisions which give the RBI certain regulatory powers cannot be said to be manifestly arbitrary.**

B. Section 35AA also emphasises that directions are in respect of "a default".

   Thus, it is clear that directions that can be issued under Section 35AA can only be in respect of specific defaults by specific debtors. This is also the understanding of the Central Government when it issued the notification dated 05.05.2017, which authorised the RBI to issue such directions only in respect of "a default" under the Code. **Thus, any directions which are in respect of debtors generally, would be ultra vires Section 35AA.** Furthermore, the provisions of Section 45L(3) had not been satisfied in issuing the impugned circular.

   The impugned circular did not state that the RBI had due regard to the conditions in which and the objects for which such institutions had been established, their statutory responsibilities, and the effect the business of such financial institutions is likely to have on trends in the money and capital markets. **For these reasons, the impugned circular will have to be declared as ultra vires as a whole, and be declared to be of no effect in law.**

B. BANK GUARANTEE

MERCATOR OIL & GAS LTD. V ONGC LTD. & ORS.

Date : 19.07.2019

Citation : Bombay High Court [2019 (5) ABR 683]

SYNOPSIS

The Court while dismissing the appeal held that an appellate court cannot interfere with exercise of discretion of trial court and substitute its discretion unless discretion exercised by the trial court is exercised arbitrarily.

FACTS

The Petitioner had filed two Arbitration Petitions to restrain ONGC from terminating a contract between the parties, to restrain it from invoking bank guarantees and to restrain it from giving effect to the termination of the contract. The Single Judge had rejected both petitions on 3 June 2019 due to which the

impugned appeal was filed challenging the earlier order.

ISSUES

Whether the ingredients required to restrain invocation and payments under bank guarantees were present.

HELD

The Court held that:

A. A case of fraud cannot be orally made. It must find a foundation in the pleadings. The evidence must be clear and mere assertion without strong corroborative evidence is not enough. This is more so in the cases of bank guarantees as a grant of injunction restraining invocation of bank guarantee is in an exceptional case. The exception cannot be taken lightly.

B. The contours of the powers of the Court to grant an injunction against the invocation of bank guarantee are narrow. The bank issuing the guarantees takes the obligation to repay the amount on demand and without questioning the legal relationship between the parties in whose favour the guarantee is given and who has given the bank guarantee. The bank is not concerned with the relationship between the supplier and buyer nor where the supplier has performed his contractual obligation. The bank must pay according to guarantee.

This is because the bank raises its credit involving its reputation. The purchaser is a sole judge to decide as to when the bank guarantee has become recoverable, or the seller or other parties has committed a breach. Only in rare circumstances that the Court will issue an order of injunction restraining the bank in performance of bank guarantee.

Of the two known exceptions to otherwise embargo are: Fraud and Special equity. If however there is fraud committed by the parties and that the bank has notice of the fraud, then the Court may issue an order of injunction. The fraud in such cases is not the one spoken in general terms. It us such fraud where the person in whose favour the bank has issued the bank guarantee fraudulently or by represents the bank expressly or by implication of a fact untrue to his knowledge. The nature of the fraud should be egregious as to vitiate the entire transaction. The word egregious generally means extraordinary, very noticeable, conspicuous, glaring, flagrant bad conduct. The fraud should be such that vitiates the underlying foundation of the main contract.

C. FEMA, 1999

STANDARD CHARTERED BANK V HEAVY ENGINEERING CORPORATION LTD. & ANR

Date : 18.12.2019

Citation : Supreme Court [I (2020) BC31 (SC)]

SYNOPSIS

A dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence on the encashment or invocation of bank guarantee so long as the invocation is in terms of the bank guarantee. It is not even open for the Court to interfere with the encashment and invocation of bank guarantee so long as the invocation was in terms of the bank guarantee.

FACTS

The first Respondent placed an order on second Respondent for the complete design, supply of both indigenous and imported equipments, erection and commissioning of requisite civil and construction works of the Coal Complex. The first Respondent (Plaintiff) from time to time advanced for the said work against several bank guarantees furnished by Second Respondent. In breach of contract with the first Respondent-Plaintiff, Second

Respondent failed to duly complete the supply of equipment and the other conditions of the letter of intent and further defective equipment. It is alleged that the work had to be abandoned due to which 1st Respondent suffered huge losses and damages. The first Respondent demanded encashment of both

the said guarantees which were refused by the bank to honour and diverse correspondence was exchanged by and between the first Respondent-Plaintiff and the Appellant-Defendant bank. Ultimately, first Respondent was constrained to institute a suit before the High Court of Calcutta for decree of sum along with interest being the aggregate sum of both the said guarantees.

The suit in the first instance came to the dismissed which was then challenged by the first Respondent in appeal before the Division Bench of the High Court of Calcutta. In a concurring judgment while setting aside the judgment of the Single Judge of the High Court, it was held that the bank guarantees were properly invoked in law by the 1st Respondent and accordingly passed a decree of sum together with interest.

ISSUES

Whether it is up to the bank to determine if the invocation of the guarantee is

HELD

The Court held that:

A. A bank guarantee is an independent contract between bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence. The Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.

B. Once a demand is made in due compliance of bank guarantees, it is not open for the Bank to determine as to whether the invocation of the bank guarantee is justified, so long as the invocation was in terms of the bank guarantee.

   The demand once made obliges the bank to pay under the terms of the bank guarantee and that a defence only falls if the case is one involving fraud, irretrievable injustice and special equities. In absence thereof, it is not even open for the Court to interfere with the invocation and encashment of the bank guarantee so long as the invocation was in terms of the bank guarantee.

JUNAID IQBAL MOHAMMED MEMON V UNION OF INDIA & ORS.

Date : 08.04.2019

Citation : Delhi High Court [AIR 2019 Delhi 142]

SYNOPSIS

As per the provisions enshrined under Section 14 of FEMA, the Court held that failure to be physically present for investigation under FEMA cannot be ground for cancellation of passport.

FACTS

The Petitioner is an NRI and had been residing permanently in UAE since 1993. He had been carrying on business in property development and hospitality in UAE since 2011. It was alleged that the Petitioner had been involved in money laundering and had transferred the sale proceeds of assets in India, belonging to his father to foreign countries.

Pursuant to these allegations, certain directives were issued to the Petitioner by the Directorate of Enforcement and summons were further issued calling upon him to appear in person before the ED. The Petitioner's passport was thereafter suspended on the ground that the Petitioner had failed to appear in person before the concerned officers investigating the alleged violation of the provisions of FEMA, 1999.

ISSUES

Whether any investigation under FEMA would warrant cancellation of a passport under Section 10(3)(c) of the Passports Act?

HELD

The Court held that:

A. Under FEMA, there is no provision for arrest or criminal prosecution as had been provided under Section 35 and 56 of FERA. The power to examine persons conferred on the officers of the Directorate of Enforcement under Section 39 of FERA re not existing in FEMA either.

B. Furthermore, the violation of provisions under Section 13 of FEMA, would result in the concerned officer making a complaint to the adjudicating authority under Section 16 of FEMA. On such complaint being made, the adjudicating authority would hold an enquiry under sub-section (1) of Section 16 of FEMA. At that stage, the person accused would have the option to either appear in person or by taking the assistance of a legal practitioner or a chartered accountant of his choice for presenting his case before the adjudicating authority by virtue of sub-section (4) of Section 16 of FEMA.

C. Lastly, the Court also noticed that provisions of FEMA do not entail custodial interrogation and, therefore, an alternative mode of examination under video conferencing was an option available to the ED. Thus not warranting cancellation of the Petitioner's passport.

D. LETTER OF CREDIT

M/S PENNAR INDUSTRIES LIMITED & ANR V RESERVE BANK OF INDIA & ANR

Date : 01.05.2020

Citation : High Court of Telangana at Hyderabad [IA No 3 of 2020 in WP No 6573 of 2020]

SYNOPSIS

The Court granted an interim injunction restraining Yes Bank Limited, the second respondent from debiting amounts due under letters of credit (LCs) from the account of the Petitioner.

FACTS

It was submitted that the Petitioner is a financially viable establishment, remained profitable for the last ten years and had been repaying the loans to its financial institutions including the Respondent no.2 (Yes Bank), and had no arrears/dues whatsoever. The Petitioners availed Letters of credit (LCs) as non-refund based working capital from Respondent no.2. Amid the Covid-19 pandemic, the Respondent no.1 (RBI) granted certain reliefs to the borrowers of term loans and working capital facilities(vide circular dated 27.3.2020) and also issued another circular(dated 17.4.2020) that the lending institutions were permitted to grant a moratorium of three months on payment of all term loan instalments falling due between March 1, 2020 - May 31, 2020.

The RBI circular would apply to the Petitioners. The lockdown imposed by the Union of India amidst the pandemic caused vide spread destruction and a complete halt in the supply and delivery chain of the petitioners, it is a force majeure. The Petitioners sought a moratorium or extension on making payment due under LCs from Yes Bank in line with the RBI Circulars but Yes Bank refused, granted no relief or benefit and resorted to coercive methods imposing ancillary interest for non-payment of dues.

It was contended by the Petitioners that similar issues were considered and granted interim orders in favour of the Petitioners, before the High Courts of Bombay and Delhi due to the impact of the lockdown and basis the RBI Circulars.

ISSUES

Whether relief should be granted to the Petitioner in the present facts and force majeure situations?

JUDGMENT

On considering all the above facts and similar matters, the Telangana High Court *prima facie* entitled the Petitioner for the interim relief and directed Respondent No. 2 to not debit the amounts due under various Letters of Credit from the account of the Petitioner for a period of 90 days and further directed not to take any coercive steps including imposition of ancillary interest against Petitioner No.1.

E. SARFAESI, 2002

PANDURANG GANPATI CHAUGULE V VISHWASRAO PATIL MURGUD SAHAKARI BANK LTD.

Date : 05.05.2020

Citation : Supreme Court [2020 (3) CTC 558]

SYNOPSIS

The Court held that co-operative banks under the State legislation and multi-State co-operative banks are 'banks' Under Section 2(1)(c) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

ISSUES

The issues framed were as follows:

A. Whether 'co-operative banks', which are co-operative societies also, are governed by Entry 45 of List I or by Entry 32 of List II of the Seventh Schedule of the Constitution of India, and to what extent?

B. Whether 'banking company' as defined in Section 5(c) of the BR Act, 1949 covers co-operative banks registered under the State Co-operative Laws and also multi-State co-operative societies?

C. Whether co-operative banks both at the State level and multi-State level are 'banks' for applicability of the SARFAESI Act?

   i. Whether provisions of Section 2(c)(iv a) of the SARFAESI Act on account of inclusion of multi-State co-operative banks and notification dated 28.1.2003 notifying cooperative banks in the State are ultra vires?

HELD

The Court held that:

A. The co-operative banks registered under the State legislation and multi-State level co-operative societies registered under the MSCS Act, 2002 with respect to 'banking' are governed by the legislation relatable to Entry 45 of List I of the Seventh Schedule of the Constitution of India.

   i. Furthermore, the co-operative banks run by the co-operative societies registered under the State legislation with respect to the aspects of 'incorporation, Regulation and winding up', in particular, with respect to the matters which are outside the purview of Entry 45 of List I of the Seventh Schedule of the Constitution of India, are governed by the said legislation relatable to Entry 32 of List II of the Seventh Schedule of the Constitution of India.

B. The co-operative banks involved in the activities related to banking are covered within the meaning of 'Banking Company' defined Under Section 5(c) read with Section 56(a) of the Banking Regulation Act, 1949, which is a legislation relatable to Entry 45 of List I. It governs the aspect of 'banking' of co-operative banks run by the co-operative societies. The co-operative banks cannot carry on any activity without compliance of the provisions of the Banking Regulation Act, 1949 and any other legislation applicable to such banks relatable to 'Banking' in Entry 45 of List I and the RBI Act relatable to Entry 38 of List I of the Seventh Schedule of the Constitution of India.

C. The co-operative banks under the State legislation and multi-State co-operative banks are 'banks' Under Section 2(1)(c) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The recovery is an essential part of banking; as such, the recovery procedure prescribed Under Section 13 of the SARFAESI Act, a legislation relatable to Entry 45 List I of the Seventh Schedule to the Constitution of India, is applicable.

   i. The Parliament has legislative competence under Entry 45 of List I of the Seventh Schedule of the Constitution of India to provide additional procedures for recovery Under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 with respect to cooperative banks. The provisions of Section 2(1)(c)(iva), of Securitisation and Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2002, adding "ex abundanti cautela", 'a multi-State co-operative bank' is not ultra vires as well as the notification dated 28.1.2003 issued with respect to the cooperative banks registered under the State legislation.

TONY ENTERPRISES & ORS. V RBI & ORS.

Date : 11.10.2019

Citation : Kerala High Court [2019 (5) KHC 269]

SYNOPSIS

The Court while disposing off the writ petitions held that in cases containing allegations of fraud, the matter is out of bounds of the SARFAESI Act and the Bank, therefore, is liable to prove its claim against the persons who have committed fraud and that the bank cannot adjudicate their claim and decide against the borrower.

FACTS

The impugned matter was a common judgement for two Writ Petitions wherein, the Petitioners had realised that sums of 16,25,00/- and 23,00,00/- had been transferred from their respective accounts after their sims had been deactivated. The Petitioners were informed by their respective network providers that their sims had been deactivated due to the issuance of duplicated sim cards to individuals that had unlawfully posed to be them. The Petitioners thus approached the Hon'ble HC seeking a declaration to the effect that they had zero liability in the light of a circular issued by the Reserve Bank of India and that a direction be made to their respective banks to make good the loss suffered by them.

ISSUES

Whether the Bank can proceed against the borrower based on an assumed liability or not, when there is a serious challenge to a banking transaction on the ground of fraud?

HELD

The Court held that:

A. As Banking transactions are both contractual and fiduciary, the bank owes a duty to the customer, but both have a mutual obligation to one and another. The bank, is bound to protect the interests of the customer in all circumstances. However, technology as adverted has its own defects as well and online transactions are vulnerable. While the bank may have devised a secured socket layer connection for online banking purpose which is encrypted, this security encryption can be hacked using different methods. **The bank cannot claim any amount from the customer when a transaction is shown to be a 'disputed transaction'.**

The bank can recover from the customers only when it can unequivocally prove that the customer was responsible for such transaction, independently through the civil court. The RBI guidelines are a clear mandate to exonerate a customer in such 'disputed transactions' as the RBI circular presumes the innocence of the customer in such circumstances. The petitioners cannot be held responsible for such debit without establishing through the civil court that they are responsible for such withdrawal from the loan account. If any amount deposited by the petitioners also have been transferred, in the same manner, that shall be restored to the petitioners without any delay at any rate within two weeks from the date of receipt of a copy of this judgment.

These directions are issued without prejudice to the bank to proceed against the persons who are responsible for these transactions through civil court.

SNG & PARTNERS
Advocates & Solicitors

COMPANY LAW

GENERAL

CYRUS INVESTMENTS PVT. LTD. V TATA SONS LTD. & ORS.

Date : 18.12. 2019

Citation : NCLAT [Company Appeal (AT) No. 254 of 2018]

SYNOPSIS

NCLAT restores Cyrus Mistry as Executive Chairman of Tata Group.

FACTS

Mr. Cyrus Mistry (**"Mr. Cyrus"**) was removed from the post of "Executive Chairman" pursuant to decision of the board of directors (**"BOD"**) of Tata Sons Ltd. (**"Tata Sons"**). The appellants, being the minority group of shareholders, moved an application u/s 241-242 of the Companies Act, 2013 alleging prejudicial and oppressional acts of the majority shareholders. However, the National Company Law Tribunal (**"NCLT"**) dismissed the said petition. Aggrieved by the order, an appeal was filed before the National Company Law Appellate Tribunal (**"NCLAT"**).

Petitioner sought extension of such facility on conditions as may be stipulated by the said respondents as other banks had also agreed to extending similar facilities.

ISSUES

Whether conduct of Tata Sons amounted to oppression against the minority shareholders.

HELD

It was observed that the nominated directors of Tata Trusts in the BOD of Tata Sons had veto power as the majority decision of the BOD could not be given effect without the affirmative vote of the nominated directors. No majority decision could be taken independently either in the general meeting of the shareholders or by majority decision of the BOD without the approval of the nominated directors.

Thus, Tata Sons was under the direct control of Tata Trusts as per the Articles of Association. It was observed that there was complete confusion about the governance framework of Tata Sons in deciding any matter or for taking any resolution by the BOD, since such a decision was already made by Mr. Ratan Tata in advance. No agenda was circulated amongst the BOD and no intimation was given to Mr. Cyrus about the decision to remove him from BOD. It was observed that the decision to remove Mr. Cyrus was pre-determined and neither any reasons were discussed nor recorded in the minutes of the meetings of the BOD in which he was removed. NCLAT didn't concur with the reason that Mr. Cyrus was removed on the basis of his performance.

It held that the reason wasn't justified as the failure of the company was not the sole responsibility of one person but was in fact a collective failure of the BOD and Mr. Cyrus could not be held liable for it alone. Lastly, records of the minutes of meetings of the Nomination and Remuneration Committee (**"NRC"**) showed that the company had performed well under Mr. Cyrus and the same was appraised unanimously by the BOD of Tata Sons in its annual performance review of NRC.

In light of all of the above facts, NCLAT held that the affairs of Tata Sons were conducted in a manner which was prejudicial and oppressive to the members, including the appellants, Mr. Cyrus as also prejudicial to the interests of the company and its group companies. Hence, the appeal was allowed and Mr. Cyrus was reinstated as the executive chairman of Tata Sons.

VINOD TARACHAND AGRAWAL V ROC GUJARAT

Date : 06.11.2019

Citation : NCLT [Company Appeal No. 53/252(3)/NCLT/AHM/2019]

SYNOPSIS

Registrar of Companies cannot strike off the name of a company when insolvency proceedings is pending by or against it.

FACTS

J.R. Diamonds Pvt. Ltd. (**"Company"**) was incorporated in 1977. A corporate insolvency resolution process (**"CIRP"**) was initiated u/s 9 of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) against the Company and the

appellant was appointed as the resolution professional and subsequently, as the liquidator of the Company. It was contended by the appellant that the Company had an active status at the time of the initiation of the CIRP and he had informed the respondent about the order of this tribunal for the liquidation of the Company by way of a letter.

During the liquidation process, he came to know that the name of the company had been struck off from the web portal of the Ministry of Corporate Affairs (**"MCA"**) without any intimation. An appeal was filed before NCLT seeking for restoration of the name of the Company.

ISSUES

Whether name of a company can be struck off by the Registrar of Companies when insolvency proceedings is pending by or against it.

HELD

It was observed that no proceedings against the Company could have been legally initiated nor the provisions u/s 248 of the Companies Act could have been invoked as the said Company was under a moratorium period u/s 14 of IBC. A reference was made to MCA circular, as per which, the provisions u/s 248 would not be applicable in respect of such companies against which any prosecution for an offense or its application for compounding of offense or an investigation was pending, pursuant to an order of a competent authority.

Placing reliance on judgments of higher courts, it was noted that the name of the Company could be restored even if the Company was not carrying out any business or was not in operation at the time of the striking off, if it appears to the court to be "otherwise just". It was also noted that when there is litigation pending by or against a company before any competent court of law, striking off the name of such company was not justified.

It would be difficult for a company either to claim its assets or answer the claim of third parties against it because the legal and corporate entity enjoyed by it is completely denuded, with the name of the company being struck off. It was also noted that the impugned action by the respondent was inoperative and void in law because Section 238 of the IBC was having an overriding effect on other laws.

Thus, the NCLT conditionally allowed the appeal and directed the respondent to restore the name of the Company subject to compliance of conditions as set out in the order.

MUKUT PATHAK & ORS. V UNION OF INDIA & ANR.

Date : 04.11.2019

Citation : Delhi High Court [W.P. (C) 9088/2018]

SYNOPSIS

Penalty u/s 164(2) of Companies Act not to apply retrospectively.

FACTS

The petitioners were directors in various companies and were disqualified from being appointed/ reappointed as directors for a period of five years u/s 164(2)(a), for default on the part of their concerned companies, in filing of the annual returns and financial statements for the financial year 2014-2016. The said list of directors, who were disqualified, was published in 2017. The petitioners challenged the list of disqualified directors, for defaults, pertaining to the financial years 2012-2014 and 2013-2015 before the High Court.

ISSUES

A. Whether the provisions of Section 164(2)(a) are retrospective?
B. Whether a prior notice and an opportunity of being heard was required to be given before publishing the list of the disqualified directors?
C. Whether the directors of a company are disqualified from being re-appointed as directors in other non-defaulting companies in which they were directors at the time of incurring the disqualification?

ISSUES

A. It was held that the provisions of Section 164(2) would apply prospectively and that it

is a well settled law, that no statute should be construed to apply retrospectively, unless such construction appears clear from the language of the enactment or otherwise necessary by implication. It was also equally trite that a statute is not retrospective merely because it affects existing rights or because a part of the requisites for its action is drawn from a time antecedent to its passing.

B. With respect to the second issue, it was noted that principles of natural justice are only meant to supplement the law and are a kind of code of fair administrative procedure in the decision making process.

However, in the present case, the administrative authorities are not required to take any qualitative decision, in as to when a director would be disqualified. Section 164(2) merely sets out the conditions, which if not complied with, would disqualify a person from being reappointed or appointed as a director. Thus, it was unable to accept that exclusion of the "audi alteram partem" rule resulted in any procedural unfairness.

C. Lastly, Section 164(2) provides that no person who is or has been a director of company that has defaulted u/s 164(2) shall be eligible to be re-appointed as a director of 'that company' or appointed in any 'other company'.

The expression 'other company' is used to refer to all companies other than the company which has committed the defaults as specified in clauses (a) and (b) of Section 164(2).

It was also noted that the term appointment would include any 'reappointment' as well. Thus, it was held that the directors of the defaulting companies were not eligible to be appointed or reappointed as directors in any company for a period of five years.

ACTION ISPAT & POWER PVT. LTD. V SHYAM METALICS & ENERGY LIMITED & SBI

Date : 10.10. 2019

Citation : Delhi High Court [Company Appeal 11/2019 & C.M. No. 31047/2019]

SYNOPSIS

Transfer of proceedings to NCLT is maintainable under IBC.

FACTS

A winding up petition was filed against the appellant by respondent 1 u/s 433 of the Companies Act, 1956. The said petition was admitted and the official liquidator was appointed. During the pendency of the winding up proceedings and before the winding up order could be passed, a petition was filed u/s 7 of the IBC by respondent 2, who was a secured creditor of the appellant. An application was also filed for transfer of the pending winding up proceedings to the NCLT, which was allowed. Aggrieved by the order, appeal was filed before the Delhi High Court.

ISSUES

Whether application seeking transfer of proceedings from Delhi High Court to NCLT under IBC is maintainable.

HELD

At the outset, the primacy of the secured creditors was recognized and it was held that respondent 2, being the secured creditor, would have the prerogative of calling the shots with regards to the manner in which the liquidation and/ or revival of the appellant should be undertaken. It was observed that the scope of the winding up proceedings before the Company Court was uni-directional, where the liquidator acts with the mandate of liquidating the assets of the company with a view to satisfy the claims of the creditors.

On the other hand, the NCLT is a specialized body which looks to revive the company, if feasible, and only if the revival of the company is not feasible, proceeds to take steps to wind it up. Even in this respect, the option exercised by the secured creditor deserves

to be respected, unless there is a clear legal impediment in acceding to the request for transfer of the winding up proceedings to the NCLT from the Company Court.

Relying on the judgments of the Supreme Court, it was held that power of the court to order transfer of the winding up proceedings to the NCLT is discretionary in nature, and that the best interests of all the creditors had to be considered while deciding on the aspect of the transfer of the winding up proceedings to the NCLT. Reference was made to Section 238 of IBC, which provides for the overriding effect of IBC over other laws.

Lastly, it noted that the decision of the Company Court to order the winding up of a company is revocable and can be recalled as held in Sudarshan Chits v. Sukumaran Pillai. Thus, the appeal was dismissed and it was held that the proceedings should be transferred to NCLT.

MR. HEMANG PHOPHALIA V THE GREATER BOMBAY CO-OPERATIVE BANK LIMITED & M/S PENGUIN UMBRELLA WORKS PVT. LTD.

Date : 05.09.2019

Citation : NCLAT [Company Appeal (AT) No. 765 of 2019]

SYNOPSIS

Corporate Insolvency Resolution Process can be initiated against a company whose name has been struck off.

FACTS

The first respondent filed an application u/s 7 of the IBC, to initiate CIRP against the second respondent, which was admitted by the NCLT. Aggrieved by the order, an appeal was filed before the NCLAT. It was contended by the appellant that CIRP cannot be initiated against a company whose name was struck off from the Register of Companies u/s 248 of the Companies Act.

ISSUES

Whether an application u/s 7 or 9 of IBC for initiating CIRP is maintainable against a company, if the name of the company is struck-off from the Register of Companies.

HELD

Reference was made to Chapter XVIII of the Companies Act, which deals with “Removal of names of the companies from the Register of Companies” and Section 248, 250 and 252 were reproduced and examined by the NCLAT. It was held that the liabilities and obligations of a company continues even after its name is removed from the Register of Companies.

It was noted that it is the adjudicating authority in terms of Section 60(1) of IBC and it also plays the role of tribunal under the Companies Act. If an application is filed by a financial creditor or an operational creditor before the expiry of 20 years from the date of publication in the official gazette of notice u/s 248(5), it is open to the adjudicating authority to give such directions and make such provisions as deemed just for restoring the name of the company and placing all other persons in nearly the same position as may be as if the name of the company had never been struck off from the Register of Companies.

Furthermore, it noted that “winding up” means winding up under the Companies Act or liquidation under the IBC as applicable. Thus, it was clear that the company, whose name had been removed from the Register of the Companies could be liquidated under IBC. Hence, appeal was dismissed and it held that the adjudicating authority who was also the tribunal was empowered to restore the name of the company and all other persons in their respective position for the purpose of initiation of CIRP u/s 7 and 9 of the IBC.

S. GOPAKUMAR NAIR & ANR. V OBO BETTERMANN INDIA PVT. LTD.

Date : 09.07. 2019

Citation : NCLAT [Company Appeal (AT) No. 272/2018]

SYNOPSIS

Purchase of minority shares without compliance to Companies Act amounts to oppression and mismanagement.

FACTS

The appellants held 100% shares in Cape Electric India Pvt. Ltd. (**"CEIPL"**). Subsequently, OBO Bettermann Holdings-GMBH Ltd. (**"OBO Germany"**) acquired 76% of the shares in CEIPL, pursuant to a shareholder's agreement entered into with the appellants. Over the course of time, the name of CEIPL was changed to OBO Bettermann India Pvt. Ltd. (**"OBO India"**) and the shareholding of the appellant was reduced to 0.36% in OBO India.

OBO Germany made attempts to buy out the equity shares of the appellants pursuant to a put and call option agreement and later, being in control of OBO India, issued notice u/s 236 of the Companies Act, to buy the shares of the appellants in spite of their resistance. A petition was filed before the NCLT u/s 241, which was held as not maintainable. Aggrieved by the order, an appeal was filed before the NCLAT.

ISSUES

A. Whether the appellants' petition filed u/s 241 is maintainable.
B. Whether Section 236 could be invoked to acquire the minority shareholding in the present case.

HELD

It was observed that there were only three shareholders in OBO India, which included OBO Germany and the two appellants. One of the criteria u/s 241 stated that the petition was maintainable if not less than one-tenth of the total number of members had filed an application making grievances of oppression and mismanagement.

Thus, it was held that appellants were eligible to file petition on the basis of the number of members. The argument that the petition wasn't maintainable as the appellants ceased to exist as the members of OBO India was rejected, since the cause u/s 241 arose only when the shares of the appellants were wrongfully acquired u/s 236. In the present case, there was a gradual change in shareholding as per different agreements executed between OBO Germany and the appellants. However, Section 236 could be invoked only in case of amalgamation, share exchange and conversion of securities and for any other reasons. It was observed that the words "for any other reasons" had to be read *'ejusdem generis'* with the preceding word and must take the same or similar colour.

If this was not the intention of the legislature, then it could have generally mentioned that, in the event of any person or group of persons becoming 90% shareholder of the issued equity share capital of the company, such members could express their intention to buyout the remaining stake. Thus, it was held that the respondents could not have invoked Section 236 to acquire the minority shares of the appellants as the said provision wasn't applicable to their case. Hence, the appeal was allowed.

RASIKLAL S. MARDIA V AMAR DYE CHEM LIMITED & ORS.

Date : 08.04. 2019

Citation : NCLAT [Company Appeal (AT) No. 337 of 2018]

SYNOPSIS

Shareholders can file application to approve settlement with creditors even after appointment of official liquidator.

FACTS

The respondent company was referred to the High Court by the Board of Industrial and Financial Reconstruction (**"BIFR"**) for winding up, on account of being a sick company and the winding up petition was admitted in 1998. In 2008, the appellant was given liberty by High Court to submit a scheme to revive the company.

The appellant tried to convene a meeting of shareholders and creditors, which was allowed by the High Court. No objections were made by the liquidator to the right of the appellant to file such a scheme of compromise/ arrangement u/s 391-394 of the Companies Act, 1956 (**"Act of 1956"**). Meanwhile, the Ministry of Corporate Affairs issued the Companies (Transfer of Pending Proceedings) Rules, 2016 (**"Transfer Rules"**)

due to which the pending proceedings were transferred to the NCLT. The NCLT held that once the company was in liquidation, only the liquidator was authorized to file the petition for compromise/ arrangement in respect to the company in liquidation. Aggrieved by the order, an appeal was filed with NCLAT.

ISSUES

Whether liquidator alone has authority to file petition for compromise or arrangement.

HELD

It was observed that the NCLT did not examine the matter on its merits and merely examined the provision u/s 391(1) of Act of 1956 to conclude that the liquidator alone could file petition for compromise or arrangement in respect to the company in liquidation. NCLT had read the word "alone" in the provision on its own which wasn't even used by the legislature to arrive to the above conclusion.

Relying on the judgement of the higher courts, it concluded that it was quite clear that the liquidator was only an additional person and not an exclusive person, who could move an application u/s 391 when the company was in liquidation.

Thus, it was unable to support the view taken by NCLT that the appellant could not have filed the petition u/s 391. Hence, it was held that the appellant could file an application to approve settlement with creditors u/s 391 of the Act of 1956, even after the liquidator had been appointed.

Further, NCLAT opined that the transfer of proceedings to the NCLT was bad in law as the Transfer Rules provided that all cases where reference was given by BIFR for the winding up of the company, were to be dealt by the High Courts. In light of above, appeal was allowed and NCLAT held that the appellant should be given an opportunity to move to the High Court to file petition for compromise and arrangement as it would be the appropriate forum to deal with the said proceedings.

CUSHMAN & WAKEFIELD INDIA PRIVATE LIMITED & ANR. V UNION OF INDIA & ANR.

Date : 31.01. 2019

Citation : Delhi High Court [W.P. (C) 9883/2018]

SYNOPSIS

Delhi High Court upholds validity of Rule 3(2) of the Companies (Registered Valuers and Valuation) Rules, 2017.

FACTS

A set of writ petitions were filed before the Delhi High Court, challenging the constitutional validity of Rule 3(2) of the Companies (Registered Valuers and Valuation) Rules, 2017 for violating Article 14, Article 19(1)(g) and Article 301 of the Constitution of India. The petitioners were engaged in the business of real estate consultancy services, including provision of real estate valuation services.

It was contended by the petitioners that the said rule in question explicitly provided that a company would not be eligible to be a registered valuer, if it was a subsidiary, joint venture or associate of another company or body corporate, and this had impaired the right of the petitioners to carry on trade and business, which was guaranteed by the Constitution of India, as it ousts the petitioner from being a registered valuer merely on the ground of it being a subsidiary of a body corporate.

ISSUES

Whether exclusion of a subsidiary company, joint venture or associate of other company, for purpose of eligibility for registration as valuer reasonable.

HELD

It was noted that the objective and intention behind laying down the rule was to introduce higher standards of professionalism in valuation industry, specifically in relation to valuations undertaken for the purpose of Companies Act, 2013 and Insolvency and Bankruptcy Code, 2016. It was observed that the rule in question obviated the possibility of conflict of interest on account of diverging

interests of constituent / associate entities which resultantly undermined the very process of valuation, being one of the most essential elements of the proceedings before NCLT. Furthermore, it was noted that a separate class had been carved out based on classification, by making eligible only companies other than subsidiary companies, associate companies and joint ventures for the purpose of registration as valuer, which was founded on intelligible differentia and as such the rule could not be faulted. In light of the above facts, the High Court dismissed the petitions.

SHASHI PRAKASH KHEMKA V NEPC MICON & ORS.

Date : 08.01. 2019

Citation : Supreme Court [Civil Appeal Nos.1965 & 1966 of 2014]

SYNOPSIS

Power vested with the NCLT to deal with issues pertaining to rectification of register of members and not the civil courts.

FACTS

The appellant had filed a petition before the Company Law Board (**"CLB"**), seeking rectification of the register of members u/s 111-A of the Companies Act, 1956. It was held that the petitions were maintainable and didn't suffer from limitation, and CLB decided to hear the matter on merits.

However, an appeal was filed by the respondent before the High Court of Madras, which reversed the decision of the CLB and in effect, relegated the parties to a civil suit. Thus, a special leave petition was filed before the Supreme Court by the appellant to resolve the subject matter of dispute in the exercise of power u/s 111-A of the Companies Act, 1956.

ISSUES

Whether issue related to transfer of shares would be adjudicated by the Civil Courts or by the Company Law Board.

HELD

Reliance was placed on the judgment in *Ammonia Supplies Corporation (P) Ltd. v. Modern Plastic Containers Pvt. Ltd. and Others* to canvass the proposition that while examining the scope of Section 155 of the Companies Act, 1956 (the predecessor to Section 111), a view was taken that the power was fairly wide, but in case of a serious dispute as to title, the matter could be relegated to a civil suit.

Furthermore, it was noted that subsequent legal developments had a direct effect on the present case as Companies Act, 2013 had been amended which provided for the power of rectification of the Register u/s 59 of the Companies Act, 2013 and conferred such powers on the NCLT. A reference was also made to Section 430 of the Companies Act, 2013 which completely barred the jurisdiction of the civil courts in matters in respect of which the power had been conferred on the NCLT. In light of the above facts, the Supreme Court was of the view that relegating the parties to a civil suit would not be appropriate, considering the manner in which Section 430 was widely worded.

Hence, the appeal was allowed and it was held that the appropriate course of action would be to relegate the appellants to remedy before the NCLT under the Companies Act, 2013.

SNG & PARTNERS
Advocates & Solicitors

CONSUMER PROTECTION ACT

1986

NEW INDIA ASSURANCE CO. LTD. V HILLI MULTIPURPOSE COLD STORAGE PVT. LTD.

Date : 04.03.2020

Citation : Supreme Court [Civil Appeal No. 10941¬10942 of 2013]

SYNOPSIS

Opposite Party can be granted a further period of 15 days and not beyond that to file reply.

FACTS

The contention of the learned Counsel for the respondent is that by not leaving a discretion with the District Forum for extending the period of limitation for filing the response before it by the opposite party, grave injustice would be caused as there could be circumstances beyond the control of the opposite party because of which the opposite party may not be able to file the response within the period of 30 days or the extended period of 15 days.

ISSUES

Whether the District Forum has the power to extend the time for filing the response beyond the period of 15 days, in addition to 30 days as mandated by Section 13(2)(a) of the Act and what would be the commencing point of limitation of 30 days stipulated under Section 13 of the Consumer Protection Act?

HELD

The District Forum has no power to extend the time for filing the response to the complaint beyond the period of 15 days in addition to 30 days as is envisaged under Section 13 of the Consumer Protection Act and that the commencing point of limitation of 30 days under Section 13 of the Consumer Protection Act would be from the date of receipt of the notice accompanied with the complaint by the opposite party, and not mere receipt of the notice of the complaint.

CANARA BANK V UNITED INDIAN INSURANCE CO. LIMITED

Date : 06.02.2020

Citation : Supreme Court of India [Civil Appeal No. 1042 of 2020]

SYNOPSIS

Beneficiary is a "consumer under the Consumer Protection Act, even though they are not parties to the contract of insurance.

FACTS

The appeal was made against the order of National Consumer Dispute Redressal Commission. The claimants are referred to be farmers who had grown crops and stored their agriculture produce in cold storage run by a partnership firm named Sreedevi Cold Store. For the security of their products, the farmer took a loan from Canara bank and the storage was insured by United India Insurance Company Limited. A fire took place in the cold store further leading to the destruction of agriculture products and cold stores.

The farmers issued notice to the Insurance Company in respect of plant, machinery and store but gets repudiated by the Insurance Company. The Insurance Company stated that the farmer has no locus standi to claim as the insured was the cold store. It was stated in the appeal that farmers are not the consumers within the meaning of the Consumer Protection Act. Hence, there was no privity of contract between the farmer and the Insurance Company. The definition of 'consumer' under the Consumer Protection Act is very wide and not only includes a 'person who hires or avails of the services for consideration' but also includes 'the beneficiary of such services 'who may be a person other than the person who hires or avails of services.

ISSUES

Whether in the present case, the farmers/ beneficiaries could be defined as consumers?

HELD

In the present case, even though the farmers were not directly involved in undertaking the services of the insurance company, they were certainly the beneficiary to the same. The

Hon'ble Court disregarded other claims of the insurance company including the claim that the fire was not accidental and was a result of human intervention. The Supreme Court states that the beneficiary of the contract will also be considered to be a consumer even if he is not the party to the contract. The farmers are consumers because the beneficiaries of the policy are taken out by the insured.

The appeal filed by the insurance company has been dismissed and court held that under the insurance policy, the insurance company is liable to indemnify the cold store as there is no evidence found to prove that the fire was not accidental. As well as being the beneficiaries of the insurance, the farmers are also entitled to get the amount from the insurance company.

MOHAN DAI OSWAL CANCER TREATMENT AND RESEARCH FOUNDATION & ORS V PRASHANT SAREEN & ORS

Date : 24.05.2019

Citation : National Consumer Disputes Redressal Commission [First Appeal No. 208 of 2008]

SYNOPSIS

Medical Negligence- Doctor is vicariously liable for acts of team which assist him in rendering treatment.

FACTS

The case was initiated after the death of a three year old who was undergoing treatment for cancer at the Oswal Hospital. A medicine used for the treatment was injected to her intrathecally (through back bone) which had to be administered intravenously. Due to this wrong method of administering the drug, her situation worsened and she died within two weeks. Her parents filed for claiming compensations for medical negligence. Aggrieved by the order of the State Commission, the doctors and the hospital moved to the National Consumer Disputes Redressal Commission.

ISSUES

Whether the doctors, his team and the hospital failed to exercise 'due care' and committed 'medical negligence' and if the order of the state commission to award compensation to the parents stands final by this Commission?

HELD

Keeping in view the deposition, the discharge summary, the treatment record and the expert opinion, it was considered that there was negligence on behalf of the Hospital and the treating Doctors in administering the medicinal drug to the Patient intrathecally which was not the correct protocol and hence, the parents stand liable for compensation for the loss of their child.

BRANCH MANAGER, NATIONAL INSURANCE CO. LTD. V MOUSUMI BHATTACHARJEE & ORS

Date : 26.03.2019

Citation : Supreme Court of India [Civil Appeal No. 2614 of 2019]

SYNOPSIS

Disease caused by insect bite in the natural course of events not covered under the accident insurance.

FACTS

The insured was working as manager for a Tea Estate in Assam and thereafter took up employment as a manager of a tea estate in Republic of Mozambique. During his stay in Mozambique, the insured was admitted to a hospital and was diagnosed with Encephalitis Malaria and died due to multi-organ failure, Encephalitis Malaria & Pnasituria-Malaria.

The Bench was hearing an appeal filed by an insurance company against the judgment passed by the National Consumer Disputes Redressal Commission which dismissed the plea of the Insurance Company, after the District Forum and State Commission had dismissed the plea of the Insurance Company.

ISSUES

Whether disease caused by insect bite in the natural course of events is covered under the accident insurance?

HELD

The Supreme Court allowed the appeal of

the Insurance Company and set aside the judgment of the National Commission on the grounds that illness of Encephalitis Malaria through a mosquito bite in Mozambique cannot be considered as an accident. It was neither unexpected nor unforeseen, it was not a peril insured against in the policy of accident insurance, this was because the disease was considered to be a common cause of death in that region.

The ruling of the Court was primarily based on the World Health Organisation's World Malaria Report 2018, according to which in Mozambique one out of three people is afflicted with malaria.

MANMOHAN KAUR V M/S. FORTIS HOSPITAL & ORS.

Date : 29.06.2018

Citation : National Consumer Disputes Redressal Commission [First Appeal No. 832 of 2015]

SYNOPSIS

Informed Consent of Patient and Medical Negligence under Consumer Protection Act.

FACTS

The Complainant is one of the sons of one Smt. Mohinder Kaur who was admitted in the Fortis Hospital at Mohali frequently and was once put in the ICU and on the ventilator due to her physical conditions. The Complainant alleged that no consent was taken from the patient (complainant's mother) by the treating Doctor before subjecting her to treatment of colonoscopy in the respondent's hospital. Whereas, the Respondents claimed that it was taken but they were unable to produce the same because the form had been destroyed due to water seepage in the room where it was kept along with other records.

Fundamentally, the law requires disclosure to the patient, information relating to the diagnosis of disease- nature of the proposed treatment, potential risks of the proposed treatment and the consequences of the patient refusing the suggested line of treatment. Disclosure/explanation of such information to the patient by the treating Doctor and the patient's conscious decision, in this behalf, before venturing into the suggested procedure/treatment, is the basic attribute of an informed consent, which is considered mandatory in every field of surgical procedure/intervention. The only exception to this general rule is the emergency medical circumstances, where either the patient is not in a medical condition or mental state to take a conscious decision in this regard.

ISSUES

Whether or not 'informed consent' as understood in the legal and medical parlance, was obtained from the Complainant before subjecting her to colonoscopy procedure?

HELD

With reference to the facts of the present case, the National Commission noted that the treating Doctor had not explained the Complainant the pros and cons, the material risks involved and the benefits of the procedure, particularly keeping in view her age and health condition.

Thus, the National Commission held that the facts and evidence did not establish that 'informed consent' as understood in legal parlance, was obtained from the Complainant before subjecting her to the said procedure and the colonoscopy procedure conducted on her was unauthorized, amounting to deficiency in service on their part, liable to a compensation Rs.10,00,000.

SNG & PARTNERS
Advocates & Solicitors

CONTRACT ACT

1872

KAPILABEN AND ORS. V ASHOK KUMAR JAYANTILAL SHETH THROUGH POA GOPALBHAI MADHUSUDAN PATEL AND ORS

Date : 25.11.2019

Citation : Supreme Court of India [Civil Appeal Nos. 10683-86 OF 2014]

SYNOPSIS

There is reaffirmation laid on the established position of law that a party to a Contract cannot assign its obligations/liabilities without the consent of the other party.

FACTS

The dispute was in relation to a property (Suit Property) that was owned by the appellants (Vendor). The Vendor had executed an agreement to sell in 1986 in favor of some of the respondents (except Respondent 1) (Original Vendees), who had only paid a part of the consideration amount. Thereafter, the Original Vendees executed agreements to sell in 1987 in respect of the Suit Property assigning the former's rights under the 1986 Agreement in favor of Respondent 1.

Subsequently, disputes arose between the parties and Respondent 1 had filed suits against the Vendor and the Original Vendees seeking specific performance of the 1987 Agreements. The trial courts dismissed the suits stating that the Original Vendees could not have assigned their outstanding obligation to pay the remaining consideration without the written consent of the Vendor.

Further, as there was no evidence of such consent given by the Vendor, either verbally or by conduct, the rights of the Original Vendees under the 1986 Agreement were not validly passed on to Respondent 1 under the 1987 Agreements. However, the Gujarat High Court reversed the findings of the trial courts and held that there was a valid assignment of rights in favor of Respondent 1.

ISSUES

Whether consent is necessary?

HELD

A contract may result by way of transfer of the rights or transfer of the obligations. If the obligations under a contract are being assigned to another party, such an assignment cannot take place without the consent of the counterparty to the contract. Rights under a contract are freely assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.

The Supreme Court observed that assignment of contractual rights interest cannot be held to be valid merely because there is no express bar against assignability stipulated in the contract. The terms of the contract, and the circumstances in which the contract was entered into, have to be seen in order to examine whether an interest is assignable, leading to an inference that the parties did not intend to make their interest therein assignable. The appeals were partly allowed and the impugned judgment is set aside.

TAJ MAHAL HOTEL V UNITED INDIA INSURANCE COMPANY LIMITED

Date : 14.11.2019

Citation : Supreme Court of India [Civil Appeal No. 8611 of 2019]

SYNOPSIS

The Hotel authorities should have a duty of care and cannot exclude its legal liability for breach of that duty to persons who entrust vehicles to the Hotel for parking by their valets.

FACTS

A person had visited Taj Mahal Hotel in his car on August 1, 1998. After reaching the hotel, he handed over the car and its key to the hotel valet parking and went inside with a parking tag that read an important condition that the hotel would not be responsible for any loss, theft or damage and that the guest had parked the car at his own risk and responsibility, no claim whatsoever against the management. The person came out of the hotel at around 1 am but he was told that his car was driven away by another person. The hotel said that three boys had visited the hotel

in their separate car, parked it and went inside the hotel. After sometime they came out and asked the valet to bring their car to the porch. During this process, one of the boys picked up the keys of the car of the person from the desk and stole the vehicle. They sped away when the security guard tried to stop him. The car was never traced by the Police, however the person received the value of the stolen car from his insurer.

Later a complaint was filed by him and the insurance company, seeking payment and compensation for the stolen car. The matter was taken to the State Commission by them and later the National Commission dismissed the appeal of the Hotel. The Hotel then appealed before the Supreme Court. The court observed that in the case of theft of a vehicle given for valet parking, the hotel cannot claim exemption from liability by arguing that it was due to acts of third parties beyond their control, or that they are protected by an 'owner's risk' clause, prior to fulfilling its burden as required under Section 151 and 152 of the Indian Contract Act, 1872.

In the instant case, the theft of the car of Respondent No. 2 was a result of the negligence of the Appellant-hotel, the exemption clause on the parking tag will not exclude the Appellant's liability. Hence, the argument of the Appellant-hotel on this count fails.

ISSUES

Among a few other issues, it was questioned whether the Appellant-Hotel can be absolved of liability by virtue of Contract?

HELD

The Court observed that once possession of the vehicle is handed to the hotel staff or valet, there is an implied contractual obligation to return the vehicle in a safe condition upon the direction of the owner.

There remains a prima facie burden of proof on the hotel to explain that any loss or damage caused to the vehicles parked was not on account of the Hotel's negligence or want of care per Sections 151 and 152 of the Contract Act. Further, the Court held that the consumer complaint in consideration is maintainable as it was filed by the insurer as a subrogee, along with the original owner as a co-complainant. Thus, the court ordered that liability should be affixed on the Appellant-hotel due to want of the requisite care towards the car bailed to it. The instant appeal was dismissed accordingly.

M/S ADANI POWER (MUNDRA) LIMITED V GUJARAT ELECTRICITY REGULATORY COMMISSION & ORS.

Date : 02.07.2019

Citation : Supreme Court of India [Civil Appeal No.11133 of 2011]

SYNOPSIS

Courts can imply a term in Contract only if literal interpretation fails to give the result intended by parties.

FACTS

Gujarat Urja Vikas Nigam Limited (GUVNL), a holding company engaged in the business of bulk purchases from the power generators and supply to the distribution companies in the State of Gujarat entered into a Power Purchase Agreement (PPA) with M/s. Adani Power Ltd. (Appellant). The Appellant herein contended that the bid submitted by it on the basis of which the PPA was entered was solely on the assurance given by Gujarat Mineral Development Corporation (GMDC) to supply four million tons of coal.

Since GMDC was not abiding by the assurance given, the Appellant sent various notices to the Government of Gujarat to find a solution. Due to the non-compliance of the Fuel Supply Agreement (FSA) between the Appellant and GMDC, the Appellant informed GUVNL that the FSA had not been finalized yet. In June 2008, GUVNL asked the Appellant to furnish an additional performance bank guarantee since it had not complied with the conditions of the PPA.

The Appellant stated non-execution of the FSA as the reason for not supplying power, in their reply to GUVNL, and that the Appellant had no other option but to terminate the PPA

unless the coal supply comes from the GMDC. After multiple communications, on January 06, 2010, the Appellant addressed another communication to GUVNL, informing it that since the period of termination has already expired, the PPA stands terminated with effect from January 04, 2010. The Appellant also deposited an amount of INR 25 crores with GUVNL towards liquidated damages in addition to the performance bank guarantee of INR 75 crores. GUVNL returned INR 25 crores and asked the Appellant to withdraw the termination notice but the same was not accepted.

GUVNL filed a petition under the Electricity Act, 2003, for adjudication of the dispute. The Gujarat Electricity Regulatory Commission held that the termination of the PPA was illegal and directed the Appellant to supply the power to the procurer at the rate determined in the PPA. The Appellant approached the Appellate Tribunal for Electricity against the order of the Commission which was dismissed and the present appeal was filed before the Supreme Court.

ISSUES

Whether courts have the right to interpret the contract liberally if literal interpretation fails?

HELD

The appeal of the Appellant was allowed and the notice of termination and the consequent termination was held valid and legal. The Appellant was directed to approach the Central Electricity Regulatory Commission for determination of the compensatory tariff, including various other aspects payable to it from the date of supply of electricity.

MAHANAGAR TELEPHONE NIGAM LIMITED (MTNL) VS TATA COMMUNICATIONS LIMITED

Date : 27.02.2019

Citation : Supreme Court of India (Civil Appeal No.1766 OF 2019)

SYNOPSIS

A claim under Section 70 of the Contract Act cannot be raised when parties are governed by Contract.

FACTS

There was a purchase order contract between MTNL and Tata. In case of a breach, the contract limited liquidated damages at 12% of the purchase value. Tata failed to discharge the obligations under the contract, due to which MTNL suffered damage. MTNL, owing to its claim for damages, deducted certain sums from the bills raised by Tata.

Tata approached Telecom Disputes Settlement and Appellant Tribunal (TDSAT), seeking that the sums deducted by MTNL were deemed to be excessive than the stipulated sums under the contract. MTNL defended its side by stating such amount to be due under *quantum meruit*. TDSAT directed to return the *quantum meruit* claim retained in excess of 12% liquidated damages, since it was unilaterally charged by MTNL without any reliable evidence of losses. MTNL then approached the Supreme Court to reconsider the appreciation of its claim.

ISSUES

Whether a claim in *quantum meruit* would be permissible in cases where the parties are governed by a contract?

HELD

The principle under section 70 is considered similar to the doctrine of restitution (*quantum meruit*) which leads to a situation where a non-gratuitous act by a person results in forming obligations on another party receiving a benefit out of such act.

The Supreme Court, in light of the above position, held that the amount deducted by MTNL was a claim of *quantum meruit* which cannot be raised due to the existence of the contract. The compensation for breach of a contract was deemed to be governed by section 74 of the Contract Act, which states that where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. The Supreme Court held that MTNL can claim only the sum stipulated in the contract and anything claimed above this sum shall be refunded accordingly.

NEW DELHI MUNICIPAL COUNCIL VS MANOHAR STONE CRUSHING CO. & ANR

Date : 01.10.2018

Citation : Delhi High Court [RFA No. 341/2006]

SYNOPSIS

The Contract does not stand violated when terms of the contract become impossible to survive.

FACTS

A contract was entered into between the parties on 11th May, 1992 where the respondent had to supply stone grit and stone dust to the appellant for a period of six months for a specified amount. The respondent could only supply 47 cubic meters of stone dust instead of the agreed quantity of 11,760 cubic meters. It was served various letters and show cause notices to resume supply.

The contract was eventually rescinded by the appellant. For the supply of the balance quantity, the appellant entered into another contract with supplier, resulting in a loss of ₹1.1 million on account of the difference in price.

The appellant then filed an application before Delhi District Court for recovery of damages of against the respondent. The respondent argued that the contract was frustrated by an order of the Supreme Court, which halted all stone crushing activities with effect from 15 August 1992, and therefore, the respondent's stone crusher was closed and could not supply the contracted quantity.

The district court dismissed the application for recovery of damages, which was challenged before Delhi High Court which in turn dismissed the appeal, holding that since it was mandatory for a supplier to have its own stone crusher and due to the prohibition on all stone crushing activity as directed by the Supreme Court, the contract for supply of stone grit and stone dust stood frustrated as per Section 56 of the Indian Contract Act, 1872, i.e. agreement to do an impossible act.

ISSUES

Whether there was any breach of Contract by the parties?

HELD

On finding no merit in the appeal, the case was dismissed. It was held that in the absence of any specified contracted quantity, which the respondent was obligated to supply before 15 August, 1992 according to the contract, there was no breach of contract. In the second part, the contract between the parties stood frustrated.

FORCE MAJEURE CLAUSES

HALLIBURTON OFFSHORE SERVICES INC. V VEDANTA LIMITED

Date : 29.05.2020

Citation : Delhi High Court [O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020]

SYNOPSIS

Debate over encashment of Bank Guarantees and invoking the Force Majeure Clause.

FACTS

An application filed by Halliburton Offshore Services Inc., which sought to restrain Vedanta Limited from encashing eight bank guarantees issued in its favour to secure performance of obligations under a contract to drill petroleum wells. Pursuant to an international tender floated by Vedanta Limited (Respondent), Halliburton Offshore Services Inc (Petitioner) and the Respondent had entered into a contract for integrated development of certain blocks (Mangala, Bhagyam and Aishwarya) in Rajasthan.

In terms of this contract, various performance, liquidated damages and advance bank guarantees were furnished by the Petitioner which includes the eight bank guarantees furnished by the Petitioner, the enforcement of which has been brought up before the High Court of Delhi.

The contract envisaged work, to be carried out, by the Petitioner, in three wells, to be completed on the 16th January, 2019, 16th March, 2019 and 16th June, 2019 respectively. However, pursuant to multiple extensions, the same was due to be completed by 31st March, 2020. The Petitioner argued that although a substantial part of the project stood completed prior to 31st March, 2020, owing to a complete lockdown consequent to Covid-19 pandemic, the Petitioner was rendered incapable of concluding the work as it required travel of persons from overseas, as well as workmen from various parts of the country both of which have been barred amidst the lockdown.

The Petitioner thereafter wrote to the Respondent, invoking the force majeure clause in the contract and seeking the benefit thereof. However, the Respondent refused to accommodate and instead, reserved its right to take appropriate recourse under the contract which included termination of the contract, invocation of eight of the bank guarantees and getting the balance activities completed through alternative resources at the risk and cost of the Petitioner.

Consequently, the Petitioner has moved to the High Court of Delhi for appropriate reliefs. The Respondent argued that the only ground on which invocation of a bank guarantee could be stayed, was the existence of egregious fraud which did not exist in the present case.

The Respondent further argued that the plea of force majeure was an afterthought wherein the Petitioner sought to exploit the Covid-19 pandemic and reap benefits therefrom, as the Respondent had never agreed to the extension of time period for completion of project.

ISSUES

Whether invoking the force majeure clause and seeking benefit thereof is possible under the present facts and circumstances?

HELD

The Delhi High Court granted interim relief observing that the petitioner is not engaged in, stricto sensu, in the production of petroleum, but is, rather, engaged in drilling of wells, which activity is substantially impeded by the imposition of the lockdown and thereby an ad interim injunction, restraining invocation or encashment of the bank guarantees, till the expiry of exactly one week from May 3, 2020 was granted.

While granting interim relief on the invocation of bank guarantees, the Delhi High Court observed that the country wide lockdown was prima facie, in the nature of force majeure. Therefore, it could be said that special equities do exist, as would justify grant of the prayer, to injunct invocation of the bank guarantees.

According to the further order dated 29th May, 2020, the term may be further extended to the extent required for Contractor to complete any services being carried out during the expiry

of the term. Until Company issues a Call Out Order, Contractor shall not become entitled to any payment under this Agreement.

RAMANAND V DR. GIRISH SONI

Date : 21.05.2020

Citation : Delhi High Court [CM APPL. 10848/2020]

SYNOPSIS

Suspension or waiver from payment of rent in commercial leases is not considered but a postponement can be granted.

FACTS

A revision petition was filed by a Tenant against an order of eviction passed by the Senior Civil Judge-cum-Rent Controller with respect to a shop in Khan Market, Delhi. Application was made by the Petitioner (tenant), seeking suspension of rent on account of force majeure due to Covid-19 lockdown, the Court observed that there is no rent agreement or lease deed between the parties, Section 32 of the Contract Act has no applicability.

The subject premises are governed by the provisions of the Delhi Rent Control Act, 1958 and hence, Section 56 of the Contract Act does not apply to tenancies. The petitioners have not urged that the tenancy is void under Section 108 (B)(e) of the Transfer of Property Act.

ISSUES

Does lockdown entitle a tenant to seek suspension of rent on account of Force Majeure?

HELD

Taking into consideration, factors such as nature of the property, financial and social status of the parties, amount of rent, any contractual condition(s) (relating to non-payment or suspension of rent), protection under any executive order(s) by the Ministry of Home Affairs, the application of the petitioners was rejected while granting a waiver or relaxation in the payment of rent by the High Court of Delhi. However, it was clarified by the court that doctrine of frustration of contract or impossibility of performance does not apply to lease agreements. The Court ultimately rejected the Urgent Application but allowed a postponement of rent in view of the lockdown. It is now clear by the aforesaid decision that Section 56 of Indian Contract Act does not apply to lease agreements. Further, the applicability of Section 108(B)(e) of the Transfer of Property Act is subject to the leased property being substantially and permanently destructed due to the Force Majeure event.

PEL POWER LIMITED V CENTRAL ELECTRICITY REGULATORY COMMISSION & ANR

Date : 19.05.2020

Citation : Appellant Tribunal for Electricity [Appeal No. 266 of 2016 & IA No. 561 of 2019]

SYNOPSIS

Suspension or waiver from payment of rent in commercial leases is not considered but a postponement can be granted.

FACTS

PEL Power Limited (PEL) filed an appeal before Appellate Tribunal for Electricity (APTEL) challenging Central Electricity Regulatory Commission's (CERC) order dated July 12, 2016 wherein CERC rejected PEL's plea of return of Bank Guarantee (BG) on account of temporary Force Majeure event as per provisions of Bulk Power Transmission Agreement (BPTA) dated December 24, 2010 executed between PEL and Power Grid Corporation of India (PGCIL).

CERC further refused to grant any directions on consequent event pertaining to levy of relinquishment charges due to abandonment of project and held that the same may be decided in separate petition. PEL issued Force Majeure notice in December 2011 to PGCIL under BPTA as it was unable to procure requisite approval from statutory authority for developing the project and eventually leading to abandonment of the project.

However, PGCIL proceeded with establishment of transmission system and invested significant amount on the

transmission lines after 2 years of issuance of Force Majeure Notice. PGCIL sought to recover the security amount furnished by way of Bank Guarantee of Rs. 49.35 crores from PEL due to which PEL filed petition for declaration of change in law and sought consequential reliefs from CERC.

ISSUES

Whether CERC is justified in declaring the non-availability of statutory approval as a temporary Force Majeure event under the BPTA?

HELD

The appeal stands allowed. The Appellate Tribunal for Electricity (APTEL) has observed that non-availability of requisite approval from statutory authority constitutes a Force Majeure event as its occurrence was beyond reasonable control of PEL. BPTA is a contractual arrangement between parties which includes other generators, as in the present case, who have suffered due to Force Majeure conditions leading to cancellation/ abandonment of the project.

In such circumstances, Bank Guarantee of INR 49.35 crore furnished to PGCIL is required to be returned to PEL. The Tribunal while allowing the appeal condoned the delay and found that the reasoning assigned in the application explaining the delay in filing the Appeal was satisfactory.

INDIRAJIT POWER PRIVATE LIMITED V UNION OF INDIA & ORS

Date : 28.04.2020

Citation : Delhi High Court [W.P.(C) 2957/2020 & CM Nos.10268-70/2020 (URGENT)]

SYNOPSIS

Relief cannot be granted in cases where the decision to invoke the Bank Guarantee is neither illegal nor discriminatory.

FACTS

The Petitioner could not fulfil its obligation under a certain Contract, after giving a 12 months extension period and even further more extensions. It was observed that the Petitioner's position under the contract was unaffected by the imposition of the lockdown. The petitioner had sought extension of deadline to complete the pending work in relation to a coal mine located in Maharashtra and prayed for the bank to renew the bank guarantee expiring on April 12, 2020.

The petitioner also submitted that it ran a captive power plant for a company, which has been closed because of lockdown. In these circumstances, it was contended that it had no immediate source of revenue and if the amount from the bank guarantees was appropriated, it would ultimately result in it being declared as a non-performing asset.

The argument of the Union of India was that the bank guarantee is unconditional and irrevocable and there cannot be any embargo on encashment of the case in the absence of fraud and/or irretrievable justice. The court took note of the fact that the petitioner has been in non-compliance of milestones and efficiency parameters since April-June 2018 and was granted a twelve-month extension much before the Covid-19 crisis.

ISSUES

Whether the Petitioner can be sought interdiction of Bank Guarantee inter-alia on account of the lockdown?

HELD

The Delhi High Court refused to grant relief to the petitioner and dismissed the petition on the ground that one extension for 12 months had already been granted to the Petitioner and the decision to invoke the bank guarantee was neither illegal nor discriminatory. It was also reiterated that merely because invocation will cause financial distress is not a ground of stay unless the exception of irrevocable injury has been proved. Basis these facts, the Hon'ble Delhi High Court dismissed the petition.

SHAKUNTLA EDUCATIONAL & WELFARE SOCIETY V PUNJAB & SIND BANK

Date : 13.04.2020

Citation : Delhi High Court (W.P.(C)2959/2020)

SYNOPSIS

The intention of the RBI while issuing the regulatory package was to maintain status quo with regard to the classification of accounts of the borrowers as they existed on March 1, 2020 and relief cannot be granted on failure of prior instalments.

FACTS

Shakuntla Educational & Welfare Society (Society) had obtained six term loans from the Punjab & Sind Bank (Bank) of which four term loans had been repaid. It was regularly repaying dues for the remaining two loans (Loans) on a quarterly basis, the most recent instalment being doing on March 31, 2020.

After the outbreak of Covid-19, the society was unable to collect fees from students because of a directive by the Uttar Pradesh government. The various education institutes run by the Society are situated in Uttar Pradesh and the Society is not in a position to repay the instalments as payable in March, 2020 with respect to the two Loans on account of its inability to collect or demand pending fees from the students.

Society has sought relief of moratorium of 3 months under the RBI's circular on loan moratorium and classification of accounts as NPA (RBI Circular) as well as interim orders restraining the Bank for declaring the Society's account as NPA. The Bank's counsel argued that the RBI Circular is only applicable to instalments which became payable on or after March 1, 2020 and not to those which had become due prior to March1,2020.

The Bank's counsel further argued that the Society's most recent instalment from the Society had fallen due on December 31, 2019, and that the RBI circular was issued at a much later date.

ISSUES

Whether relief measures under the RBI Circular would be applicable to the petitioner in the present case?

HELD

The Hon'ble Court held that the Society still had time to make the payment of the due instalments till March 31, 2020, before which date on account of the lockdown and directive issued by the State Government, it has been prevented from demanding the due fees from the students of its various institutes.

It was decided by the Court that till the next date, the Bank is restrained from declaring the Society's accounts as NPA and in case the directive issued by the State of Uttar Pradesh prohibiting the Society from demanding fees from its students is withdrawn before the next date, the Society would be liable to pay the remaining instalments within one week from the date of the said withdrawal.

TRANSCON SKYCITY PRIVATE LIMITED V ICICI BANK, TRANSCON ICONICA PRIVATE LIMITED V ICICI BANK

Date : 11.04.2020

Citation : Bombay High Court [Writ Petition LD-VC No. 28 & 30 of 2020]

SYNOPSIS

Lockdown period must be excluded from computing the 90 days period for declaring a loan account as NPA.

FACTS

Writ petitions are filed by Transcon Sky City Private Limited and Transcon Iconica Private Limited which had availed financing facilities from ICICI Bank for a construction project in the Mumbai suburbs. They defaulted on payments due on January 15, 2020 and February 15, 2020. The petitioners filed petition against their lender, ICICI Bank seeking protection from being declared an NPA amid the lockdown.

As per RBI guidelines, if a loan instalment remains unpaid for 90 days, the account is declared a Non-Performing Asset (NPA).

However, on March 27th, RBI had permitted all lending institutions to allow a 3-month moratorium on the payment of instalments of term loans outstanding between March 1, 2020, and May 31, 2020. The petitioners contended that the moratorium period must be excluded for the computation of any balance days of the NPA declaration.

ISSUES

Whether the moratorium is excluded for NPA classification?

HELD

The Bombay High Court held that the period of the moratorium during which there is a lockdown will not be reckoned by the lender for the purposes of computation of the 90-day NPA declaration period. The Court held the period from March 01, 2020 to May 31, 2020 during which there is a lockdown will stand excluded until the lockdown is lifted.

The reprieve is predicated on the lock down and not RBI moratorium. Further, it was also clarified that this order will not serve as a precedent for any other case in regard to any other borrower who is in default or any other bank. Each case will have to be assessed on their own merits. In that scenario, should the lockdown be lifted before 31st May 2020, the

Petitioners will have 15 days after the ending of the lockdown in which to regularize the payment under the first instalment due on 15th January 2020 and a further three weeks thereafter to regularize the payment under the second instalment due on 15th February 2020.

However, if the lockdown extends beyond 31st May 2020, then these days will be deferred accordingly, irrespective of whether the moratorium itself is extended beyond 31st May 2020.

STANDARD RETAIL PRIVATE LIMITED V. M/S G.S. GLOBAL CORP & ORS

Date : 08.04.2020

Citation : Bombay High Court [Commercial Arbitration Petition (L) NO. 404 of 2020]

Similar matters :

i. Integral Industries Private Limited. V. M/s. G. S. Global Corp. & Ors
ii. Vinayaga Marine Petro Limited. V. M/s G. S. Global Corp. & Ors
iii. Hariyana International Private Limited. V. M/s Hyundai Corporation & Ors
iv. Prabhat Steel Traders Private. Limited. V. M/s Hyundai Corporation & Ors

SYNOPSIS

Lockdown cannot rescue petitioners from contractual obligations to make payments.

FACTS

The petitions were filed under Section 9 of the Arbitration and Conciliation Act, 1996. The petitioners who were steel importers approached Court seeking directions restraining the Respondent Bank from negotiating/encashing the Letters of Credit provided to Korean based exporters, claiming that the lock down hand rendered performance of contract impossible.

Respondent has complied with its obligations and performed its part of the contract and the goods had already been shipped. It is to be noted that distribution and movement of steel is declared as an essential service and no restrictions have been laid by the Central/ State Government of India despite the prevailing pandemic of Covid-19.

ISSUES

Whether the force majeure clause contained in the contracts can be invoked in the present situation of Covid-19 against a third party and that whether the force majeure clause be invoked by the Petitioners in view of the fact that the Respondent had already complied with their part of the contract?

HELD

The Bombay High Court refused the injunction to grant interim measures to the Petitioner

observing that the commodity in question was an essential item and lockdown is only for a limited period. Consequently, Petitioner cannot realise from its contractual obligation of making payments to the Respondents. The Letters of Credit are an independent transaction with the Bank and the Bank is not concerned with underlying disputes between the Petitioners and the Respondent.

The Force Majeure clause in the present contracts is applicable only to the Respondent and cannot come to the aid of the Petitioners. The fact that the Petitioners would not be able to perform its obligations towards their own purchasers is not a factor which can be considered and held against the Respondent. The distribution of steel has been declared as an essential service. There are no restrictions on its movement. The force majeure clause was only to aid exporters and not importers.

ANANT RAJ LIMITED V YES BANK LIMITED

Date : 06.04.2020

Citation : Delhi High Court [W.P.(C) URGENT 5/2020]

SYNOPSIS

Banks cannot classify a private limited company's account as non-performing asset for its failure to repay dues on account of the Covid-19 outbreak.

FACTS

Anant Raj, a real estate developer private company filed a petition seeking a direction to Yes Bank to not take adverse step of declaring their account as NPA (Non-Performing Asset) on account of non-payment of instalments for the month of January and February, 2020.

According to the terms of the Income Recognition and Asset Classification Guidelines (IRAC Guidelines) of the Reserve Bank of India, if an instalment is overdue by a period of 30 days, the borrower's account is classified as Special Mention Account-1 (SMA-1) and if the instalment is overdue by 60 days, the account is classified as Special Mention Account-2 (SMA-2) and if the instalment is overdue by a period of 90 days, the account is classified as a Non-Performing Asset (NPA). The petitioner had been regularly servicing the loans in terms of the loan conditions till December 31, 2019. It is stated that the instalment for repayment which fell due on January 1, 2020, which is the subject matter of the present petition, could not be paid by the petitioner because of adverse economic conditions brought about by the effects of Covid-19 pandemic.

The counsel appearing for the respondent contended that the moratorium is applicable only with regard to instalments which fell due after March 1 and are not applicable in respect of the instalments that had fallen due as on March 1. Yes Bank, however, argued that according to the RBI's norms, if an instalment becomes overdue by a period of 90 days, the account must be declared as an NPA.

ISSUES

Can benefit be given to Petitioners whose account would be declared as NPA in normal times according to the RBI guidelines, but decision be made otherwise owing to the Covid-19 Outbreak?

HELD

The Delhi High Court's Justice Sanjeev Sachdeva, who heard the case via video conference amid a nationwide lockdown, read into the Reserve Bank of India's measures to ease financial stress on borrowers issued on 27th March, 2020, restored classification of Anant Raj Limited's account as it stood on 1st March, 2020 i.e. status quo ante is restored. The developer said it would make the payment by April 25th availing the time granted by the Court for payment of its January instalment.

RURAL FAIRPRICE WHOLESALE LIMITED V IDBI TRUSTEESHIP SERVICES LIMITED

Date : 03.04.2020

Citation : Bombay High Court [Interim Application No.1 of 2020 in Commercial Suit (L) 307 OF 2020]

SYNOPSIS

IDBI restrained from selling shares pledged by Fairprice Limited (Future Group) amid market collapse due to Covid-19.

FACTS

Rural Fairprice Wholesale Limited (RFWL) issued debentures in 2018 and 2019, secured by pledge of shares of Future Retail Limited (FRL) held by Future Corporate Resources Private Limited (FCRPL) which is the holding company of RFWL and promoter of FRL – together a part of Kishore Biyani controlled union. Due to stock market crash amid Covid-19 pandemic, the value of the pledged shares fell and the Debenture Trustees (IDBI) proposed to sell the pledged shares.

The plaintiffs (RFWL and FCPRL) approached the Bombay High Court seeking restraint of invocation and/or sale of pledged shares submitting that it would cause irreparable loss to them. One of the Investors, UBS AG London Branch opposed grant of any ad -interim injunction on the ground that, they had to recover more than Rs 610 Crores and as per the present market value, valuation of shares is not more than Rs. 350 Crores, which would account for major loss to them.

ISSUES

Can benefit be given to Petitioners who would be liable for a major loss, owing to stock market crash amid the Covid-19 outbreak?

HELD

The Bombay High Court granted the plaintiffs ad-interim relief. The Court issued a temporary injunction on the sale notices issued by the Debenture Trustee and the Investors for sale of pledged FRL shares till 4th May, 2020. The Supreme Court refused to interfere with the Bombay High Court order on an appeal made against its decision by the Debenture Trustees and the Investors.

COASTAL ANDHRA POWER LIMITED V ANDHRA PRADESH CENTRAL POWER DISTRIBUTION CO. LIMITED

Date : 15.01.2019

Citation : Delhi High Court [FAO (OS) No. 272/2012]

SYNOPSIS

Price escalation and change in foreign law cannot be considered a force majeure event.

FACTS

Coastal Andhra Power Limited (Appellant) entered into a Power Purchase Agreement with Andhra Pradesh Central Power Distribution Co. for setting up and operating an Ultra Mega Power Project at Krishnapatnam. Under the terms of the Agreement, the fuel to be used for generating electricity was imported coal and the appellant had to arrange for import of coal from Indonesia. The appellant failed to perform its part of the contract. The contention advanced was that such failure to perform has been on account of escalation in the price of coal, which resulted from amendments in Indonesian law and that such price increase amounted to force majeure under the Agreement. In that backdrop, Coastal Andhra said that power generation will not be viable without renegotiation of prices. Not willing to renegotiate prices, the respondents (APCPDL) terminated the contract and sought for damages of Rs.400 crores from Coastal Andhra, for breach of contract.

ISSUES

Does changes in foreign law prima facie amount to Force Majeure under the agreement?

HELD

The argument was rejected by the Honourable High Court of Delhi. The High Court of Delhi in this matter applied the principles laid down in *Energy Watchdog v. CERC (2017) 14 SCC 80* (supra) and held that the change in Indonesian law and consequential increase in price of coal in Indonesia does not prima facie amount to force majeure under the Agreement, as it was not an event which could render the performance of the contract impossible.

Further, it also held that a change in prices of coal risk that the parties knowingly undertook before entering the contract. Consequently, it held that alternative arrangements, at higher prices, could be made and the performance of the contract could be carried on. Upon a perusal of the foregoing dictum of the Supreme Court, it is clear that change in Indonesian law and consequential increase in the price of coal in Indonesia has been specifically held not to amount to change in law or to force majeure within the meaning of the Agreement.

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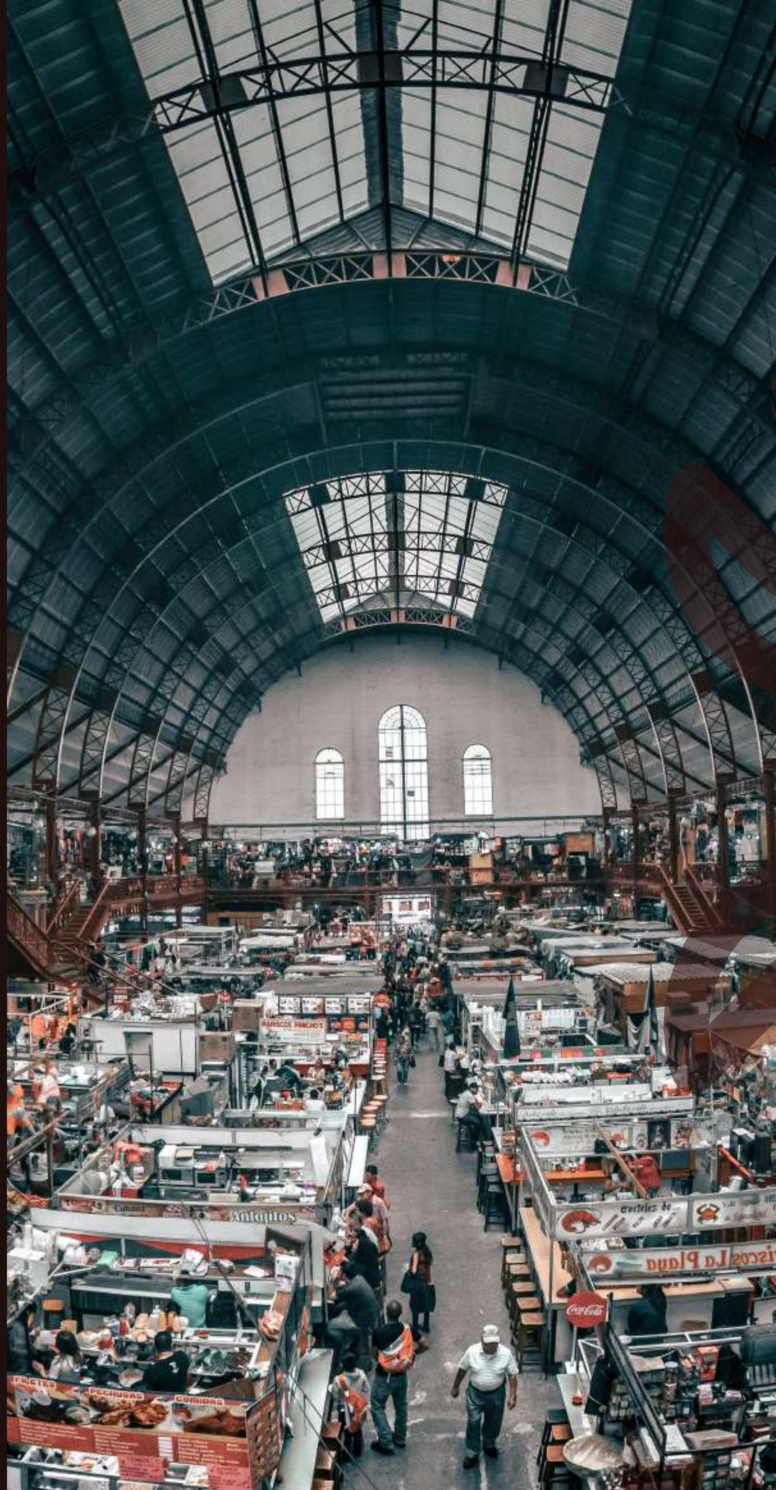

INDUSTRIAL DISPUTES ACT

1947

FICUS PAX PRIVATE LTD. AND ORS. V UNION OF INDIA (UOI) AND ORS.

Date : 12.06.2020

Citation : Supreme Court [MANU/SC/0477/2020]

FACTS

The Secretary, Government of India, Ministry of Labour and Employment and Ministry of Home affairs, in exercise of powers under Section 10(2)(1) of Disaster Management Act, 2005 directed private employers to make full payment of wages to the employees during the period of lockdown.

The writ petitions filed questioned the orders issued by different States where directions had been issued that all the employers be it in the industries or in the shops, commercial establishment, shall make payment of wages of their workers, at their work place, on the due date, without any deduction, for the period their establishments are under closure during the lockdown.

HELD

The Court while instructing for the matter to be listed in the last week of July for final consideration, provided the following interim relief :

A. The private establishment, industries, employers who are willing to enter into negotiation and settlement with the workers/employees regarding payment of wages for 50 days or for any other period as applicable in any particular State during which their industrial establishment was closed down due to lockdown, may initiate a process of negotiation with their employees organization and enter into a settlement with them and if they are unable to settle by themselves submit a request to concerned labour authorities who are entrusted with the obligation under the different statute to conciliate the dispute between the parties who on receiving such request, may call the concerned Employees Trade Union/workers Association/workers to appear on a date for negotiation, conciliation and settlement. In event a settlement is arrived at, that may be acted upon by the employers and workers irrespective of the order dated 29.03.2020 issued by the Government of India, Ministry of Home Affairs.

B. Those employers' establishments, industries, factories which were working during the lockdown period although not to their capacity can also take steps as indicated in direction No. (i).

C. The private establishments, industries, factories shall permit the workers/employees to work in their establishment who are willing to work which may be without prejudice to rights of the workers/employees regarding unpaid wages of above 50 days.

The private establishments, factories who proceed to take steps as per directions (i) and (ii) shall publicise and communicate about their such steps to workers and employees for their response/participation. The settlement, if any, as indicated above shall be without prejudice to the rights of employers and employees which is pending adjudication in these writ petitions.

ALIGN COMPONENTS PVT. LTD. & ORS. V UNION OF INDIA & ORS.

Date : 30.04.2020

Citation : Bombay High Court [MANU/MH/0554/2020]

SYNOPSIS

The Court held that, since the State of Maharashtra had partially lifted the lock down in certain industrial areas, workers were expected to report for duties as per their shift schedules subject to adequate protection, from the Corona Virus by the employer. In the event such workers voluntarily remain absent, the Management would be at liberty to deduct their wages for their absence subject to the procedure laid down in Law while initiating such action. This would apply even to areas where there may not have been a lock down.

FACTS

The Petitioners challenged the notification issued by the Government of India, Ministry of Home Affairs dated 29/03/2020 vide which powers conferred u/s. 10(2)(1) of the Disaster Management Act, 2005 have been invoked to ensure that the workers, would be paid their

monthly wages by the employers taking into account the peculiar situation on account of Covid-19. It was contended that though the Managements were willing to offer work to the workers and though the workers would be willing to perform the work, restrictions had been imposed on the continuance of the manufacturing activities so as to restrict the spread of Covid-19 due to which, the Managements had been mandated to reduce/ shut down their manufacturing activities.

JOHN D'SOUZA V KARNATAKA STATE ROAD TRANSPORT CORPORATION

Date : 16.10.2019

Citation : Supreme Court [2019 (6) ALT 56]

SYNOPSIS

The Labour Court/Tribunal cannot without first examining the material led in the domestic enquiry jump to a conclusion and mechanically permit the parties to lead evidence as if it is an essential procedural part of the enquiry to be held under Section 33(2)(b) of the Act.

FACTS

Appellant-workman joined the Corporation as a bus conductor. The Appellant reportedly remained absent from duty without prior permission of his superiors or getting his leave sanctioned. The disciplinary authority was not satisfied with the explanation furnished by the Appellant, hence it passed the order of dismissal from service. On reference to Labour Court, the Labour Court, held that the Appellant could not be treated as an absentee and held that it was within its jurisdiction under Section 33(2)(b) of the Act to find out that there was victimisation or unfair labour practices adopted by the Management.

The aggrieved Corporation assailed the order of the Labour Court before a Single Judge who declined to interfere with the order. The Corporation, therefore, once again questioned the order of the Single Judge in writ appeal which had been allowed by the Division Bench of the High Court essentially on the premise that the jurisdiction under Section 33(2)(b) of Act could not be stretched and expanded to permit the parties to lead their evidence which was never produced in the domestic enquiry. Such new evidence could not be relied upon to hold that the charges were not proved or that the punishment of dismissal was disproportionate.

ISSUES

Whether jurisdiction under Section 33(2)(b) of Act could be expanded to permit parties to lead their evidence which was never produced in domestic enquiry.

HELD

The Court observed that:

A. The Labour Court or the Tribunal while exercising their jurisdiction under Section 33(2)(b) of Act are empowered to permit the parties to lead evidence in respect of the legality and propriety of the domestic enquiry held into the misconduct of a workman, such evidence would be taken into consideration by the Labour Court or the Tribunal only if it is found that the domestic enquiry conducted by the Management on the scale that the standard of proof required therein can be preponderance of probability and not a proof beyond all reasonable doubts suffers from inherent defects or is violative of principles of natural justice.

B. B. The Labour Court/Tribunal while holding enquiry under Section 33(2)(b) of Act cannot invoke the adjudicatory powers vested in them under Section 10(i)(c) and (d) of the Act nor can they in the process of formation of their prima facie view under Section 33(2)(b) of Act, dwell upon the proportionality of punishment, for such a power could be exercised by the Labour Court/Tribunal only under Section 11A of the Act.

DECCAN CHARTERS PVT. LTD. V SARITA TIWARI

Date : 27.08.2019

Citation : Delhi High Court [2019 VIII AD (Delhi) 622]

SYNOPSIS

Trainee/Probationer not a workman under Section 2(s) of the ID Act and termination does not amount to retrenchment.

FACTS

The Petitioner appointed the respondent as “Trainee AME” at a monthly salary of Rs. 15,000/-. The appointment letter provided that the respondent would be on probation for three months from the date of joining and she would be deemed to continue on probation until confirmed in writing and such period, after initial period of probation, shall be deemed to be an extension of probation.

The respondent’s performance was not satisfactory and therefore, she was not confirmed; on 13th October, 2006 i.e. within the initial period of probation, a warning letter was issued to the respondent that she was not punctual in reporting to the office and had little interest in work; on 07th August, 2007, the petitioner issued a show cause notice to the respondent on the complaint made by Senior AME who informed the management that the respondent misbehaved with him when he was giving maintenance tips to the respondent to improve her work standard, and the petitioner terminated her service on 09th August, 2007.

The respondent raised an industrial dispute which was referred to the Labour Court. The Labour Court held the termination of the respondent to be illegal. The Labour Court granted reinstatement with full back wages and continuity of service along with the consequential benefits to the respondent.

ISSUES

Whether an employee on probation could be considered a workman under Section 2(s) of the Act.

HELD

The Court held that the law, with respect to the termination of service of a probationer is well settled, and that the probationer is not a workman within the meaning of Section 2(s) of the Industrial Disputes Act and the service of a probationer can be terminated during the period of probation in terms of the appointment and such termination does not amount to retrenchment within the meaning of Section 2 (oo) of the Industrial Disputes Act.

PUNJAB URBAN PLANNING AND DEVELOPMENT AUTHORITY AND ORS. V KARAMJIT SINGH

Date : 15.04.2019

Citation : Supreme Court [2019 SC 1913]

SYNOPSIS

The Apex Court held that an order of regularization obtained by misrepresenting facts, or by playing a fraud upon the competent authority, cannot be sustained in eyes of law.

FACTS

The Respondent in connivance with some officials of the Appellant-Authority, got his name surreptitiously included in a final list of employees recommended for regularization as per the State Governments revised regularisation policy. The report submitted by the Executive Engineer to the Chief Administrator showed that, the Respondent had not fulfilled the mandatory pre-requisite of having served for 3 years’ or more up till 22nd January, 2001.

The Chief Administrator annulled the office order qua the regularization of the services of the Respondent. Appellant-Authority conducted a disciplinary enquiry against the officials who had recommended the name of the Respondent for regularization, which found four officials had supplied wrong information with respect to regularization of the Respondent, and some other daily wagers who had less than 3 years’ service. Since the appointment of the Respondent on regular basis was void on account of having been fraudulently obtained by collusion, the Respondent was not entitled to the protection under the provisions of the Industrial Disputes Act, 1947.

ISSUES

Whether termination of the services of the Respondent by mere issuance of a Show-Cause Notice was de hors the Regulations, but also contrary to the principles of natural justice.

HELD

The Court held that :

A. An order of regularization obtained by misrepresenting facts, or by playing a fraud upon the competent authority, cannot be sustained in the eyes of law. In Rajasthan Tourism Development Corporation and Anr. v Intejam Ali Zafri, it was held that if the initial appointment itself is void, then the provisions of the Industrial Disputes Act, 1947 are not applicable for terminating the services of such workman.

B. The Respondent could not be considered to be an "employee", and thus was not entitled to any benefits under the Regulations applicable to employees of the Appellant-Authority vide the position of law in Rupa Rani Rakshit and Ors. v Jharkhand Gramin Bank and Ors., wherein the Apex Court had held that service rendered in pursuance of an illegal appointment or promotion cannot be equated to service rendered in pursuance of a valid and lawful appointment or promotion.

C The Appellant-Authority rightly terminated the Respondent.

MANJU SAXENA V UNION OF INDIA & ORS.

Date : 03.12.2018

Citation : Supreme Court [AIR 2019 SC 257]

SYNOPSIS

The Appellants conduct, which consisted of refusal to accept four other job profiles at the same pay scale and constant request for an enhanced severance package, clearly indicated her intention to abandon service, thus making her termination justifiable and legal.

FACTS

The appellant's post became redundant in 2005, after the officer she was attached to left the services of HSBC Bank (Respondent 2). Thereinafter, she was offered four distinct verticals that she could join with a similar pay scale. The Appellant refused to accept any of those jobs and was thus given a letter, terminating her services, as her current job profile ahd become redundant. R2 thereafter offered a generous severance package, which she declined. R2 thus terminated her service, and paid 6 months' compensation in lieu of Notice as per contract of employment and as a special case, R2 also paid Compensation, which was equivalent to 15 days' salary for every completed year of service. But, the Appellant raised an Industrial Dispute and sought enhancement of severance package paid to her.

ISSUES

Whether refusal to join any of the offered jobs amounted to wilful abandonment, thereby making the termination legal.

HELD

The Court held that :

A. The concept of "abandonment" as discussed in *The Buckingham & Carnatic Co. Ltd. v Venkatiah and Ors.* case, wherein it was laid down that abandonment of service can be inferred from existing facts and circumstances which prove that the employee intended to abandon service. In the impugned matter, the intentions of the Appellant could be inferred from her refusal to accept any of the 4 alternative positions offered by the R2-Bank.

B. The Appellant's conduct constitutes a voluntary abandonment of service, since the Appellant herself had declined to accept the various offers of service in the Bank. Furthermore, even during conciliation proceedings she has only asked for an enhanced severance package, and not reinstatement. Thereby making retrenchment procedure under Section 25F of the Act, not applicable.

ARIHANT SIDDHI CO. OP. HG. SOC. LTD. V PUSHPA VISHNU MORE AND ORS.

Date : 22.06.2018

Citation : Bomaby High Court [2018(159)FLR 271]

SYNOPSIS

The Court while quashing the earlier judgement of the Labour Court stated that merely because the society charged some extra charges from a few of its members for display of neon signs, the society cannot be treated as an industry.

FACTS

The Petitioner a Co-operative Housing Society had engaged Respondent No. 1 as a watchman. Upon his completion of 60 years of age, his services were terminated. Respondent No. 1 was paid ex-gratia/retirement benefit, which was accepted by him, but he, thereafter, raised a demand for reinstatement stating that he was a permanent employee of the Petitioner and was terminated without any enquiry or offering proper retrenchment compensation.

ISSUES

Whether the housing society could be considered as an industry because various commercial businesses were running out of its premise?

HELD

The Court held that :

A. As held by the Supreme Court in Bangalore Water Supplycase when there are multiple activities carried on by an establishment, what is to be considered is the dominant function. In the present case, merely because the society charged some extra charges from a few of its members for display of neon signs, the society cannot be treated as an industry carrying on business of hiring out of neon signs or allowing display of advertisements. In the premises, the impugned award of the Labour Court suffers from a serious error of jurisdiction.

M/S HARYANA SURAJ MALTING LTD. V PHOOL CHAND

Date : 18.05.2018

Citation : Supreme Court [AIR 2018 SC 2670]

SYNOPSIS

The Labour Court/Tribunal is not functus officio (i.e. still has the power to re-examine its earlier judgement) after the award has become enforceable as far as setting aside an ex parte award is concerned.

FACTS

A reference to a larger bench was made by the High Court due to a conflict of views in two decisions of the Supreme Court. In Sangham Tape Co. v Hans Raj, it was held that an application for recall of an ex parte award may be entertained by the Industrial Tribunal/Labour Court only in case it is filed before the expiry of 30 days from the date of pronouncement/publication of the award, whereas a contrary view was taken in Radhakrishna Mani Tripathi v L.H. Patel and Anr.

ISSUES

Whether the Industrial Tribunal/Labour Court becomes functus officio after 30 days of the pronouncement/publication of the award and loses all powers to recall an ex parte award on an application made by the aggrieved party after 30 days from the date of pronouncement/publication of the award?

HELD

The Court observed that the Court/Tribunal cannot be said to have completed its function (functus officio) and therefore become powerless, to allow an application to set aside an ex-parte award as:

A. For an award to become binding, it should be passed in compliance with the principles of natural justice. An award passed denying an opportunity of hearing when there was a sufficient cause for non-appearance can be challenged on the ground of it being nullity. An award which is a nullity cannot and should not be a binding award.

B. Furthermore, in case a party is able to show sufficient cause within reasonable time for its non-appearance before the Court/Tribunal, the Court/Tribunal is bound to consider such an application and cannot reject said application on the ground that it was filed after the award had become enforceable.

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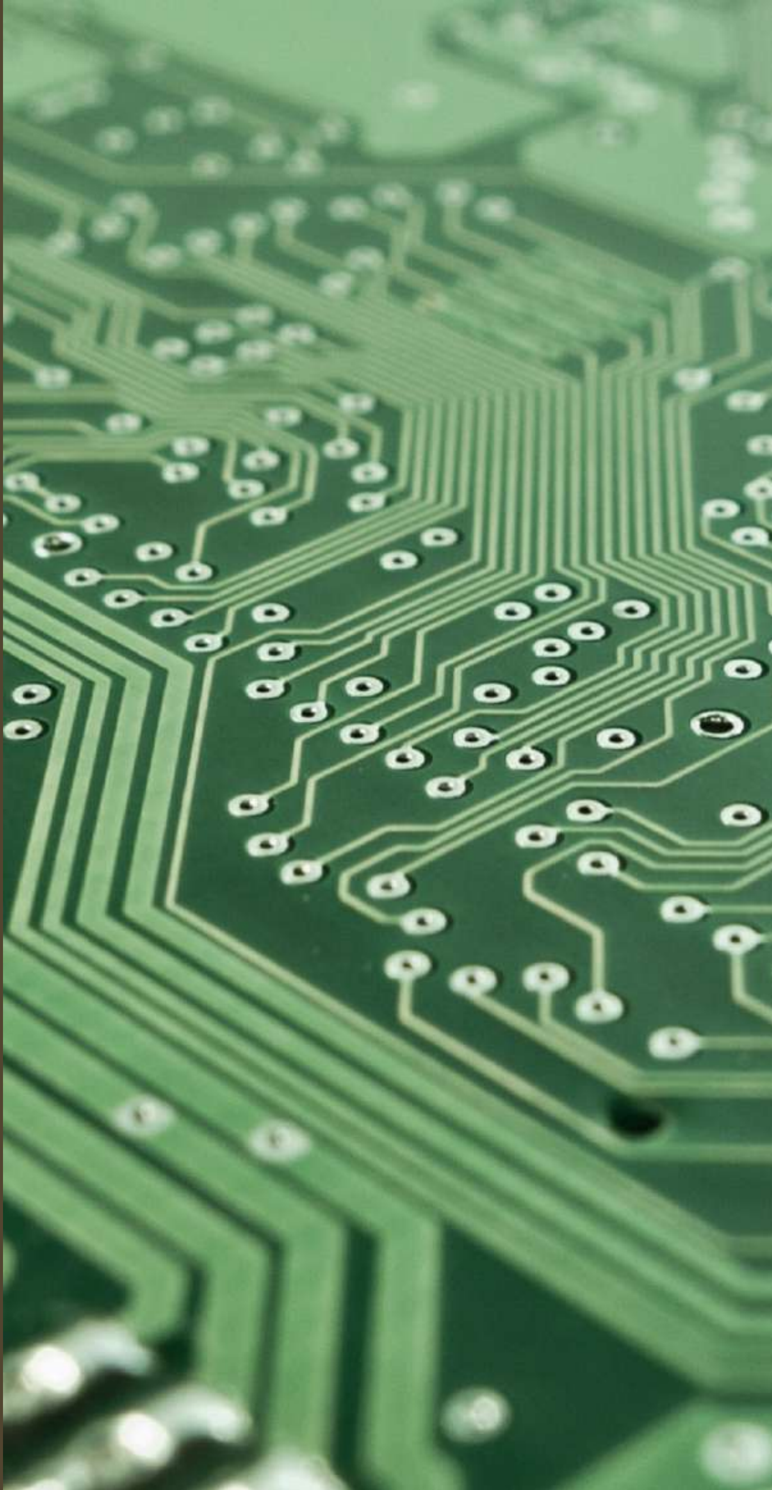

INFORMATION TECHNOLOGY ACT

2000

SARANYA S. V UNION OF INDIA & ORS.

Date : 25.07.2020

Citation : Madras High Court [WP No. 7982 of 2020]

SYNOPSIS

The Court while taking due cognizance of the matter, observed that the same was a matter of large public importance and issued notice to all respondents in the impugned matter to file apropos counters.

FACTS

The PIL was filed before the Madras HC due to lacking IT Regulations over Online Education, with there being no mechanism in place to restrict or monitor any pop-ups during the learning sessions, which could be detrimental for the students.

JAGRAN PRAKASHAN LTD. V TELEGRAM FZ LLC & ORS.

Date : 29.05.2020

Citation : Delhi High Court [CS(COMM) 146/2020]

SYNOPSIS

The Court held that due to Telegrams failure to duly block the infringing channels even after due notice being served upon them, protection under the ambit of Section 79 could be granted and that Telegram cannot be cited as an intermediary in the impugned case.

FACTS

The suit was filed because various channels on Telegram were reproducing, adopting, distributing, transmitting and disseminating the e-newspapers of the plaintiff and thereby causing the plaintiff serious financial loss and also violating the plaintiff's trademark and copyrights. Telegram was impleaded into the suit because aforementioned channels were anonymous in nature and telegram had taken no steps to ensure that the activities of these channels would cease after due notices being served upon them.

HELD

The Court adjudicated that:

A. Prima-facie case had been made out against the defendants, due to which an ad-interim injunction could be awarded, and that,

B. Telegram must disclose the basic subscriber information/data of users/owners of the infringing channels.

GOOGLE INDIA PVT. LTD. V VISAKHA INDUSTRIES & ANR

Date : 10.12.2019

Citation : Supreme Court [AIR 2020 SC 350]

SYNOPSIS

The Hon'ble Apex Court in this impugned matter laid down that Section 79 and the protection therein was not retrospective in nature i.e. that an intermediary received protection only after the 2009 Amendment Act to the IT Act .

FACTS

The impugned matter was preferred before the Hon'ble Apex Court in the form of an appeal to the AP High Court's judgement. Visakha industries had impleaded Google India into defamation proceedings as a result of their failure to remove the defamatory content from their platform after receipt of notice towards the same.

ISSUES

Whether the principal of 'actual knowledge' would be applicable, and whether Google could be considered an intermediary.

HELD

The Court held that:

A. As laid down in Shreya Singhal's case, 'actual knowledge' would imply the receipt of an order from a competent authority towards removal of content and thus the plea of not having actual knowledge would not be applicable in the present case, and,

B. That the scheme of the 2009 Amendment Act was clear vis a vis the applicability of Section 79 and that protection to an intermediary could not be granted in a retrospective manner.

SWAMI RAMDEV & ANR. V FACEBOOK, INC. & ORS

Date : 23.10.2019

Citation : Delhi High Court [CS (OS) 27/2019]

SYNOPSIS

The Court laid down that any offending material uploaded from within India must be disabled and blocked on a global basis on receipt of its nature by the aggrieved party and that a global injunction would operate in respect of such content.

FACTS

The suit was filed by Swami Ramdev due to the circulation of defamatory content and pieces of content from a book that had been deemed defamatory in an earlier judgement on various social media intermediaries against Swami Ramdev.

ISSUES

Whether the platforms are intermediaries and if so, what should be the form of injunction order that is to be passed.

HELD

The Court held that:

A. Defamatory content uploaded from an IP Address within India must be disabled and blocked globally, as the offence was committed within India, and

B. In case of such content being uploaded outside India the content be blocked/ restricted from access/view within India.

JISAL RASAK V THE STATE OF KERALA

Date : 30.09.2019

Citation : Kerala High Court [2019 (4) KHC 928]

SYNOPSIS

CCTV footage is “data” as defined under Section 2(o) of the Information Technology Act, 2000 and is an electronic record as defined under Section 2(t) of the IT Act.

Therefore, the electronic record produced for the inspection of the Court has to be regarded as documentary evidence. Furthermore, cloned digital copies of the footage relied on by the prosecution have to be made available to the accused, unless it is impracticable or unjustifiable

FACTS

Present petition was filed to ascertain whether the accused person was entitled to obtain a digital copy of CCTV footage which was being used to establish charge against him.

ISSUES

Whether CCTV footage amounts to material evidence and thereby warrants non-production of copy to accused.

HELD

The Court held that in the case on hand, there was no doubt that the investigating agency had committed a grave error by producing the CCTV footage as a material object and also in refusing to give a copy of the same to the accused. The accused is entitled to a digital copy of the CCTV footage, which is relied on by the prosecution to prove the charge.

UTV SOFTWARE COMMUNICATION LTD. & ORS V 1337X. TO & ORS

Date : 10.04.2019

Citation : Delhi High Court [2019 SCC OnLine Del 8002]

SYNOPSIS

In a bid to curb the growing menace of online piracy, the Delhi HC granted a dynamic injunction providing a remedy to copyright owners to extend an injunction order already granted against a website to another website with the same content.

FACTS

UTV Software Communications ltd. and Twentieth Fox Film Corp filed a suit against identifiable owners of websites, unknown parties responsible for infringement and Internet Service Providers that allowed access to impugned websites after taking notice of various websites hosting their copyrighted materials without authorisation.

ISSUES

Whether the impugned websites could be termed as intermediaries for the purposes

of protection under Section 79 of the IT Act, and Whether infringement was to be treated differently in the cyberspace.

HELD

The Court held that:

A. The Court observed that the impugned websites did not fall under the ambit of protection provided by Section 79 of the IT Act and that the defence of "actual knowledge" could not be utilised in the present matter.

B. While Section 79 grants a measured privilege to an intermediary, that does not mean that the rights guaranteed under the Copyright Act are curtailed in any manner. Section 79 regulates the liability in respect of intermediaries, while the Copyright Act grants and controls rights of a copyright owner.

CHRISTIAN LOUBOUTIN SAS V NAKUL BAJAJ AND ORS.

Date : 02.11.2018

Citation : Delhi High Court [MANU/DE/4019/2018]

SYNOPSIS

The impugned case was the first time that a Court adjudged an IP related matter against an e-commerce website. The Court held that because darveys.com was involved in the promotion and sale of luxury products with no clarity as to whether the offshore seller was selling genuine products, giving exemptions of Section 79 would in fact amount to legalizing the infringing activity.

FACTS

The suit was filed against the defendants as they were retailing products with the brand name "Christian Louboutin", without due approval from the Plaintiff. Furthermore, the e-commerce website was designed so as to give the false impression of affiliation with the Plaintiff, which also amounted in trademark infringement.

ISSUES

Whether Darveys' use of the Plaintiff's mark, logos and image could be protected under Section 79 of the IT Act.

HELD

The Court held that the trademark owner loses its huge customer base if the products turn out to be counterfeit or not up to the mark. In such a scenario, the trademark owners brand equity is diluted, while the seller does not suffer. Such immunity is beyond what is contemplated to intermediaries under Section 79 of the IT Act. While Section 79 of the IT Act is to protect genuine intermediaries, it cannot be abused by extending such protection to those persons who are not intermediaries and are active participants in the unlawful act

GAGAN HARSH SHARMA & ANR V STATE OF MAHARASHTRA & ANR

Date : 26.10.2018

Citation : Bombay High Court [Cr. WP. No. 4361 of 2018]

SYNOPSIS

If charges can be lodged under both, IT Act and the Indian Penal Code, IT Act will supersede and charges cannot be lodged under IPC.

FACTS

FIR alleged that the Accused persons had committed offences punishable under Sections 408, 420 of the Indian Penal Code and also offences under Sections 43, 65 and 66 of the Information Technology Act, 2000 as a result of theft of M/s Manorama's software and data.

ISSUES

Whether the alleged offences under Section 43,65 and 66 could be tried together with the same charges under the IPC.

HELD

The Court observed that:

A. Firstly, the legal principle of Generalia Specialibus Non Derogant (special law supersedes general law) would apply to cases wherein the IT Act contains a mechanism for the prosecution of offences falling within its purview, and

B. That the invocation and application of the provisions of the Indian Penal Code being applicable to the same set of facts cannot be justified.

SNG & PARTNERS
Advocates & Solicitors

INSOLVENCY & BANKRUPTCY CODE

2016

SRIKANTH DWARAKANATH, LIQUIDATOR OF SURANA POWER LIMITED V BHARAT HEAVY ELECTRICAL LIMITED

Date : 18.06.2020

Citation : NCLAT - Company Appeal (AT) (Insolvency) No. 1510 of 2019

SYNOPSIS

A creditor must obtain 60% of the consensus over the value of the security assets in order to oppose liquidation under section 33(1) of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**).

FACTS

Surana Power Limited was admitted into insolvency in January 2019, and did not receive any valid resolution plans, and was therefore ordered to be liquidated by the NCLT.

During the pendency of liquidation, the Respondent, a secured creditor of the corporate debtor, attained an ex-parte arbitration award against the corporate debtor, that granted lien over the assets, equipment, goods lying at the site of the power plant, in addition to title rights over the finished and unfinished buildings and facilities at the site of the corporate debtor. However, this was not an exclusive sole charge.

While the other secured creditors (constituting approximately 74% of the value of the corporate debtor's assets) relinquished their security interest into the liquidation estate, the Respondent conveyed its unwillingness to do the same. Consequently, the liquidator was unable to proceed with the sale of the assets, given that not all creditors had relinquished their interests.

The Appellant approached the NCLT, which rejected the appellant's application, and held that BHEL (secured creditor) was right in claiming priority over other creditors. Thereupon, the Appellant approached the NCLAT.

ISSUES

Whether the Appellant-liquidator can discharge/sell the assets of the corporate debtor (u/s. 53 of the IBC) despite the charge holder (Respondent-creditor) not relinquishing its security interest over the assets of the corporate debtor (as per section 52 IBC)?

HELD

The NCLAT in its judgment relied on section 13(9) SARFAESI Act, 2002 and observed that any realization of assets by the secured creditors requires confirmation from creditors having at least 60% value of the security assets.

Given that creditors holding 73.76% of the value of security interest had already relinquished their interest into the liquidation estate, the NCLAT allowed the appeal. Since the respondent did not meet the requisite 60% consensus of secured interest holders, it does have the right to realize the security interest. Allowing the respondent to realize its security interest would be detrimental to the liquidation process, as well as to the interest of the remaining secured creditors that had relinquished their interests.

ALLAHABAD BANK V. POONAM RESORTS LIMITED AND ALLAHABAD BANK V LINK HOUSE INDUSTRIES LTD

Date : 22.05.2020

Citation : NCLAT - Company Appeal (AT) (Insolvency) No. 1303 of 2019 & Company Appeal (AT) (Insolvency) No. 1304 of 2019

SYNOPSIS

IBC does not envisage a pre-admission enquiry in regard to proof of default by directing a forensic audit of the accounts of the Financial Creditor, Corporate Debtor or any financial institution, and thus the NCLT cannot direct a forensic audit and engage in a long drawn pre-admission exercise which will have the effect of defeating the object of the IBC.

FACTS

Corporate Debtors alleged before the NCLT that false information had been provided by financial creditor in its application for initiation of the Corporate Insolvency Resolution

Process (**"CIRP"**). Thereafter, NCLT, being of view that during the entire loan process due diligence was not carried out, appointed a Forensic Auditor to examine the allegations raised by Corporate Debtors and submit an Independent Report delineating some factual aspects bearing upon utilization of credit facility extended by financial creditor. Aggrieved by the same, Allahabad Bank approached NCLAT.

ISSUES

Whether NCLT was justified in ignoring time frame prescribed u7 of IBC and initiating an enquiry to determine whether the applications filed u 7 contained false information, when matters were at the threshold stage?

HELD

NCLAT observed that legal framework governing CIRP has been created around the object that speed is paramount - and all authorities under IBC have to adhere to prescribed timelines. It further observed that satisfaction in regard to occurrence of default has to be drawn by NCLT either from the records of an information utility, or through other evidence provided by financial creditor.

NCLT cannot direct a forensic audit and engage in a long-drawn pre-admission exercise which will only serve to defeat the objective of the IBC. In view of the same, NCLAT allowed the appeals and set aside impugned order.

The NCLAT added that the plain language of Section 7(4) left no room for doubt that the NCLT was required to ascertain the existence of default within 14 days of the receipt of the application, from records of an information utility or other evidence furnished by the Financial Creditor.

The NCLT cannot travel beyond the letter of law and the dictum of the Apex Court.

Section 75 is a penal provision which postulates an enquiry and recording of finding in respect of culpability of the applicant regarding commission of an offence. The same cannot be allowed to thwart the initiation of CIRP unless in a given case forgery or falsification of documents is patent, and established *prima facie*.

ANUJ JAIN INTERIM RESOLUTION PROFESSIONAL FOR JAYPEE INFRATECH LIMITED V AXIS BANK LIMITED ETC.

Date : 26.02.2020

Citation : Supreme Court of India in Civil Appeal Nos. 8512-8527, 6777-6797 of 2019 & Civil Appeal Nos. 9357-77 of 2019

SYNOPSIS

The key requirement for a debt to be a financial debt, is the disbursement of certain amounts to the corporate debtor against the consideration of time value of money – whether or not specified as an element of the transaction contemplated under section 5(8) of the IBC. Simply holding security interest on the assets of a corporate debtor doesn't make a lender a financial creditor from the perspective of corporate debtor.

FACTS

During the CIRP of the corporate debtor, Jaypee Infratech Limited (JIL) - the Interim Resolution Professional (**"IRP"**) preferred an application before the NCLT, seeking orders for the avoidance of several impugned transactions on the grounds that they were preferential, undervalued, as well as fraudulent.

Under these transactions, several parcels of land were put under mortgage with the lenders of Jaiprakash Associates Ltd (JAL), the holding company of JIL, – and it was argued that these were in the nature of asset stripping, and entered into with intent to defraud the creditors of the corporate debtor without obtaining the approval of shareholders.

At the same time, two of the Respondent banks namely, ICICI Bank Limited and Axis Bank Limited, sought their inclusion in the category of financial creditors of JIL – but the IRP declined to recognize them as such. Being aggrieved by the decision of the IRP, the said banks preferred separate applications before NCLT, while asserting their claim

to be recognized as financial creditors of the corporate debtor on account of the mortgaged properties provided by JIL for the benefit of the lenders of JAL.The NCLT held that the transfer of the land was fraudulent and undervalued, directing JAL to return the 758 acres of land to JIL, as well as to release and discharge the interest created over the land to lenders. It also held that the lenders of JAL do not fall in the category of the financial creditors of JIL just because of the mortgage of JIL's properties in favour of JAL.

An appeal was made before NCLAT by JAL, which quashed the NCLT decision, and instead held that the transactions were genuine, and that the allegation of undervaluation was not justified.

From this impugned NCLAT judgment lies this appeal to the Supreme Court.

ISSUES

A. Whether the impugned transactions were liable to be avoided, being preferential, undervalued, and fraudulent, under the provisions of the IBC?
B. Whether the lenders of JAL could be recognized as financial creditors of JIL, given that the loans to JAL were secured by mortgage of properties of JIL.

HELD

On the first issue, the Supreme Court stated that the provisions of Section 43 of the IBC that relate to preferential transactions need to be strictly construed, as the consequences of declaring any transaction "a preferential transaction" are serious. Yet any such construction taken has to be such that it leads towards achieving the object of the provision.

Preferential Transactions

A. As such, it set out the key ingredients for a transaction to be considered as 'preferential', as provided by s43:
   i. the transaction of transfer of property (or interest thereof) of the corporate debtor ought to be for the benefit, whether direct or indirect, of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor.
   ii. Further, such transfer ought to be of the effect of putting such creditor or surety or guarantor in beneficial position than it would have been in the event of distribution of assets u/s 53 (which provides for how proceeds from the sale of assets of the corporate debtor under liquidation are to be distributed amongst the creditors), and finally,
   iii. such event of giving preference, ought to have occurred within and during the 'relevant time'.

It was held that the relevant time as per Section 43 of the IBC, is a period of two years preceding the insolvency commencement date, if the preference is given to a related party (other than an employee); and if the preference is given to an unrelated party, then the relevant time is a period of one year preceding the commencement date.

Therefore, in light of the fact that JIL (being both a subsidiary of JAL, as well as owing several debts towards JAL), the Supreme Court held that JAL is a related party to JIL, and is also a creditor as well as surety of JIL. The Supreme Court further held that JIL had given a preference by way of the mortgage transactions in question for the benefit of JAL, for and on account of debts owed to JAL. It also noted that JAL as an operational creditor, stood on a much lower footing in the priority of recovery of debts in terms of Section 53 of the IBC and thereby, by the mortgage transactions, JAL was put in a much more beneficial position vis-à-vis other creditors than it would have been in the absence of such transfers.

Preferential Transactions

A. The Supreme Court, referring to the definition of a financial debt, as discussed in its *Swiss Ribbons, Essar Steel,* and *Pioneer Urban* judgments, clarified that in order for a debt to be a financial debt, the basic requirement it must fulfill is that it be a disbursal against the consideration for time value of money.

It was held that the key requirement for the existence of a debt, is the disbursement of certain amounts to the corporate debtor (against the consideration of time value of money) – and that this requirement remains an essential part of all transactions and dealings described under the sub-sections of section 5(8), even though it is not necessarily explicitly stated as such.. It was therefore held that no transaction could be a financial debt without this element.

Therefore, the Supreme Court held that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purposes of the IBC.

With regard to secured creditors, the Court held that a person having only a security interest over the assets of corporate debtor (like the instant third-party securities), even if falling within the description of 'secured creditor', would nevertheless not be a financial creditor without there being a disbursal against the consideration for time value of money. It concluded by stating that *"every secured creditor would be a creditor; and every financial creditor would also be a creditor; but every secured creditor may not be a financial creditor."*

In light of the aforesaid, the Supreme Court concluded that the lenders of JAL, on the strength of the mortgages in question, may fall in the category of secured creditors, but such mortgages being neither towards any loan, facility or advance to the corporate debtor nor towards protecting any facility or security of the corporate debtor, it cannot be said that the corporate debtor owes them any financial debt and that, such lenders of JAL do not fall in the category of financial creditors of JIL.

This position was further explained: *"since a third party security beneficiary" does not "lend" any money to the corporate debtor , it could not be considered as being interested in the rejuvenation, revival or growth of the corporate debtor, which is the domain of a financial creditor and therefore, while JAL's lenders could be considered as 'secured creditors' of JIL, they could not be treated as its financial creditors."*

Accordingly, the order passed by NCLT was upheld in regard to the findings that the transactions in question are preferential within the meaning of Section 43 of the IBC. The directions by NCLT for avoidance of such transactions were also upheld accordingly.

The applications filed by the lender banks were dismissed, and the respective orders passed by NCLT were restored with the findings that the applicants are not the financial creditors of the corporate debtor.

NEERAJ JAIN DIRECTOR OF M/S FLIPKART INDIA PRIVATE LIMITED VS. CLOUDWALKER STREAMING TECHNOLOGIES PRIVATE LIMITED

Date : 24.02.2020

Citation : NCLAT - Company Appeal (AT) (Insolvency) No. 1354 of 2019

SYNOPSIS

Issuance of notice under Form 3 or Form 4 is dependent on the nature of the debt. Merely producing a supply agreement by itself does not constitute proof of existence of debt.

FACTS

This was an appeal from an NCLT Order admitting the Respondent's claim as an operational creditor.

ISSUES

A. Whether it is the discretion of the Operational Creditor, or the nature of the Operational Debt, that determines the issuance of notice in Form 3 or Form 4 under Sec 8 (1) of the IBC?

B. Whether for filing an application under section 9 of the IBC through Form 5, the submission of a copy of the invoice is a mandatory requirement, despite the issuance of a demand notice under Form 3?

HELD

NCLAT, setting aside the impugned NCLT order – stated that the creditor's application was incomplete, and showed no actual proof

of existence of debt, or the amount in default: *"As per Proforma of Form-3, the Operational Creditor is required to attach documents with the demand notice in order to prove the existence of an operational debt, and the amount in default."*

A. The choice of issuance of demand notice under section 8(1) of the IBC, either in Form 3 or Form 4, under the Insolvency and Bankruptcy Code Application to Adjudicating Authority Rules 2016 (**"IBC Rules"**), depends on the nature of Operational Debt.

   It was held that Section 8(1) does not provide the Operational Creditor the discretion to send the demand notice either in Form 3 or Form 4, as per its convenience: rather, it depends directly on the nature of the operational debt and the applicability of Form 3 or Form 4 as per the nature of the debt – specifically, whether it arises out of a transaction, or not.

   It was also made clear that the copy of the invoice is not mandatory if the demand notice is issued in Form 3 of the IBC Rules provided the documents to prove the existence of operational debt and the amount in default are attached with the application.

B. It was held that Operational Creditors must submit documents proving the existence of the operational debt and the amount in default (by way of invoices and other documents) as referred to in Form 5 of the IBC Rules – and that merely producing a supply agreement by itself does not constitute proof of debt.

JSW STEEL V MAHENDER KUMAR KHANDELWAL

Date : 17.02.2020

Citation : NCLAT - Company Appeal (AT) (Insolvency) No. 957 of 2019

SYNOPSIS

New management of a corporate debtor cannot be held liable for the acts of the erstwhile management. Further, once the Resolution Plan is approved by the NCLT, it is binding on all parties, as well as on statutory and government bodies.

FACTS

The CIRP of the corporate debtor, Bhushan Power and Steel Limited, came to a standstill, due to the property of the corporate debtor having been attached by the Directorate of Enforcement (**"ED"**) in the Ministry of Finance, Government of India, after the acceptance of the Resolution Plan.

After the Resolution Plan submitted by the Appellant-Resolution Applicant was approved by the NCLT with certain conditions, and while the change of management was being overseen by the Monitoring Committee, the ED attached assets of the Corporate Debtor under Section 5 of the Prevention of Money Laundering Act, 2002 (**"PMLA"**). The Resolution Applicant, in its appeal raised objections to, and challenged the jurisdiction of the ED to attach the properties of the Corporate Debtor, after change of hands.

Thereupon, an appeal was filed before NCLAT by the Resolution Applicant. At this juncture, the Ministry of Corporate Affairs, Government of India, stated its position in an Affidavit in Reply (discussed below).

As contradictory pleas were taken by two Departments of the Central Government, time was allowed to resolve the issue. Only thereafter, after deliberation by the Central Government, the Ordinance to amend the IBC was issued on 28th December, 2019, inserting Section 32A.

ISSUE

Whether, after approval of a Resolution Plan under Section 31 of IBC, it is within the jurisdiction of (a government agency such as) the ED to attach the assets and properties of the Corporate Debtor on the alleged ground of money laundering by erstwhile Promoters?

HELD

NCLAT answered this question in the negative, based on both, the factual matrix of the case, as well as by interpreting the newly added section 32A.

Upon examining section 32A(1) and (2), NCLAT concluded that even a plain reading

clearly suggests that the ED and other investigating agencies do not have the powers to attach assets of a Corporate Debtor, once the Resolution Plan stands approved, and the criminal investigations against the 'Corporate Debtor' stand abated.

The NCLAT also noted that that the benefit under Section 32A of the IBC is also for such resolution plans which are yet to be approved and that there is no basis to make distinction between a resolution applicant whose plan has been approved after or prior to the promulgation of the Ordinance.

The Tribunal further cited the Union of India's position, communicated via the Ministry of Corporate Affairs' response, prior to the passing of the Ordinance:

A. It would be the erstwhile management that would be held responsible, for crimes committed under their supervision. The new management taking over the company after the IBC process cannot be held to be liable for the acts of omission or commission of the previous management. Hence, no criminal liability can be fixed on the successful Resolution Applicant or its officials.

B. Under the process envisaged under the IBC, once a Resolution Plan is approved by the NCLT, it is binding on all stakeholders. Before approving the Resolution Plan, objections are heard by the NCLT, and once hearing on the Resolution Plan and objections is completed before the NCLT and the Resolution Plan is approved, such approved Resolution Plan is binding on all stakeholders, **including all government agencies.** The provision of the IBC (Amendment) Act, 2019 by which Section 31(1) was amended, makes it amply clear that a resolution plan is binding on Central Government and all statutory authorities.

NCLAT also discussed the ineligibility of the Resolution Applicant in terms of section 32A. It was held that where a party for the purpose of its business, if mandated by the Central Government to join hands with and is compelled to form a consortium or act as joint associate, such person cannot be held to be an ineligible resolution applicant in terms of Section 32A(1)(a) on the grounds of being a related party. On this basis, it concluded that the resolution applicant was not a related party of the Corporate Debtor.

NCLAT also re-affirmed that it is the Committee of Creditors (**"CoC"**) that is empowered to decide whether the Resolution Applicant is ineligible in terms of Section 29A, whereby the CoC is also required to decide whether it is related party to the Corporate Debtor or not; and the NCLT while passing an order under Section 31 can find out whether the Resolution Applicant fulfils the conditions under Section 30(2) which includes Section 30(2) (e) and in terms of Section 29A can decide whether the Resolution Applicant is a related party to the Corporate Debtor.

NCLAT finally held that the attachment of assets of the Corporate Debtor by the ED, pursuant to order dated 10th October,2019 was illegal and without jurisdiction. Allowing JSW's appeal, the ED's attachment was released.

COMMITTEE OF CREDITORS OF ESSAR STEEL INDIA LIMITED THROUGH AUTHORISED SIGNATORY V SATISH KUMAR GUPTA & ORS. ("ESSAR STEEL-II")

Date : 15.11.2019

Citation : Supreme Court of India in Civil Appeal No. 8766-67 of 2019

SYNOPSIS

Operational Creditors and Financial Creditors cannot be treated as equals – as such treatment is neither contemplated under the IBC, nor desirable. The NCLT and NCLAT are not empowered to question the commercial wisdom of the CoC.

FACTS

The case was appealed in the Supreme Court of India after the NCLAT, in **"Essar Steel-I"**, decided that operational creditors ought to be treated at par with financial creditors. While approving the resolution applicant **ArcelorMittal**'s bid for the acquisition of Essar Steel, NCLAT had held that financial and

operational creditors must be treated at par under a resolution plan, and also ruled that the 'waterfall mechanism' under Section 53 of IBC is only applicable to distribution of proceeds from liquidation and not to resolution bids.

In keeping with its view, the NCLAT accordingly modified the Resolution Plan of ArcelorMittal, and re-distributed its payable proceeds such that all financial creditors (whether secured or unsecured) were paid 60.7% of their admitted claims, and operational creditors with claim amounts equal to, or above Rs. 1 crore, were paid 60.26% of their admitted claims. Other operational creditors with admitted claim amounts less than Rs. 1 crore were paid in full. NCLAT also held that the financial creditors could not be classified on the basis of their security interest for the purpose of distribution of resolution proceeds.

In addition to this treatment of the claims of the operation creditors, the lenders of Essar were aggrieved that Standard Chartered Bank, with a much lower security interest value, was treated at par with the other lenders – especially since although it was a a secured creditor, there was no security on its loan.

ISSUES

Whether the operational creditors and financial creditors are to be treated at par and as equals under a resolution plan?

HELD

The Supreme Court, allowing the appeal by the Committee of Creditors of Essar Steel, overruled the impugned order and held unequivocally, that there is no equality between financial creditors and operational creditors.

Justice Nariman observed that the NCLT cannot substitute the commercial wisdom of the CoC. The Supreme Court reiterated that it is ultimately the commercial wisdom of the CoC which determines and approves the best resolution plan. This includes the "feasibility and viability" of a resolution plan, considering all aspects including the manner of distribution of funds among the various classes of creditors.

It was further remarked that the NCLT only has limited scope to review the decision of the CoC, whereby the resolution plan can only be sent back to the CoC, in the event that in NCLT's view, the legal parameters are not met. The SC made the following observations in *"Essar Steel-II"* on creditors.

A. The real position of the creditors is purely a matter of equity given that every creditor strikes a different commercial bargain with the corporate debtor which also includes grant of security interest by the debtor to the creditor.
B. Noting the difference between the financial creditors and operational creditors, the Court remarked that while financial creditors were capital-providers for companies enabling them to purchase assets and run their business operations, operational creditors were the beneficiaries of amounts lent by these financial creditors. A financial creditor "enables business ventures to run their operations and increases the capacity of enterprises to expand.".
C. The representation made by the FICCI to the MCA was acknowledged by the court as it held that prioritizing secured creditors over unsecured creditors would allow banks to lend to companies at lower rates of interests, otherwise, borrowing rates for all classes would increase in the future because banks cannot be sure of protecting their losses.

The Court finally held that the equality principle cannot be stretched to treating un-equals equally, as such an interpretation in this context would defeat the purpose behind IBC to resolve stressed assets. Justice Nariman highlighted the implications of adopting an 'equality-for-all' approach and noted that it could lead to secured financial creditors being incentivised to vote for liquidation instead of resolution. Accordingly, he stated that "equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational." The decision of the CoC cannot be tampered with by the adjudicating authorities and the "commercial wisdom" of the 51% majority of the CoC cannot be

disturbed. The Court has also held that the time limit of 330 days for resolution to be not mandatory. It is open to the NCLT to extend the timeline if required.

JET AIRWAYS (INDIA) LTD VS. STATE BANK OF INDIA & ANR.

Date : 26.09.2019

Citation : NCLAT - Company Appeal (AT) (Insolvency) No. 707 of 2019

SYNOPSIS

If parallel insolvency proceedings have been initiated against the Corporate Debtor, the respective authority of other country also has the right to participate in the meetings of CoC & joint CIRP will continue in accordance with IBC and the Cross Border Insolvency Protocol.

FACTS

Insolvency proceedings in India were initiated against Jet Airways in June, 2019 when an application moved by the consortium of lenders led by the State Bank of India, was admitted by NCLT, Mumbai.

While hearing the said admission petition, NCLT was informed by the foreign court-appointed Administrator in Bankruptcy Proceedings (Holland) that Insolvency proceedings against Jet Airways had already been initiated in Netherlands. In view of the ongoing insolvency proceedings in Netherlands, the Administrator pleaded for a stay on the insolvency proceedings running in India. It was also contended by the Administrator that parallel insolvency proceedings in the case of Jet Airways in different jurisdictions would hurt the resolution process as the Interim Resolution Professional (IRP) and Administrator would be competing to take control of the management and assets. Citing jurisdictional issues, NCLT Mumbai held that it was not empowered to entertain the order passed by the foreign jurisdiction in the case, as the registered office of Jet Airways is situated in India.

The Administrator moved to NCLAT by way of an appeal following this decision.

ISSUE

Whether separate proceeding(s) in CIRP against a common Corporate Debtor (Jet Airways (India) Ltd. can proceed in two different countries, one having no territorial jurisdiction over the other?

HELD

NCLAT held that if parallel insolvency proceedings have been initiated against the Corporate Debtor, the respective authority of other country has also right to participate in the meeting of CoC & joint CIRP will continue in accordance with IBC.

In its earlier order, the NCLAT had clarified its intent to have a joint CIRP against Jet Airways, against which two proceedings have been initiated – one in India and another in Holland. It was observed by the NCLAT that the control and custody of assets of Jet Airways situated outside the country could only be taken with an arrangement with the Administrator of Jet Airways, Offshore Regional Hub (Holland). The Interim Resolution Professional (IRP) was asked to collate the claim of all the offshore creditors after reach an arrangement with the Administrator, appointed pursuant to the insolvency proceeding initiated at Holland against Jet Airways. The question whether the CoC has any role left to play, was left open.

Subsequent to its earlier direction, the NCLAT bench was informed that the Dutch Administrator, the Resolution Professional, as well as the CoC had reached an agreement for settlement termed as 'Cross Border Insolvency Protocol', except for one clause. The clause being disagreed upon was regarding the participation of the Administrator in the CoC meetings.
The Administrator wanted to insert the clause that allowed him to participate in the CoC meetings, whereas, the settlement proposed by the RP, on the instructions of the CoC, provided for exclusion of the Administrator from the CoC meetings.

After hearing the parties, the NCLAT has held that 'The Dutch Trustee' is equivalent to the 'Resolution Professional' of India, and as per law, has a right to attend the CoC meetings. However, to avoid overlapping of powers,

the Appellate Bench directed that the Dutch Trustee shall be invited to participate in the meetings of the CoC as an observer but shall not have a right to vote.

The NCLAT Bench also clarified CoC has no role to play as the agreement reached between the Dutch Administrator and the RP of India, is on the basis of the direction of this Appellate Tribunal. With the aforesaid view, the draft of 'Cross Border Insolvency Protocol' agreement was finalized. Further, the order passed by the NCLT, Mumbai, in so far as it was related to the observation that the 'Dutch Court' has no jurisdiction in the matter of CIR process of Jet Airways (Offshore Regional Hub), was set aside.

Thus, a joint 'Corporate Insolvency Resolution Process' will continue in accordance with 'Insolvency and Bankruptcy Code, 2016' **and the 'Cross Border Insolvency Protocol'**.

GAURAV HARGOVINDBHAI DAVE V ASSET RECONSTRUCTION COMPANY (INDIA) LTD AND OTHERS

Date : 18.09.2019

Citation : Supreme Court of India in Civil Appeal No. 4952 of 2019

SYNOPSIS

Article 137 of the Limitation Act applies to applications filed under Section 7 of the IBC.

FACTS

The borrower was declared as an NPA on July 21, 2011. An application under section 7 of the IBC was filed on October 3, 2017. The NCLT applied Article 62 of the Limitation Act, 1963 and held the period of limitation to be 12 years from the date when the money sued for becomes due, and accordingly held that the application was filed within the limitation period and admitted the application.

The NCLAT held that the time of limitation would begin to run for the purposes of limitation only from December 1, 2016 i.e. when the IBC was brought into force. Consequently, it dismissed the appeal.

ISSUES

Whether the limitation period for filing a Section 7 application is 12 years as under Article 62 of the Limitation Act, 1963?

HELD

The Supreme Court held that Article 62 of the Limitation Act would only apply to suits and not to "an application" which is filed under Section 7 of the IBC, which would fall only within the residuary Article 137. It further held that the time period would be calculated from July 21, 2011 i.e. when the right to sue accrued. Since 3 (three) years have elapsed since then in 2014, the section 7 application filed in 2017 was held to be clearly out of time.

The bench while considering an appeal against the NCLT order [upheld by NCLAT] that admitted a Section 7 application on the ground that, as per Article 62, the limitation period was 12 years from the date on which the money sued has become due.

Both sides referred to the judgment of the Apex Court in *B.K. Educational Services Private Limited vs. Parag Gupta and Associates. Answering the issue, the bench observed that Article 62 is "out of the way on the ground that it would only apply to suits. The present case being "an application" which is filed under Section 7, would fall only within the residuary article 137."* As per Article 137, the limitation period is three years and it runs from the time when the application for right to apply accrues.

The court also observed that the Report of the Insolvency Law Committee itself has stated that the intent of the IBC could not have been to give a new lease of life to debts which are already time-barred.

With regard to the contention based on 'commercial interpretation', Justice Nariman said: *"Further, it is not for us to interpret, commercially or otherwise, articles of the Limitation Act when it is clear that a particular article gets attracted. It is well settled that there is no equity about limitation [...]"*.

PIONEER URBAN LAND AND INFRASTRUCTURE LIMITED VS. UNION OF INDIA

Date : 09.08.2019

Citation : Supreme Court of India in Writ Petition (Civil) No. 43 of 2019

SYNOPSIS

Homebuyers have been included within the ambit of Financial Creditors u/s 5(8)(f) since the inception of the IBC, and thus, may file an application under section 7 of the IBC. In addition, homebuyers active through their representative shall form a part of the CoC, and also be allowed to vote in it.

The remedies available to homebuyers under IBC, RERA and Consumer Protection Act are concurrent. Thus, the principle of harmonious interpretation is to be adopted and RERA is to be interpreted harmoniously with IBC as far as practicable, but in cases of conflict, the IBC will prevail.

FACTS

The IBC Amendment was challenged on grounds that the treatment of allottees as financial creditors violated facets of Article 14: *"The amendments so made deem allottees of real estate projects to be financial creditors so that they may trigger the IBC, u/s. 7 thereof, against the real estate developer. In addition, being, they are entitled to be represented in the CoC by authorized representatives."*

ISSUES

Whether the IBC (Second Amendment) Act, 2018 (**"2018 Amendment"**) contained changes that were 'arbitrary, unreasonable, excessive and disproportionate', and therefore violative of Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India?

HELD

Rejecting the argument that the changes introduced by way of the 2018 Amendment infringed Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India, the Supreme Court held that treating homebuyers as under the IBC is not unconstitutional, and that allottees/homebuyers had always been included within the ambit of section 5(8)(f). The Court clarified that the Explanation to section 5(8)(f) in 2018 Amendment Act is merely a clarification and the existing status of the homebuyers as Financial Creditors, is beyond doubt.

"The explanation added to Section 5(8)(f) of the Code by the Amendment Act does not in fact enlarge the scope of the original Section as home buyers/allottees would be subsumed within Section 5(8)(f) as it originally stood."

Further, it was held that the expression "borrow" is wide enough to include an advance given by homebuyers to a real estate developer for "temporary use" such as use in a construction project, so long as it is intended by the agreement to give "something equivalent" of money back to the homebuyers.

The Court observed that any amount raised from an allottee under a real estate project "would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing", falling u/s 5(8)(f) of IBC.

The Court remarked that the remedies available to the homebuyers under the IBC are in **addition** to the remedies available to them under the Real Estate (Regulation and Development) Act, 2016. (**"RERA"**). Thus, RERA is to be read harmoniously with the IBC. However, in case of conflict between the provisions of the IBC and RERA, provisions of IBC shall prevail.

The Supreme Court referred to the homebuyers as unsecured creditors. Therefore, by implication, in the event of liquidation, homebuyers will be placed along with other unsecured creditors in the priority of payment in the waterfall mechanism prescribed u/s 53 of the IBC

The Court rejected the arguments that there be a 25% of total number of allottees threshold limit to trigger the provisions of the IBC, holding that the threshold limit to trigger the IBC is purposely kept low – at only one lakh rupees – so as to enable small individuals

to trigger the IBC as financial creditors, along with banks and financial institutions to whom crores of money may be due.

NOTE

The December 2019 Amendment to the IBC raises the threshold required for homebuyers to trigger the provisions of the IBC. This amendment is presently under challenge before the Supreme Court.]

BIKRAM CHATTERJI & ORS. V. UNION OF INDIA & ORS. ("AMRAPALI-I")

Date : 23.07.2019

Citation : Supreme Court of India in Writ Petition (C) No.940/2017

SYNOPSIS

The dues of the banks and the Noida and Greater Noida Authorities, could not be treated at par with the dues of home buyers.

FACTS

Between 2010 and 2014, the Amrapali group of companies was engaged in various real estate housing projects in Noida and Greater Noida, and proposed to construct approximately 42,000 flats for housing purposes. The Noida and Greater Noida Authorities (Authorities) accordingly allotted lands to the group. Various homebuyers booked their apartments through signing an 'Allotment cum Flat Buyers Agreement' – which contained a clause that enabled the builder to finance loan from any financial institution by way of mortgage, charge, securitization of receivables of land and flats.

Another clause authorized the builder to keep full authority over the flat depriving the allottees of any lien or interest despite payment of entire amount thereof.

Upon various instances of default, where the Amrapali group failed to deliver the flats to the homebuyers, pay the lease premium and other land dues to the Authorities, or repay the project loans it had availed from various banks, in 2017, the Bank of Baroda, one of the company's lenders filed an application for initiation of CIRP before the NCLT, for defaulting in its loan obligations.
NCLT appointed an IRP and declared a moratorium under the IBC, thereafter it was argued on behalf of the homebuyers that this directly impacted the interests of the homebuyers as they are ranked low in the order of priority of distribution of liquidation assets under Section 53 of the IBC.

A writ petition was filed with the Supreme Court, against such order of NCLT, with many homebuyers subsequently filing intervention applications. In the course of these hearings, and in order to establish the facts of the case, the Supreme Court ordered a forensic audit of the affairs and accounts of the Amrapali group.

ISSUES

What relief can be provided to the homebuyers given the present facts and circumstances?

HELD

The Supreme Court directed that the registration of the Amrapali group of companies under the RERA Act, 2016, be cancelled considering the forensic audit report, and the widespread diversion of funds, the showing of bogus expenses, and the establishing of an intricate web of sham companies that it revealed. The Supreme Court also appointed the state-run NBCC to complete the projects and handover possession to buyers, at a commission of 8%.

The Supreme Court concluded that the banks, as well as the Noida and Greater Noida Authorities had not acted in good faith, and were negligent in discharging their functions and duties. Holding that the matter included issues of larger public interest, the Court held that the banks and Authorities had acted against the *Public Trust doctrine*, as both were public institutions and were supposed to protect the trust of the public. It observed that the real estate business mainly survived on the money invested by the buyers, for the purchase of their houses, hence, they had the right to obtain their houses.

It was further observed that no valid mortgages are subsisting on the allotted land, due to

procedural irregularities in the creation of the mortgages. Holding that it was incumbent on the bank officials to ascertain whether the conditions like making full payment of premium and up to date annual lease rent to the Authorities, had been complied with or not, the Court opined that no mortgage could have been validly created in favour of the banks, as the ease rentals were owned by relevant lessee companies to concerned land authorities, and the bankers had the right to mortgage subject only to the fulfilment of conditions imposed by the authorities.

Additionally, in terms of the lease deeds, mortgage was permissible for the purpose of financing the investment in the projects. Accordingly, it was the bankers' duty to ensure that money made available was invested in the project only - however, that money was diverted and banks failed to monitor the same.

Thus, since no charge could be said to have been created by the bank loans on the projects, as the money, in fact, had not been used in the projects – and bearing in mind that the home buyers cannot be saddled with such a liability, the Court held that the banks could only be allowed to realize their money from those assets and the guarantors, and not from the investment of home buyers, and not from the buildings where the funds of the banks were not even used.

The Supreme Court also held that the Authorities would also not have any charge on the incomplete projects, which, according to the court rightfully belonged to the home buyers, especially because the officials of the authorities had continued to allot more land to the Amrapali group without insisting on the payment of existing dues owned on lands already allotted to lessee companies.

"It was incumbent upon the Authorities, as well as the banks, to prevent the fraud. Now, if banks, as well as the Authorities, are permitted to recover the amount from the home buyers' investment, in that case, it would be equally unjust and would be against the conscience of the law and nothing would be left for the buyers, not even a brick and the structures have come up by investing their money." Therefore, in keeping with the principle that "fraud vitiates", the dues of the Noida Authority and Greater Noida Authority were found to not be at par with the dues of home buyers. Further, based on the above principle and public trust doctrine, the mortgages were held to be void vis-à-vis lenders.

NOTE

Another order was passed by the Supreme Court on 10.06.2020 where it considered and disposed of various interim applications filed by miscellaneous parties. It is discussed briefly, below:

BIKRAM CHATTERJI & ORS. V. UNION OF INDIA & ORS. ("AMRAPALI-II")

Date : 10.06.2020

SYNOPSIS

Banks and financial institutions are to release loans to homebuyers whose loans have been sanctioned, notwithstanding the fact that their accounts are declared as NPAs – and that there should be restructuring of the loan amount.

FACTS

Following the judgment in *Amrapali I*, banks stopped making further disbursements of the retail loans to individual home buyers. While 14 buyers had to cancel their units, RERA ordered a refund of 6 units along with interest upon the complaints filed before it. Further, in at least one case, a loan had to be taken out by a homebuyer at a very high rate of 21% in order to deposit the amount required for continuation of the project by NBCC – and it was prayed that it would be difficult to repay the loan in case interest is not waived. The interest of the homebuyers was at stake, as the project had been delayed for more than three years due to the injunction granted by the Supreme Court.

ISSUES

Following the judgment in *Amrapali-I*, banks had stopped disbursing loans to the homebuyers, thereby affecting the viability of the completion of the project.

HELD

The Supreme Court recognized that since the projects had been stalled for the last several years, the home buyers had taken out loans, but could not enjoy the fruits of their investment. The court remarked that if projects were not completed and home buyers were not assured of the handing over of flats, it would be difficult for them to pay bank dues "till eternity" – and held that it was in the interest of home buyers as well as banks and financial institutions that they should be allowed to recover money once the projects were completed in an effective manner.

Banks and financial institutions were accordingly directed to release loans to homebuyers whose loans had been sanctioned, notwithstanding the fact that their accounts were declared as NPAs. Further, the Court directed a restructuring of the loan amount.

BOHAR SINGH DHILLON V ROHIT SEHGAL (INTERIM RESOLUTION PROFESSIONAL) AND OTHERS

Date : 09.05.2019

Citation : NCLAT - Company Appeal (AT) (Insolvency) No. 665 of 2018

SYNOPSIS

Section 14 of the IBC would prevail over Section 28A of the SEBI Act, 1992, by virtue of the overriding effect of section 238 IBC. Accordingly, SEBI cannot recover any amount, including the penalty from the Corporate Debtor.

FACTS

In 2015, the Securities and Exchange Board of India (**"SEBI"**)passed an order against HBN Dairies (the Corporate Debtor), after it was found to have floated a Collective Investment Scheme without obtaining registration from SEBI under the Securities and Exchange Board of India Act, 1992 (**"SEBI Act"**). On appeal, the Securities Appellate Tribunal upheld SEBI's findings, and in 2017, SEBI ordered the attachment of properties of the Company, and a recovery certificate was issued to pay investors.

However, given that the investors under the scheme had not been paid for several months, they approached NCLT, preferring an insolvency application under section 7 of the IBC. In 2018, NCLT admitted the application and declared a moratorium under Section 14 of IBC on grounds that the investors could be considered financial creditors. It further held that Section 14 of IBC would, by virtue of the non-obstante clause present in Section 238 of IBC, prevail over Section 28A of the SEBI Act which provides for recovery of money from a Company by selling movable or immovable property.

ISSUES

Whether SEBI is allowed to recover amounts from the corporate debtor during the moratorium period?

HELD

Till the period of Moratorium continues, SEBI cannot recover any amount, nor can it sell the assets of the Corporate Debtor.

In appeal, NCLAT allowed the application under section 7 of the IBC, holding that it was maintainable, and that while the period of moratorium continued, SEBI could not recover any amount, nor sell the assets of the Corporate Debtor.

While allowing the application, NCLAT clarified that the resolution professional was responsible for complying with the requirements under the SEBI Act and the Regulations framed under it; and that SEBI was nonetheless, entitled to take action against individuals including the former Directors and Shareholders of the 'Corporate Debtor'.

NOTE

While the case is under appeal before Supreme Court, an order has been passed for maintaining the status quo: SEBI is not required to return the title certificates to the assets of HBN Dairies, but is also not allowed to create any encumbrance over the assets.

PR. DIRECTOR GENERAL OF INCOME TAX (ADMN. & TPS) VS. M/S. SYNERGIES DOORAY AUTOMOTIVE LTD. &ORS.

Date : 20.03.2019

Citation : NCLAT - Company Appeal (AT) (Insolvency) No. 205 of 2017

SYNOPSIS

"Operational Debt in the normal course means a debt arising during the operation of the Company ('Corporate Debtor'). If the Company ('Corporate Debtor') is operational and remains a going concern, only in such case, the statutory liability, such as payment of Income Tax, Value Added Tax etc., will arise. As the 'Income Tax', 'Value Added Tax' and other statutory dues arising out of the existing law, arises when the Company is operational, we hold such statutory dues has direct nexus with operation of the Company."

FACTS

Appeal is filed in relation to the NCLT order approving the resolution plan of Synergies Dooray. The grievance is that the Adjudicating Authority has granted huge Income Tax benefits to the 2nd Respondent- 'Synergies Castings Ltd.' without impleading the Appellant department as a Respondent to the said proceedings.

ISSUES

Whether statutory dues of income tax, value added tax etc. are 'operational debts' under the insolvency and bankruptcy code, 2016?

HELD

The NCLAT held that statutory dues of income tax, value added tax etc. are operational debts under the IBC, reasoning that "operational debt" in the normal course, means a debt arising during the operation of the corporate debtor.

Reasoning that as Income Tax, Value Added Tax, and other statutory dues arising out of the existing law only arise when a company is operational, the NCLAT held that such statutory dues have direct nexus with the operation of the company.

Accordingly, it held that 'Income Tax Department of the Central Government' and the 'Sales Tax Department(s) of the State Government' and 'local authority', who are entitled for dues arising out of the existing law are operational creditor within the meaning of Section 5(20) of the IBC.

BOMBAY STOCK EXCHANGE V ASAHI INFRASTRUCTURE

Date : 11.02.2019

Citation : NCLT - CP No. 1718/ IBC/NCLT/MB/MAH/2017 & MA 216/2018

SYNOPSIS

Listing fees owed to a stock exchange are not operational debt under IBC, as the SEBI Act provides for its own recovery mechanism for them.

FACTS

A petition to initiate CIRP was filed under section 9 of the IBC by the Petitioner, a recognized stock exchange, in the capacity of an operational creditor, against Asahi Infrastructure & Projects.

The Respondent-corporate debtor had entered into a Listing Agreement with the Petitioner-operational creditor, pursuant to which the Petitioner had provided services relating to listing of securities of the corporate debtor on its trading platform.

The operational creditor's claim is with regard to the outstanding Annual Listing Fees owed to it by the corporate debtor. It was alleged that the corporate debtor had defaulted in making payment of its outstanding Listing Fees – thus committing a breach of contract – and this outstanding debt was contended as being an operational debt under IBC.

ISSUES

Whether the nonpayment of listing fees is an 'operational debt' or a 'regulatory due'?

HELD

NCLT held that the operational creditor, being an entity registered under SEBI, was under an obligation to follow the Regulations framed

under the SEBI Act for the recovery of its dues. To this effect, NCLT ascertained that SEBI, being a regulatory body of the stock exchange, and being empowered to execute not only its recovery mechanism, but also enshrined with power to punish the defaulter, meant that the unpaid Listing Fees cannot be said to be 'operational' dues or 'contractual' dues: Rather, they come under the ambit of 'Regulatory' dues, as they can be recovered only under the set guidelines prescribed by SEBI.

While consulting Law Commission Reports to determine the intent of the legislature, the NCLT noted that there was an explicit mention of the desire to exclude regulatory fees from being classified as debts recoverable under the IBC. Accordingly, the debt in question ought to be categorised within the the ambit of 'Regulatory Dues', and could not be treated as an operational debt.

Stating that the initiation of insolvency proceedings would not be gainful either to the Regulator or the Exchange, it was held that the right forum to initiate recovery proceedings for non-payment of Listing Fees was not NCLT.

NOTE

This judgement has been appealed, but has yet to be heard by the NCLAT, owing to various procedural delays.

K. SASHIDHAR VS. INDIAN OVERSEAS BANK

Date : 05.02.2019

Citation : Supreme Court of India in Civil Appeal No.10673 of 2018

SYNOPSIS

NCLT has no jurisdiction or authority to analyse or evaluate the commercial decision of the CoC to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors.

FACTS

A common judgement arising out of appeals from several decisions of the NCLAT in which it had held that a resolution plan must mandatorily be approved by vote of not less than 75% of voting share of financial creditors.

HELD

Rejecting the appeal filed by the respective Resolution Applicants, the Supreme Court observed that the liquidation process is only avoidable if the resolution plan is accepted by a vote of not less than 75% of the voting share of the CoC.

To ascertain whether the voting share meets this threshold, the "percent of voting share of the financial creditors" approving in relation to the dissenting financial creditors is required to be reckoned - and the approving votes must then fulfill the threshold percent of voting share of the financial creditors.

Further, it was reiterated the NCLT and NCLAT have no jurisdiction and no authority to analyse or evaluate the commercial decisions taken by the CoC or to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors.
It was also held that the word "may" in section 30(4) is ascribable to the discretion of CoC to approve or not to approve the resolution plan. There is no corresponding provision which grants such discretion, or that empowers the resolution professional, or the adjudicating authorities (NCLT & NCLAT) to reverse the "commercial decision" of the CoC.

At best, the NCLT may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the IBC. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors be it for approving, rejecting or abstaining, as the case may be.

Therefore, upon receipt of a "rejected" resolution plan, the NCLT is obligated to initiate the liquidation process under Section 33(1) of the IBC.

The bench also observed that non-recording of reasons for approving or rejecting the resolution plan by the concerned financial creditor during the voting in the meeting of CoC, would not render the final collective decision of CoC nullity per se.

If resolution plan is approved by CoC, it is obligatory for RP to submit it to the NCLT. If plan is rejected by not less than 25% of voting shares of Financial creditors, the RP is under no obligation to submit it under section 30(6) to NCLT. The legislative intent is to uphold the opinion of the minority dissenting financial creditors. On receipt of the plan, the NCLT is required to satisfy itself that the plan approved by CoC meets the requirements specified in section 30(2).

Noting that the IBC (Second Amendment) Act, 2018 reduced the threshold requirement under section 30(4) for the approval of a resolution plan from 75% to 66%, the SC observed that the reduction of this threshold requirement introduced a new norm and qualifying standard for the approval of a resolution plan and the same cannot be treated as a clarification or procedural matter. Therefore, it cannot have retrospective application, and will only be applicable to the decisions of the CoC taken on or after the date of coming into force of the amendment.

"We hold that the NCLAT has justly concluded in the impugned decision that the resolution plan of the concerned corporate debtor(s) has not been approved by requisite percent of voting share of the financial creditors; and in absence of any alternative resolution plan presented within the statutory period of 270 days, the inevitable sequel is to initiate liquidation process under Section 33 of the Code. That view is unexceptional."

VIJAY KUMAR JAIN V. STANDARD CHARTERED BANK AND ORS

Date : 31.01.2019

Citation : Supreme Court of India in Civil Appeal No. 8430 of 2018 and Writ Petition (Civil) No. 1266 of 2018

SYNOPSIS

Members of the erstwhile Board of Directors, being vitally interested in resolution plans that may be discussed at CoC meetings, must be given a copy of such plans as part of the documents to be furnished along with the notice for such meetings.

FACTS

A director of a company in CIRP had moved NCLT seeking the right to participate in CoC meetings and access all documents and/or information including the resolutions plans being discussed in the meetings, for effective participation.

NCLT on August 1, 2018 held that directors have the right to attend CoC meetings (Section 24 of the IBC). However, directors could not receive information that is considered confidential by the resolution professional or the CoC, including the resolution plans. In the first appeal, the NCLT decision was upheld by NCLAT I on August 9, 2018. The director then moved the Supreme Court of India in challenge to the NCLAT decision.

ISSUES

Whether members of the suspended Board of Directors of a corporate debtor have a right to receive insolvency resolution plans submitted before the Resolution Professional, in order to effectively participate in CoC meetings?

HELD

"Members of the erstwhile Board of Directors, being vitally interested in resolution plans that may be discussed at CoC meetings, must be given a copy of such plans as part of "documents" that have to be furnished along with the notice of such meetings."

Ruling in favour of the Appellant, the Supreme Court held that members of the suspended Board of Directors are permitted to participate in CoC meetings only for the purpose of giving information regarding the financial status of the debtor.

It clarified that the Notes on Clauses to section 24 of the IBC contained erroneous stipulations, and reiterated that the resolution professional does not seek information at a meeting of the CoC, nor does he prepare a resolution plan as is mentioned in the Notes: he only prepares an information memorandum which is to be given to the resolution applicants.

The court also noted that every participant is entitled to a notice of every meeting of the

CoC, and that such notice must contain an agenda for the meeting, together with copies of all documents relevant for matters that will be discussed, and issues that will be voted upon.

The court also clarified that under the proviso to Section 21(2), it is only a director who is also a financial creditor who is a related party of the corporate debtor that shall not have any right of representation, participation, or voting in a meeting of the CoC.

SWARAJ INFRASTRUCTURE PVT. LTD. V. KOTAK MAHINDRA BANK LTD.

Date : 29.01.2019

Citation : Supreme Court of India in Civil Appeal No. 1291 of 2019

SYNOPSIS

"A secured creditor can file a winding up petition even after obtaining a decree from the Debts Recovery Tribunal and a recovery certificate based thereon."

FACTS

In appeal from the judgement of the Bombay High Court which had rejected the contention that once a secured creditor has obtained an order from the Debts Recovery Tribunal (**"DRT"**), and a recovery certificate has been issued, it cannot file a winding up petition as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (**"RDDBFI"**) is a special law, which vests exclusive jurisdiction in the DRT. The contention that a secured creditor can file a winding up petition only on giving up its security was also rejected by the High Court.

ISSUES

Whether a secured creditor can file a winding up petition even after obtaining a decree from the DRT and a recovery certificate based thereon.

Whether a winding up petition can be filed by a secured creditor against a borrower even after obtaining decree from the DRT?

HELD

The Supreme Court of India maintained the exclusivity of the RDDBFI Act for recovery of debts and reaffirmed that the winding up process is not an alternate remedy for realization of debts due to a creditor. It held that a secured creditor can file a winding up petition against the borrower even after obtaining a decree from the DRT.

It upheld the High Court's view and observed that when it comes to a winding up proceeding under the Companies Act, 1956, since such a proceeding is not "for recovery of debts" due to banks, the bar contained in Section 18 read with Section 34 of the RDDBFI Act would not apply to winding up proceedings under the Companies Act, 1956.

It dismissed the contention that the winding up of a company shall be deemed to commence at the time of presentation of the petition for winding up, and that the stage at which a secured creditor has to give up security is at the stage of the filing of the winding up petition itself.

SWISS RIBBONS PRIVATE LIMITED & ANR. V. UNION OF INDIA

Date : 25.01.2019

Citation : Supreme Court of India in Writ Petition (Civil) No. 99 of 2018

SYNOPSIS

The IBC, judged by the generality of its provisions, passes constitutional muster. Resolution Professionals are only facilitators of the CIRP, and do not have quasi-judicial powers.

FACTS

A number of petitions were moved before the Supreme Court, inter alia contending that IBC was discriminatory and unfair to operational creditors as compared to financial creditors, and also assailing the constitutional validity of various provisions of the IBC.

ISSUES

A. Whether the IBC unfairly discriminates between operational creditors and financial creditors?
B. Whether section 29A is constitutionally valid?
C. Whether resolution professionals have quasi-judicial powers?

HELD

The Supreme Court by way of this judgment upheld the constitutionality of the IBC in its entirety. Emphasising that insolvency proceedings, by nature, are not adversarial to the corporate debtor:

A. The court found that the distinctions drawn between operational creditors and financial creditors were based on intelligible differentia, which had a direct relation to the objects sought to be achieved by the IBC. Therefore, it concluded that drawing such a distinction was neither discriminatory, nor arbitrary, and was therefore non-violative of Article 14, since "equality is only among equals, [and] no discrimination results if the court can be shown that there is an intelligible differentia which separates two kinds of creditors." Accordingly, it was held that there was no unfair discrimination between operational and financial creditors.
B. The court also upheld Section 29A in its entirety:
   i. With regards the retrospective operation of section 29A, the court held that no vested right had been taken away, as resolution applicants have no vested right to put forth resolution plans.
   ii. The court also found no merit in the argument that the ineligibility conditions set out in Section 29A treated unequals as equals, as the disqualifiers bring within their ambit a variety of persons, not based on any requirement to evidence malfeasance.
   iii. The court also made reference to RBI guidelines, that state that a person who is unable to service his own debt beyond the grace period provided by law is unfit and cannot be an eligible resolution applicant.
   iv. The court however, did read down the bar on 'related persons', to mean only persons who have a business connection with the resolution applicant, with an aim towards increasing the number of participants.
C. With regards the powers of the resolution professional, the court held that the resolution professional is only given administrative, rather than quasi-judicial powers. This is in stark contrast to the role of a liquidator, who is tasked with "determining" claims – an act that is quasi-judicial in nature, and may therefore be appealed against.

BRILLIANT ALLOYS PRIVATE LIMITED VS MR. S. RAJAGOPAL & ORS.

Date : 14.12.2018

Citation : Supreme Court of India in Special Leave to Appeal (C) No. 31557/2018

SYNOPSIS

"Regulation 30A has to be read subject to Section 12A of IBC, which does not impose the condition that withdrawal application has to be filed before the invitation of expression of interest."

FACTS

The case arose out of proceedings in NCLT. During the CIRP, the corporate debtor, financial creditor and the operational creditor entered into a settlement. Based on the settlement, the corporate debtor submitted application for withdrawal. Relying on Regulation 30A, the bench refused to permit withdrawal of application on the ground that Resolution Professional has already issued invitation of expression of interest.

ISSUES

Whether Regulation 30 A of the CIRP Regulations is directory or mandatory?

HELD

The Supreme Court set aside the order of NCLT and held that regulation 30A has to be read along with the main provision section 12A, which contains no such condition. Hence, the condition under regulation 30A can only be considered as directory in nature depending on the facts of each case.

"Regulation 30A has to be read subject to Section 12A of IBC, which does not impose the condition that withdrawal application has to be filed before the invitation of expression of interest."

JAIPUR METALS & ELECTRICALS EMPLOYEES ORGANIZATION V. JAIPUR METALS & ELECTRICALS LTD. AND ORS.

Date : 12.12.2018

Citation : Supreme Court of India in Civil Appeal No. 12023 of 2018

SYNOPSIS

"Winding up proceedings under the Sick Industrial Companies (Special Provisions) Act, 1985 (**"SICA"**) will continue in the High Court and not the NCLT, until an application for transfer to NCLT is filed by a party under Section 434(1)(c) of the Companies Act, 2013."

FACTS

The case related to winding up proceedings of the Company (Jaipur Metals and Electricals Ltd). The debt-ridden Company made an application in 1997 for restructuring before the Board for Industrial and Financial Reconstruction (BIFR) under SICA. In 2002, BIFR forwarded an opinion to the Rajasthan High Court that the Company ought to be wound up under Section 20 of SICA. Meanwhile, a workers' union filed for liquidation of the Company for realization of their dues.

In 2018, a financial creditor of the Company moved an application before NCLT under Section 7 of the IBC to initiate the insolvency resolution process. NCLT admitted the application, but the High Court stayed the admission. The High Court also refused to transfer the winding up proceedings pending before it to the NCLT. These High Court were challenged by the workers union in the Supreme Court of India.

ISSUES

Whether winding up proceedings under SICA would continue in the High Court and not NCLT.

HELD

The Supreme Court held that the omission of Rule 5(2) was due to the fact that SICA was repealed in 2016. Section 434 of Companies Act, 1956, when read with Rules 5 and 6 of the 2016 Transfer Rules had specifically refers to classes of cases that are to be transferred to NCLT. Since no specific reference was made to SICA proceedings, it cannot be held that they cannot continue in the High Court.

In the words of J. Nariman:
"The effect of the omission of Rule 5(2) is not to automatically transfer all cases under Section 20 of the SIC Act to the NCLT, as otherwise, a specific rule would have to be framed transferring such cases to the NCLT, as has been done in Rule 5(1). The real reason for omission of Rule 5(2) in the substituted Rule 5 is because it is necessary to state, only once, on the repeal of the SIC Act, that proceedings under Section 20 of the SIC Act shall continue to be dealt with by the High Court".

It was held that under the scheme of Section 434 (as amended) and Rule 5 of the 2016 Transfer Rules, all proceedings under Section 20 of SICA pending before the High Court are to continue as such until a party files an application before the High Court for transfer of such proceedings after 17.08.2018 (under Section 434(1)(c) of the Companies Act).

The Supreme Court did hold as unsustainable v the portion of the High Court order which set aside the NCLT order of admission of application under Section 7 IBC. The proceedings in NCLT by the financial creditor are independent proceedings and by virtue of Section 238 of IBC, they have overriding effect.

USHA HOLDINGS L.L.C & ORS. VS. FRANCORP ADVISORS PVT. LTD.

Date : 30.11.2018

Citation : NCLAT - Company Appeal (AT) (Insolvency) No. 44 of 2018

SYNOPSIS

The NCLT not being a Court or Tribunal & CIRP not being litigation, has no jurisdiction to decide whether a foreign decree is legal or illegal.

FACTS

This appeal lies from the order passed by the NCLT, New Delhi, which held that:

A. *In absence of a certified copy of a decree of any of the superior courts of any reciprocating territory, the said decree cannot be executed.*

B. *Foreign judgment is not conclusive where it has not been pronounced by a Court of competent jurisdiction and founded on an incorrect view of international law.*

C. *The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.*

ISSUES

Whether NCLT has jurisdiction to decide the legality of a foreign decree?

HELD

The NCLAT relying on the decision in *Binani Industries Ltd.*, held that the NCLT not being a 'Court' or 'Tribunal', and 'Insolvency Resolution Process' not being a litigation, means that the Adjudicating Authority has no jurisdiction to decide whether a foreign decree is legal or illegal.

Therefore, all findings reached by the NCLT with regard to the legality and propriety of the foreign decree in question, being without jurisdiction, were held to be a nullity in the eye of law.

BINANI INDUSTRIES V BANK OF BARODA

Date : 14.11.2018

Citation : Supreme Court of India in Company Appeal (AT) (Insolvency) No. 82 of 20

SYNOPSIS

The IBC is based on objective of maximization of value of the assets of the Corporate debtor and thereby for all its creditors. The IBC and the Regulations framed thereunder, do not prescribe differential treatment between similarly situated 'Operational Creditors' or the 'Financial Creditors' on one or other grounds. Thus, **any Resolution Plan discriminating against one or other Financial Creditor or the Operational Creditor, shall be against the provisions of the IBC.**

FACTS

The CoC by majority vote approved the Resolution Plan submitted by Rajputana Properties Private Limited. The approved plan allowed differential payments to the secured financial creditors, unsecured financial creditors, and the operational creditors. Consequently, the differential payments were objected to by the unsecured financial creditors and the operational creditors, including the respondents, Binani Industries Limited, a group company of Binani Cement Limited- (Corporate Debtor), Ultratech Cement Limited etc.

Additionally, 10.53% of the CoC who were forced to vote in favour of the resolution plan recorded protest note(s) alleging that they had not been dealt with equitably, as opposed to other 'Financial Creditors' who were corporate guarantee beneficiaries of the 'Corporate Debtor'.

It was also alleged that the Resolution Plan submitted by the 'Ultratech Cement Limited', including revised offer was not properly considered by the CoC or wrong reasons.

ISSUE

A. Whether the CoC discriminated between the eligible 'Resolution Applicants', while considering the resolution plan of Rajputana Properties Pvt. Ltd.?

B. Whether the Resolution Plan submitted by Rajputana Properties Pvt. Ltd. is discriminatory?

HELD

The Supreme Court re-affirmed that the insolvency process must seek to extract maximum value from resolution of stressed assets and ensure that interests of operational creditors (who are not part of CoC) are also well served.

A. It was held that the objective of the IBC is resolution and, maximization of the value of assets of the corporate debtor and thereby for ***all* the creditors**. It is not a process for selective maximization of value for an individual stakeholder, or a group of stakeholders. The maximization of the assets' value is essentially to promote entrepreneurship, making credit available, and balancing the interests of all the creditors/stakeholders.

   Therefore, once an insolvency application is filed, it cannot be withdrawn at a later date merely because the promoter of the financially stressed company has offered to pay all outstanding dues.

   Remarking that while approval of the NCLT is not a mere requirement/ formality, NCLT is not permitted to alter the terms of the plan approved by the CoC.

   The ultimate authority to approve/reject a plan vests with it the NCLT only wile considering: (i) whether the plan complies with the requirements of Section 30(2)? (ii) Whether the plan is fair and equitable or there is any unjust discrimination not envisaged in law? and (iii) Whether the plan adheres to the object of the IBC i.e. maximizes the value of assets and balances the interests of all the stakeholders? Observing the objectives of the code relied upon the report of the Bankruptcy Law Reform Committee, the Supreme Court held that;

   i. The liabilities of all creditors who are not part of the CoC must also be met in the resolution,
   ii. The financial creditors can modify the terms of the existing liabilities, while other creditors cannot take the risk of postponing payment for better future prospectus,
   iii. A creditor cannot maximise its own interests in view of the moratorium,
   iv. If one type of credit is given preferential treatment, the other types of credit will disappear from market, which will be against the objective of promoting the availability of credit,
   v. The dues of operational creditors must get at least similar treatment as compared to the due of the financial creditors.

   The Court also remarked that a resolution plan is for insolvency resolution of the corporate debtor as a "going concern", which can take any shape and form as per the wishes of the stakeholders (CoC) – and as long as the resolution plan was valid, it did not matter if it was discriminatory.

B. The resolution plan proposed by Rajputana Properties Pvt. Ltd. was found to have clearly discriminated against some of the financial creditors who were all equally situated. Further, the plan did not balance the interests of other stakeholders, such as operational creditors. Therefore, the NCLAT held that the resolution plan submitted by Rajputana Properties Private Limited was discriminatory, and could not be accepted.

TRANSMISSION CORPORATION OF ANDHRA PRADESH LIMITED VS EQUIPMENT CONDUCTORS AND CABLES LIMITED

Date : 23.10.2018

Citation : Supreme Court of India in Civil Appeal No. 9597 of 2018

SYNOPSIS

Whenever there is existence of real dispute, the IBC provisions cannot be invoked.

FACTS

The Appellant had awarded contracts in relation to supply of goods and services to the Respondent. A dispute arose in the course of the contract, and the matter was referred to

arbitration, whereupon it was held that the claims on certain invoices were barred by limitation, but claims on other invoices were decided in favour of the Respondent.

After a series of appeals to the High Court, the Respondent filed execution petitions for the execution of judgments rendered by the High Court, as well as the arbitral award.

The Respondent also filed a petition under section 9 of the IBC before the NCLT, which dismissed the petition. Thereafter, an appeal was filed before NCLAT, which observed that a prima facie case has been made out by the petitioner, and stated that if the appeal were allowed and CIRP be initiated against the Appellant, it "may face trouble."

While posting the case for admission, the NCLAT also stated: "Therefore, by way of last chance we grant one opportunity to respondents to settle the claim with the appellant, failing which this Appellate Tribunal may pass appropriate order on merit."

ISSUES

Whether recourse to IBC is maintainable if existence of debt is disputed?

HELD

It was found by the Supreme Court that the NCLAT had, without discussing the merits of the case, and also without stating how the amount was payable, essentially threatened the Appellants.

Relying on its own decision in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited* the Court held that while examining an application under Section 9 of the Act, the NCLT has to determine (i) Whether there is an "operational debt" as defined exceeding Rs 1 lakh;

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid; and (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute. With these observations the NCLAT order was set aside.

B.K. EDUCATIONAL SERVICES PRIVATE LIMITED V. PARAG GUPTA AND ASSOCIATES

Date : 11.10.2018

Citation : Supreme Court of India in Civil Appeal No. 23988 of 2017

SYNOPSIS

Section 238A of the IBC must be read retrospectively. Section 433 of the Companies Act, 2013 applies to the Tribunal even when it decides applications under sections 7 and 9 of the IBC.

FACTS

Numerous appeals concerning Section 238A of the IBC were clubbed, where the NCLAT had held that Limitation Act will not be applicable for applications for initiation of CIRP, since Section 238A, which introduced the explicit applicability of the Limitation Act, was only added via an amendment in 2018.

The NCLAT also held that the Doctrine of Limitation and Prescription is necessary to be looked into for determining whether an application made u/s 7 and/or 9 of the IBC.

This was regarding the applications filed between 01.12.2016 till 06.06.2018, after which the proviso regarding Limitation was added in the code via amendment.

ISSUES

Whether the Limitation Act applies in respect of applications made under Section 7 and/or Section 9 of IBC from its commencement on December 1, 2016 till June 6, 2018 i.e. the date on which the Amendment Act came into force?

HELD

The Supreme Court while interpreting Section 238A of the IBC, held that provisions of the Limitation Act, 1963 are applicable to applications filed by financial and operational creditors under Sections 7 and 9 of the IBC from the "inception of the Code". It also stated that Act has been applicable to applications

filed under Sections 7 and 9 of the IBC from the code's inception.

The NCLAT had proceeded with the incorrect understanding that even under the shorter limitation period, as provided under Article 137 of the 1963 Act, since three years have not elapsed since the commencement of the IBC, all these applications, in any event, could be said to be within time.

The appellants argued that the object of the Amendment Act which introduced Section 238A into the IBC was to clarify the law and, thus, Section 238A must be held to be retrospective. Further, since the law of limitation belongs to the domain of procedure, it must be held to apply retrospectively in any case.

The Supreme Court held that "the right to sue", accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, a Section 5 application (condonation of delay) is filed.

It stated, *"The Code cannot be triggered in the year 2017 for a debt which was time-barred, say, in 1990, as that would lead to the absurd and extreme consequence of the Code being triggered by a stale or dead claim…."*

The Bench therefore remanded the cases to the NCLAT to decide the appeals afresh in the light of this judgment. As for Section 238A, the Court said that it should be applied retrospectively, "otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not being governed by the law of limitation."

The Court also held that Section 433 Companies Act would in any case be applicable to the tribunal when it decides applications u/s 7 & 9 of the IBC, and therefore the Limitation Act would have applied regardless. In this sense the court stated that the said amendment was unnecessary.

K. KISHAN VS. M/S VIJAY NIRMAN COMPANY PVT. LTD.

Date : 14.08.2018

Citation : Supreme Court of India in Civil Appeal No. 21824 of 2017

SYNOPSIS

"Dispute" under section 9 of the IBC would include within its scope a challenge to an arbitral award under section 34 of the Arbitration and Conciliation Act, 1996.

FACTS

NCLT had admitted a Section 9 (IBC) petition while observing that pendency of Section 34 petition was irrelevant for the reason that the claim stood admitted, and there was no stay of the award.

NCLAT upheld the NCLT view, observing that the non-obstante clause contained in Section 238 of the IBC would override the Arbitration Act. It also held that since Form V of Part 5 of the IBC Rules requires particulars of an order of an arbitral panel adjudicating on the default, the same would have to be treated as "a record of an operational debt", as a result of which the petition would have to be admitted.

ISSUES

Whether CIRP could be put into operation when there is a pending proceeding challenging against an arbitral award?

HELD

Allowing the appeal, the Supreme Court held that the pendency of a petition under Section 34 of the Arbitration Act constitutes a 'dispute' under the IBC.

Thus, the IBC cannot be invoked to initiate the CIRP in respect of an operational debt where an Arbitral Award has been passed against the operational debtor, even if it has not yet been finally adjudicated upon due to a challenge under Section 34 of the Arbitration Act.

The court held that the challenging of an arbitral award by way of a Section 34 petition under the Arbitration Act proves that there is a "pre-existing ongoing dispute" which exists between the parties, and continues till the

final conclusion of adjudicatory process under Sections 34 and 37 of the Arbitration Act.

Since the prime consideration for the NCLT at the time of admission, with regards the operational debt is whether the said debt can be said to be disputed, the existence of such a challenge would be a clear bar on the initiation of the CIRP.

The Supreme court reiterated from its landmark judgment *Mobilox Innovations Private Limited v. Kirusa Software Private Limited*, that the insolvency process, particularly in relation to operational creditors, cannot be used to bypass the adjudicatory and enforcement process of a debt contained in other statutes. Meaning thereby, that the operational creditor cannot use the IBC either prematurely or for extraneous considerations or as a substitute for debt enforcement procedure. It was also reiterated that the dispute between the two parties need not be a *bona fide* one.

The bench laid down that where a Section 34 petition challenging an arbitral award may clearly and unequivocally be barred by limitation, in which case, it can be demonstrated to the Court that the period of 90 days plus the discretionary period of 30 days has expired, after which either no petition under Section 34 has been filed (or a belated petition under Section 34 has been filed). It is only in such clear cases that the insolvency process may then be allowed to be put into operation.

In cases where a Section 34 petition may have been instituted in the wrong court, as a result of which the petitioner may claim the application of Section 14 of the Limitation Act to get over the bar of limitation laid down in Section 34(3) of the Arbitration Act, the insolvency process cannot be put into operation without an adjudication on the applicability of Section 14 of the Limitation Act.

Finally, the Supreme Court held that section 238 of the IBC would only apply in case there is an inconsistency between the IBC and the Arbitration Act. In the present case there was no such inconsistency, rather, the Award passed under the Arbitration Act together with the steps taken for its challenge would only make it clear that the operational debt, in the present case, happened to be a disputed one.

STATE BANK OF INDIA V. V. RAMAKRISHNAN AND ORS.

Date : 14.08.2018

Citation : Supreme Court of India in Civil Appeal Nos. 3595 and 4553 of 2018

SYNOPSIS

The period of moratorium under Section 14 of the IBC does not apply to the personal guarantors of a corporate debtor.

FACTS

The respondent-guarantor, a managing director of the Corporate Debtor, signed a personal guarantee in favor of State Bank of India, with respect to certain credit facilities availed from it by the corporate debtor.

Upon the corporate debtor's failure to repay its debt in time, the bank initiated proceedings under The Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (**"SARFAESI Act"**).

Subsequently, the corporate debtor initiated CIRP against itself, by way of an application u/s 10 of the IBC before the NCLT. Admitting the application, NCLT passed an order of Moratorium under section 14 of the IBC.

During the pendency of the CIRP, an interim application was also filed by the respondent-guarantor, wherein it was argued that provisions of Section 14 of IBC would also apply to the personal guarantors of a corporate debtor, and therefore, any proceedings against him and his property would have to be stayed. NCLT, allowing the application filed by the respondent-guarantor, restrained SBI from moving against him until the period of moratorium was over. This view was then upheld by NCLAT, whereupon State Bank of India challenged the matter before the Supreme Court of India.

In the meantime, the IBC (Amendment) Ordinance, 2018 was promulgated, which specifically laid this question to rest. However, the respondents argued that it did not have any bearing on the case, due to it not having retrospective effect.

ISSUES

Whether Section 14 of IBC, applies to the Personal Guarantor of a Corporate Debtor?

HELD

Section 14 did not make any reference to personal guarantors, and it was only the corporate debtor, which was referred to therein. In such a scenario, a plain reading of Section 14 would lead to the conclusion that the period of moratorium would have no application to the personal guarantors of a corporate debtor.

The Supreme Court concluded that in a contract of guarantee, the liability of surety and that of principal debtor is coextensive and hence, the creditor can proceed against assets of either the principal debtor, or the surety, or both, in no particular sequence.

The Court noted that SBI had placed heavy reliance on the substitution of Section 14(3) by way of the IBC (Amendment) Ordinance, 2018, wherein it states that provisions of moratorium shall not apply to a surety in a contract of guarantee for corporate debtor. In this regard, it observed that the amendment was clarificatory in nature and therefore, could be retrospective in its operation.

In stating that the Ordinance was clarificatory in nature, the Court relied upon the Report dated 26 March 2018 prepared by the Insolvency Law Committee. The Committee had suggested that the intention of Section 14 was not to bar actions against assets of guarantors to the debts of the corporate debtors and had consequently, recommended that an explanation to clarify this may be inserted in Section 14 of the IBC.

Hence, as the provisions of section 96 and 101 have not been brought into force, upon a plain reading of section 14, and the amended section 14(3)'s retrospective effect, it was held that the personal guarantor is not entitled to moratorium period under the IBC.

PR. COMMISSIONER OF INCOME TAX VS. MONNET ISPAT AND ENERGY LTD.

Date : 10.08.2018

Citation : Supreme Court of India in SLP No. 6483 of 2018

SYNOPSIS

"Given Section 238 of the IBC, it is obvious that the IBC will override anything inconsistent contained in any other enactment, including the Income Tax Act." Income-tax dues, being in the nature of Crown debts, do not take precedence over secured creditors, who are private persons.

FACTS

The NCLT had admitted an application under section 7 of the IBC against Monnet Ispat and Energy Ltd. A challenge to the applicability of the moratorium order was brought forth by Principal Commissioner of Income Tax-6 as regards the proceedings of the Income Tax Appellate Tribunal (**"ITAT"**) against the corporate debtor. This question was answered by the Delhi High Court holding that the moratorium period under Section 14 of the IBC announced by the National Company Law Tribunal would also apply to the order of the Income Tax Appellate Tribunal in respect of the tax liability of the assessee.

The HC reasoned through reliance on the judgment of the Supreme Court in *M/s Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407, wherein it was observed that Section 238 of the IBC unambiguously provides that the IBC will apply, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Section 14(1)(a) of the IBC states that on the 'Insolvency Commencement Date', the adjudicatory authority shall by order declare moratorium for prohibiting "the institution of suits or continuation of pending suits or proceeding against the corporate debtor including execution of any judgment, degree or order in any court of law, tribunal, arbitration panel or other authority".

Therefore, the HC concluded that the execution of the order given by the ITAT in respect of the tax liability will be stayed until the approval of the resolution plan. This was appealed through an SLP before the Supreme Court.

ISSUE

Whether the moratorium period under Section 14 of the IBC would also apply to the order of the Income Tax Appellate Tribunal in respect of the tax liability of the assessee?

HELD

Upholding the order of the Delhi High Court, the Supreme Court held that in view of Section 238 of IBC, the provisions therein will override anything inconsistent contained in any other enactment, including Income-Tax Act. The Supreme Court unequivocally reaffirmed that section 238 of the IBC overrides any statute inconsistent with it, including the Income Tax Act, 1961. Therefore, it would appear that having a first charge (under another statute) may become immaterial if a company enters the ambit of insolvency under IBC.

The court relied on *Dena Bank vs Bhikhabhai Prabhudas Parekh and Co & Ors* (2000) 5 SCC 694, making it clear that income-tax dues are in the nature of Crown debts, and therefore do not take precedence over secured creditors.

CHITRA SHARMA & ORS. V. UNION OF INDIA & ORS

Date : 09.08.2018

Citation : Supreme Court of India in Writ Petition (Civil) No. 744 of 2017

SYNOPSIS

Jaiprakash Associates Limited, being a related party, and the holding company of the corporate debtor, was ineligible to be a resolution applicant.

FACTS

After the petition for initiating CIRP against Jaypee Infratech Limited (JIL) was admitted by the NCLT.

During the pendency of the application, several writ petitions were filed in the Supreme Court by the homebuyers, concerning the projects of JIL. As these events occurred before the notification of the IBC (Amendment) Ordinance, 2018, which explicitly recognized homebuyers as being within the purview of financial creditors, the IRP was permitted to take over the management of JIL, and was tasked with protecting the interests of the home buyers during CIRP, since the homebuyers did not have a representative in the CoC of JIL.

The Supreme Court also directed Jaiprakash Associates Limited (JAL), being the holding company of JIL, to deposit a sum of Rs. 2000 crores to secure the interests of home buyers. Following this, after the expiry of the 270 days from initiation of CIRP, the Amendment Ordinance was notified.

JAL made a representation before the Supreme Court, claiming that the liquidation of JIL was not in the interest of homebuyers, and that JAL/JIL should be allowed to complete the housing projects in a time-bound manner, which could be supervised by a Court appointed committee, and expressing its desire to propose a resolution plan.

Following this, the bid submitted by JAL was found to be ineligible under Section 29A of the IBC, and was not opened. Subsequently, no resolution plan was approved by the CoC within the CIRP period of 270 days, from whence this appeal lies.

ISSUES

Whether JAL was barred from being a resolution applicant under section 29A of the IBC?

HELD

Noting that accepting the proposal submitted on behalf of JAL would cause serious prejudice to the discipline of the IBC, the Supreme Court held that JAL stood disqualified under Section 29A of the IBC under sub-clauses (c) and (g), as it has an account which has been classified as a non-performing asset for a period of over one year from the date of commencement of the CIRP of JIL, and also because it was a person who had been a promoter or in the management or control

of the corporate debtor, who has engaged in a fraudulent transaction. Bearing in mind Parliament had enacted section 29A in the larger public interest, and to rectify a loophole in the Act which would otherwise allow a back-door entry to the erstwhile management of the corporate debtor in the CIRP, the Court held that there was a bar on the promoters of JAL/ JIL participating in the resolution process.

The Court also expressed serious doubts as to the credentials of JAL, which may have diverted funds from JIL towards its other businesses, in addition to finding that JAL did not have the financial capacity to complete the unfinished projects, as the Reserve Bank of India was seeking to initiate insolvency proceedings against JAL itself.In view of these conclusion, the Supreme Court held that JAL could not submit a resolution plan for the consideration of the CoC.

The Court further issued directions for the re-recommencement of the CIRP from the stage of appointment of IRP of JIL, in exercise of its powers under Article 142 of the Constitution of India, thereby renewing the CIRP period of JIL.

SHAH BROS ISPAT PVT. LTD V. P. MOHANRAJ & ORS.

Date : 31.07.2018

Citation : NCLAT - Company Appeal (AT)(Insolvency) No. 306 of 2018

SYNOPSIS

Criminal proceedings before a court of competent jurisdiction do not interfere with moratorium imposed under section 14 of the IBC.

FACTS

The Appellant had filed a company petition against the corporate debtor, for non-payment of debt by the Respondents. NCLT admitted the Company Petition, and appointed the Interim Resolution Professional, while declaring the moratorium period. Before the commencement of the CIRP, the Appellant had filed a case under section 138 of the Negotiable Instruments Act against the Corporate Debtor.

The Respondents petitioned the NCLT, which by its order dated May 24, 2018, held that the Appellant had filed proceedings against Corporate Debtor in spite of the order of moratorium dated June 6, 2017. Further, the Appellant was directed to withdraw the aforesaid complaints forthwith, failing which appropriate order would be passed for violation of the moratorium. This appeal lies from said NCLT order.

ISSUES

Whether the order of moratorium also applies to a criminal proceeding under section 138 of the Negotiable Instruments Act?

HELD

The NCLAT held that proceedings under section 138 of the Negotiable Instruments Act would not fall within the purview of Section 14 of the IBC, as such proceedings are penal in nature, empowering a Court of competent jurisdiction to pass order of imprisonment or fine, which cannot be held to be under the category of a proceeding, judgment or decree of money claim.

It was further concluded that neither the imposition of a fine cannot be held to be a money claim or recovery against the corporate debtor, nor an order of imprisonment, if passed by the court of competent jurisdiction on the directors, could come within the purview of Section 14 of the IBC. Therefore, it concluded that *"In fact no criminal proceeding is covered under Section 14."*

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SANDEEP KUMAR GUPTA RESOLUTION PROFESSIONAL V. STEWARTS & LLOYDS OF INDIA LTD. & ANR.

Date : 28.02.2018

Citation : NCLAT - Company Appeal (AT) (Insolvency) No.263 of 2017

SYNOPSIS

NCLT is within its jurisdiction to engage another person as Resolution Professional or Liquidator, if it is dissatisfied with the performance of the current one.

FACTS

Two appeals have been preferred by the Appellant, the Resolution Professional, against orders passed by the NCLT, deciding not to appoint the Resolution Professional as Liquidator, as he had failed to take appropriate steps for completing the Resolution Plan, and instead appointing another individual as Liquidator.

ISSUES

Whether the Adjudicating Authority can engage another resolution professional or liquidator in place of the existing resolution professional/liquidator if his/her performance is not satisfactory?

HELD

The NCLAT ruled that although the resolution professional's performance did not amount to misconduct, since the NCLT was not satisfied with the performance of the Resolution Professional, it was well within its jurisdiction to engage another person as Resolution Professional or Liquidator.

LABOUR LAWS

GENERAL

SUSHILABEN INDRAVADAN GANDHI & ANOTHER V THE NEW INDIA ASSURANCE COMPANY LIMITED AND OTHERS

Date : 15.04.2020

Citation : Civil Appeal No. 2235 of 2020

SYNOPSIS

The test to determine the nature of a contract (contract of service or contract for service) is not universal, and courts must interpret the terms of the contract in the context of the facts of the case to determine the nature of the contract.

FACTS

The Appellant's deceased husband, a surgeon, had entered into a contract for services with an eye clinic. While travelling with other medical staff in a mini-bus owned by the clinic, the driver of the mini-bus lost control, causing the accident that which led to the death of the Appellant's husband.

Before the accident, the clinic had availed a comprehensive car policy from the Respondent. The policy stated that it covered the insured, but not the employees of the clinic. The clinic paid an additional premium for an endorsement under which the Respondent would pay compensation for any unnamed passengers other than the insured and/or his paid driver attendant or cleaner and/or a person in the employ of the insured coming within the scope of the Workman Compensation Act, 1923 and engaged in and upon the service of the insured at the time of injury. Thus, even under such endorsement, employees of the clinic were excluded from the Policy.

The Appellants filed a petition before the Motor Accidents Claims Tribunal ("Tribunal") against the driver, the clinic, and the Respondent ("Insurer"), claiming compensation of INR 1 crore for the death of the Appellant's husband. The Respondent opposed the petition claiming that the deceased was an employee of the clinic, and thus, as per the policy, the Respondent were not liable. The Tribunal allowing the petition, held that the Contract was a 'contract for service'. Hence, the deceased was not in the employment of the Clinic at the time of the accident. The Tribunal held all three Respondents jointly and severally liable to pay compensation to the Appellants.

However, the Gujarat High Court overruled the Tribunal's decision and held that there was 'contract of service'. Therefore, the Respondent was liable to pay only to the extent of Rs. 50,000/- and the rest would have to be borne by the driver and the clinic.

ISSUES

Whether the Appellant's husband was an employee of the clinic, or an independent professional giving service on contract?

HELD

The Supreme Court identified the issue of insurance liability to be one hinging around a question of labour law: what determines if a contract is a 'contract *for* service' or 'contract *of* service'?

Holding that no one test of universal application can ever yield the correct result, the court examined various tests to determine the employer-employee relationship, ultimately going beyond the conventional control test, and looking also, at the increasing prevalence of independent professionals being contracted by employers for providing services.

The Supreme Court held that a conglomerate of all the applicable tests, based on all the facts of the case should be used , particularly in complex/hybrid situations. Court opined that the courts can only perform a balancing act by weighing all the relevant factors to arrive at the correct conclusion on the facts of each case.

It highlighted the importance of the "context" in which a finding on the nature of the contract is made, and it was observed that where the context involved a welfare/beneficial legislation, applied to weaker sections of society, the balance would tilt in favour of

declaring the contract to be one of service. Whereas, where the context was not of a beneficial legislation or only in the realm of contract, and the context of that legislation or contract is pointing towards a contract for service, and other things being equal, the context would tilt in favour of the contract being construed as one for service.

To determine if a contract is 'contract of service' or a 'contract for service' the test should be one that considers a series of factors: the 'control test' should not only be restricted to the sense of controlling the kind of work that is given, but also to the manner in which it is to be done – and this test breaks down when it comes to professionals who may be employed.

Another important test is whether a person employed is integrated into the employer's business or is a mere accessory thereof Taking inspiration from English judgments, the court remarked that the 'three-tier test', which inquires *whether a wage or other remuneration is paid by the employer, and whether there is a sufficient degree of control by the employer*, among other factors, is a test that would be elastic enough to apply to a large variety of cases.

Another important test when it comes to work to be performed by independent contractors as against piece-rated labourers, is of *who owns the assets* with which the work is to be done, and/or who ultimately makes a profit or a loss so that one may determine whether a business is being run for the employer or for oneself.

In the US, the test of whether the employer has economic control over the workers' subsistence, skill and continued employment (the 'economic reality test') is applied when it comes to the question of whether a particular worker works for himself or for his employer.

Thus, the Court, after it analysis, held that the factors to make the contract in question a 'contract for service' far outweighed the factors pointing otherwise. Applying the economic reality test and looking at the terms of the contract, it was held that the Contract is determined as one between the Clinic and an independent professional, hence it is a contract *for* service.

On the liability clause in the Policy which exempted the liability of Insurer in cases of death of a person in a motor accident where such death or injury arises out of and in the course of the employment by the insured, the Supreme Court relied on the principle of contra proferentum, which states that an ambiguous contract be interpreted against the party who has drafted the contract.

While citing a litany of judgments relying on this principle, the Court, held that in this case, the expression "employment" should not be construed widely so to include any person who is not a regular employee. The words 'in the course of' would include only a person regularly employed by the employer, and thus the deceased could not be considered as being in the employment of the clinic. Thus, the Court, restored the order passed by the Motor Accidents Claims Tribunal and set aside the order of the High Court.

THYSSEN KRUPP INDUSTRIES INDIA PRIVATE LIMITED V SURESH MARUTI CHOUGULE

Date : 21.08.2019

Citation : Supreme Court [Civil Appeal No. 6586 of 2019]

SYNOPSIS

The question of whether advocates may appear before a labour court/tribunal was referred to a larger bench. On the specific facts of the case, both parties were allowed to be represented by advocates, which is generally not permitted in labour courts/tribunal.

FACTS

The writ petition challenges the constitutional validity of Section 36(4) of the Industrial Disputes Act, 1947 (ID Act), and he civil appeal was filed against an order of the Labour Court dismissing the application filed by the Appellant seeking permission to engage an advocate.

ISSUE
Whether lawyers can appear before labour court as a matter of right? OR Whether the parties to an Industrial dispute can be represented by advocates/lawyers in labour courts/industrial tribunals?

HELD
The Supreme Court, after hearing the parties, came to the conclusion that these matters require consideration by a larger bench.
However, It was submitted that the reference before the Labour Court had been pending since 2009, and had yet to be decided.

Therefore, ON THE BASIS OF SPECIFIC FACTS, especially the management's decision to bear the cost of the workmen's advocates, the workmen were given the liberty to engage an advocate, whose fee of would be paid by the Management.

The Appellant-management was also permitted to be represented by an Advocate. As this direction was given in view of the complaint of the workman that he is suffering due to the delay, it was deemed that the workmen had no objection to the Appellant engaging an advocate. Accordingly, the Labour Court was directed to proceed expeditiously and decide the matter within a period of six months.

CHIEF REGIONAL MANAGER, UNITED INDIA INSURANCE COMPANY LIMITED V SIRAJ UDDIN KHAN

Date : 11.07.2019

Citation : Civil Appeal No. 5390 of 2019

SYNOPSIS
No individual can claim wages for the period that he/she remained absent without leave or justification.

FACTS
The Respondent was relieved from the Allahabad branch of the Appellant, to join the Jaunpur branch. However, the Respondent did not join the Jaunpur branch on the assigned date and was unauthorizedly absent from work for four months. A disciplinary enquiry was conducted against the Respondent, following which a a reduction of basic pay by two steps was ordered in May 2009.

The Respondent continued to be absent from work until for several more years, and in June 2012, the Appellant passed an order terminating the services of the Respondent. The Respondent preferred a series of writ petitions before the High Court of Allahabad against the above-mentioned orders, which were quashed by the High Court citing procedural lapses in the disciplinary enquiry, and also in that the Appellant was not directed to provide back wages to the Respondent from 2009-2012.

Upon refusal of the Appellant to pay back wages from 2009 - 2012, the Respondent filed another writ petition before the High Court. The High Court directed the Appellant to pay salary for the period 2009 - 2012, along with 18% interest. The Appellant preferred the present appeal before the Supreme Court (SC) against this order of the High Court of Allahabad.

The challenge in the present case came from the Appellant's claim that since the Respondent was absent from work during the period, he was clearly not entitled for payment of salary on the principle of "No Work No Pay"

ISSUES
Whether an employee, who had voluntarily absented himself from employment was entitled to back-wages?

HELD
The Supreme Court held that the setting aside of a termination order does not automatically entitle the Respondent to the salary for the period 2009 - 2012.

The court differentiated the present case from the classic situation where an employee was dismissed from service, and when such dismissal was set aside, he would automatically be entitled for back wages. The court noted that since the Respondent was not kept away from the work on account of dismissal, or by any order of the Appellant, the

Respondent could not claim arrears of wages. It was reiterated that the principle of 'no work no pay' applies only in instances where the employee has voluntarily absented himself from work, and not where the employer has restrained the employee from attending work. Therefore, setting aside the order of the High Court, the Supreme Court partly allowed the appeal, and directed the Appellant to consider the claim of back wages of the Respondent and pass appropriate orders with reasons.

PANKAJ PRAKASH V UNITED INDIA INSURANCE COMPANY LIMITED AND ANOTHER

Date : 10.07.2019

Citation : Supreme Court [Civil Appeal No. 5340-5341 of 2019]

SYNOPSIS

All public servants are entitled to know their grades in an annual performance appraisal report (APAR)

FACTS

Appellant was aggrieved by the fact that the entries in his APAR for two years were not disclosed, due to which he was unable to submit a representation for promotion at the particular time.

The Appellant filled a writ petition before the High Court of Allahabad against such action of the employer. The High Court held that in the absence of an adverse entry or an entry below the benchmark, the failure to communicate the grade in an APAR did not result in an actionable grievance. The Appellant preferred an appeal against this judgment of the High Court of Allahabad.

ISSUES

Whether non-communication of annual performance appraisal report grades is an actionable grievance?

HELD

The Supreme Court disagreed with the reasoning given by the High Court of Allahabad and held that non-communication of the entries in an APAR, whether good or bad grades, is a matter in respect of which a legitimate grievance can be made by the Appellant. It is mandatory that every entry in the APAR of a public servant must be communicated to him/her within a reasonable period.

Apart from ensuring transparency in the system, such disclosures also ensure that a public servant is given reasonable opportunity to make representations against the gradings if he / she is dissatisfied with the results.

Accordingly, the SC directed the Appellant to communicate the details of the APAR to the Respondent within a period of one month from the date of receipt of this order.

DR POOJA JIGNESH DOSHI V THE STATE OF MAHARASHTRA AND ANOTHER

Date : 03.07.2019

Citation : Writ Petition No. 1665 of 2015

SYNOPSIS

Surrogate parents are entitled to Maternity and Paternity Leave.

FACTS

The matter in this case took place prior to the introduction of an explicit provision in the Maternity Benefit Act,1961, (effective from 1 April 2017), providing that even a commissioning mother (i.e. a biological mother who uses her egg to create an embryo implanted in any other woman) shall be entitled to a paid maternity leave of 12 weeks from the date the child is handed over to the commissioning mother.

The petitioner along with her husband, had opted for a child born through surrogacy. With reference to the expected date of delivery, the Petitioner sought maternity leave to take care of the surrogate child. The application for maternity leave was denied on the basis of the Leave Rules and policy governing the Rules, which did not permit maternity leave for a surrogate child.

The petitioner challenged the said denial by way of the present petition

ISSUE

Whether surrogate mother is entitled to maternity leave, under the Maternity Benefit Act, 1961?

HELD

The high Court of Bombay (Court) reiterated the law laid down by the division bench of the Court in *Dr Mrs Hema Vijay Menon v. State of Maharashtra*, where it had held that that *"even in case of birth of a child by surrogacy, the parents who have lent the ova and sperm, would be entitled to maternity and paternity leave, respectively."*

Referring to its earlier decision, the Court held that a woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy.

Further holding that any interpretation of the term 'mother', would have to include a commissioning mother or a mother securing a child through surrogacy, as any other interpretation would result in frustrating the object of providing maternity leave to a mother, who has begotten the child.
The Court thus ordered that the Petitioner be granted maternity leave.

ANSHU RANI V STATE OF U.P.

Date : 19.04.2019

Citation : Allahabad High Court [Writ-A No. -3486 of 2019]

SYNOPSIS

Women employees are entitled to maternity leave of 6 months, irrespective of nature of employment.

FACTS

The Petitioner, an instructor in the education department of the state, prayed for the District Basic Education Officer be directed to grant her maternity leave with honorarium.

The Respondent authority had only granted the Petitioner a maternity leave for 90 days, instead of 180 days, from whence this petition lies. The Respondent averred that maternity leave was rightly granted only for a period of 90 days in view of various Government Orders, but the Petitioner contended that she was entitled to the benefit under the provisions contained in the Maternity Benefit Act, 1961. as has been amended by Maternity Benefit (Amendment) Act, 2017 and in view of the amendment any order contrary to the same is liable to be ignored.

ISSUES

Whether a contractual employee/honorarium employee is entitled to maternity leave?

HELD

The Allahabad High Court (Court) allowed the petition, while directing the Respondent authority through a mandamus, to grant 180 days of maternity leave with honorarium. The Court opined that maternity leave is a social insurance given for maternal and child health and family support.

Examining a number of cases, including the Division Bench judgment of the Allahabad High Court in *Dr. Rachna Chaurasiya Vs. State of U.P. and others*, wherein it had directed the State Government to grant maternity leave to all female with full pay of 180 days, irrespective of nature of employment, i.e., permanent, temporary/ad hoc or contractual basis. The Court also highlighted that the purpose of maternity leave does not change with the nature of employment.

The Court also stated that the Maternity Benefit Act, 1961 had been created by Parliament in consonance with the provisions of Article 42, , which specifically speaks of "just and humane conditions of work" and "maternity relief". Accordingly, it was stated that the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is still available for determining the legal efficacy of the action complained of.

Upon a perusal of different provisions of the Maternity Benefit Act, and noting that the Central Act had been adopted by the state of U.P., the Court concluded that all female employees of the State of U.P. are entitled

for the benefits of the maternity leave as contained in the Maternity Benefit Act, 1961 as amended by the Maternity Benefit (Amendment) Act, 2017.

REGIONAL PROVIDENT FUND COMMISSIONER (II) WEST BENGAL V VIVEKANANDA VIDYAMANDIR AND OTHERS

Date : 28.02.2019

Citation : Supreme Court [Civil Appeal No(s). 6221 of 2011]

SYNOPSIS

Allowances which are universally, necessarily and ordinarily paid to employees across the board would be considered as part of 'basic wages' ("Basic Wages") under the EPF Act, on which PF contribution has to be calculated.

FACTS

Multiple appeals were made to the Supreme Court from the decision of the Appellate Authority under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (**"EPF Act"**), on the question of the scope of the expression 'basic wages', for computing contributions towards the provident fund.

ISSUES

Whether special allowances paid by an establishment to its employees falls within the ambit of 'basic wages' under section 2(b)(ii) read with section 6 of the EPF Act,, for the computation of deductions towards provident fund contributions?

HELD

The Supreme Court first considered the definition of 'basic wages' under section 2(b)(ii) and section 6 of the EPF Act, and observed that 'basic wage' has been defined as *"all emoluments paid in cash to an employee in accordance with the employment contract"*. The court noted some exceptions which would not be included within the definition of 'basic wage', such as dearness allowances, among others. However, in terms of section 6, dearness allowance is to be included for determining the provident fund contribution.

It was held that in the determination of whether any payment is to be excluded from 'basic wages' or not, it is necessary that such payment have "direct access and linkage to the payment of a special allowance" as not being commonly paid to all employees.

Reaffirming the principles laid down by the Supreme Court in the landmark decision of *Bridge and Roof Co. (India) Limited vs. Union of India*, holding that allowances which are universally, necessarily and ordinarily paid to employees across the board would be considered as part of 'basic wages' under the EPF Act – and it is upon those that PF contributions are to be calculated.

It was reiterated and observed that the test for determining whether any payment would form part of 'basic wages' was of *universality* – and whether such payment was given to all employees or was variable or performance/incentive based. Any payments that may vary from individual to individual according to their efficiency and diligence would thus be excluded from the term 'basic wages'.

In reference to the facts of the appeals, the Court observed that the various establishments had failed to provide any evidence to show that the allowances under contention were variable, or linked to any incentive for production resulting in greater output by an employee. No evidence was adduced to show that the allowances in question were not paid across the board to all employees in a particular category or were being paid essentially to those who avail the opportunity. It was further stated that for an amount to go beyond the basic wages, it has to be shown that the concerned employees had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in.

Thus, the Court concluded that it would not be possible to ascertain whether the extra amounts paid to employees was in fact for extra work which had exceeded the normal output prescribed for, and expected of the employees. Noting that the EPF Act was a beneficial social welfare legislation, and that it must be interpreted as such, the Court

upheld the factual findings of the provident fund authorities that the allowances in question were essentially a part of the basic wages, which were camouflaged as part of an allowance merely to avoid having the said allowances being included for the determining and deducting the provident fund contributions.

MANAGEMENT OF THE BARARA COOPERATIVE MARKETING CUM-PROCESSING SOCIETY LTD. V WORKMAN PRATAP SINGH

Date : 02.01.2019

Citation : Supreme Court [Civil Appeal No. 7 of 2019]

SYNOPSIS

A wrongfully terminated workman cannot claim re-employment under section 25(H) of the Industrial Disputes Act, upon the employer regularizing the services of other workmen, as there is no vacancy being filled by such act of the employer.

FACTS

The Respondent, who worked as a peon, was terminated from services by the Appellant - whereupon the Labour Court, by its award, held that his termination was bad in law, awarded a lump-sum compensation in lieu of reinstatement of service.

Later, it came to the Respondent's knowledge that the Appellant had regularized the services of two peons and hence the respondent claimed that even he became entitled to re-employment in the appellant's services in terms of Section 25 (H) of the Industrial Disputes Act, 1947 i.e. re-employment of retrenched employee.

Respondent filed a representation to the Appellant, praying therein that since Appellant had recently regularized services of two peons therefore, he had become entitled to claim re-employment in Appellant's services in terms of Section 25(H) of ID Act. After the Labour Court held that Respondent was not entitled to claim any benefit of Section 25(H) of ID Act to claim re-employment in Appellant's services, the Respondent filed a writ petition in the High Court. The Single Judge set aside the award of the Labour Court and directed re-employment of Respondent on post of peon in the Appellant's services. This was appealed before a Division bench of the High Court by the Appellant-employer, but the appeal was dismissed.

ISSUES

Whether the retrenched workmen (respondent) is entitled to claim re-employment in the appellant's services, under Section 25 (H) of the Industrial Dispute Act (ID Act) given regularization of services of others by the appellant-employer?

OR

Whether the right of a workman to claim re-employment arises upon the employer regularizing the services of other workmen?

HELD

While referring to the facts of the case and the underlying statutory provision under Section 25(H) of ID Act, the Supreme Courtheld that no case was made out by the respondent (workman) seeking re- employment in the appellant's services on the basis of Section 25 (H) of the ID Act and that Section 25(H) of the ID Act had no application to the case at hand. The Court held that Section 25(H) of the ID Act applies to cases where the employer has proposed to take into their employment any persons to fill up vacancies.

It is then that the employer is required to give a prior opportunity to the "retrenched workman" offering them re-employment. Moreover, if such retrenched workman offers themselves for re-employment, they shall have preference over other persons, who have applied for employment against the vacancy advertised. The Court noted to attract the provisions of Section 25(H) of the ID Act, the workman must firstly prove that he is a "retrenched employee", and secondly, that his employer has decided to fill up vacancies.

The court distinguished between 'employment' and 'regularization of service", establishing that while 'employment' signified a fresh employment to fill vacancies, 'regularization

of service' signified that, employee, who was already in service, his services were regularized as per service Regulations.

The Supreme Court held that the regularization of an employee already in service does not give any right to a retrenched employee so as to enable him to invoke Section 25(H) of the ID Act for claiming re-employment in the services, because by such act the employer is not offering any fresh employment to any person to fill any vacancy.

Moreover, here, Respondent's termination was held illegal, and, in consequence thereof, he had been awarded lump sum compensation in full and final satisfaction. It was not in dispute that he had accepted the compensation. This was, therefore, not a case of a retrenchment from service as contemplated under the scheme of Section 25(H) of ID Act.

Thus, the court overruled the High Court's decision, and held that Section 25(H) of ID Act had no application to facts of this case.

RAJASTHAN STATE ROAD TRANSPORT CORPORATION, JAIPUR V SHRI PHOOL CHAND

Date : 20.09.2018

Citation : Civil Appeal No. 1756 of 2010

SYNOPSIS

A worker cannot automatically be entitled to back-wages.

FACTS

A workman was dismissed from service on account of dereliction of duties. The Labour Court ordered reinstatement of service and awarded payment of full back-wages to the employee for a period of 13 years. The employer preferred an appeal against this order; however, the position of the Labour Court was affirmed by both the single judge and the division bench of the High Court of Rajasthan. The employer challenged the order of the division bench before the SC.

ISSUES

Whether a workman can claim back-wages based on the fact that the dismissal order had been set aside?

HELD

The Supreme Court (Court) partly set aside the order of the High Court and held that the worker has no right to claim back-wages purely on the basis that the dismissal order had been set aside.

It was observed by the apex court that in order to claim back-wages, a worker is required to prove that he was not gainfully employed anywhere after dismissal, and had no earnings to maintain himself and/or his family. Further, the employer is required to prove that a worker was gainfully employed elsewhere – however, the initial burden lies on the worker to substantiate his unemployment.

Citing various judicial precedents, the Court reiterated that several factors should be taken into account to determine the entitlement of back-wages and/or the amount to be paid to such a worker, which was not done by the lower courts in the present case. Accordingly, the Court overturned the decision of the lower courts, noting that the lower courts did not consider the principles for awarding back-wages.

However, the Court awarded 50% back-wages, considering the various circumstances of the worker (the period and money spent in litigation even after his death) in exercise of its powers under Article 142 of the Constitution of India.

SNG & PARTNERS
Advocates & Solicitors

NEGOTIABLE INSTRUMENTS ACT

1881

MAKWANA MANGALDAS TULSIDAS V STATE OF GUJARAT AND ORS

Date : 05.03.2020

Citation : Supreme Court [MANU/SC/0517/2020]

SYNOPSIS

The Court observed that there is a need to work out mechanisms for the expeditious and just adjudication of cases relating to dishonour of cheques, fulfilling the mandate of law and thereby reducing high pendency.

FACTS

The Hon'ble Supreme Court in the impugned matter was presented with a petition relating to the dishonour of two cheques, which had been tried for over a period of 15 years. The Court, highly distressed with the delay observed that matters under the purview of Section 138 were to be adjudicated summarily to remain efficacious and to bear actual advantage to the aggrieved party. More so, while reading into the true legislative intent behind the addition of Section 138, the Court held the following.

HELD

The Court held that:

A. The legislative intent behind the amendment was to ensure faith in the efficacy of banking operations and credibility in transacting business on cheques. It was to provide a strong criminal remedy in order to deter the high incidence of dishonour of cheques and ensure compensation to the complainant.

   Subsequent amendments in the Act and the pronouncements of this Court reflect that it was always perceived that these cases would be disposed of speedily so as to preserve the object of criminalisation of the act.

B. Having regard to the prevailing state of affairs, there is a need to evolve a system of service/execution of process issued by the court and ensuring the presence of the accused, with the concerted efforts of all the stakeholders like Complainant, Police and Banks.

C. With ever growing institution of N.I. cases, there is also need of developing a mechanism for pre-litigation settlement in these cases. The Legal Services Authorities Act, 1987 provides for a statutory mechanism for disposal of case by Lok Adalat at pre-litigation stage Under Sections 19 and 20 of the Act. Further, Section 21 of the Act, recognises an award passed by Lok Adalats as a decree of a civil court and gives it a finality

D. The High Courts, in addition to the above, may also consider setting up of exclusive courts to deal with matters relating to Section 138, especially in establishments where the pendency is above a standard figure. Special norms for assessment of the work of exclusive courts may also be formulated giving additional weightage to disposal of case within the time-frame as per legal requirement

SURINDER SINGH DESWAL & ORS. V VIRENDER GANDHI & ORS.

Date : 08.01.2020

Citation : Supreme Court [AIR 2020 SC 415]

SYNOPSIS

The Court while disposing the Appeal held that Section 143A will apply to only those complaints filed after the 2018 Amendment to the NI Act which inserted the provision and has no retrospective applicability.

FACTS

The complaints were filed by Respondent No. 1 against the Appellants under Section 138 of the NI Act before the Judicial Magistrate. The complaints were decided by Judicial Magistrate vide his judgment holding the Appellant Nos. 1 and 2 guilty for the offence punishable under Section 138 of the NI Act, who were accordingly convicted. The appeal was filed by the Appellants against the judgment in which Appellants had filed an application under Section 389 of Code of Criminal Procedure for suspension of sentence.

The Appellate Court entertained the appeal and suspended the sentence during the pendency of the appeal, subject to furnishing

of bail bond and surety bond with one surety in the like amount and also subject to deposit of twenty five percent of the amount of compensation awarded by the learned trial court in favour of the complainant. The Appellants preferred an application seeking extension of time to deposit the amount of the compensation amount.

The Sessions Judge allowed the application granting time to deposit the amount. Additional Sessions Judge in view of the non-compliance of the order directed the Appellants to surrender in the trial court within four days. The Appellants were also not present when the case was taken by the Additional Sessions Judge.

Another petition under Section 482 Code of Criminal Procedure was filed by the Appellants challenging the order passed by the Additional Sessions Judge. The petitions under Section 482 Code of Criminal Procedure filed by the Appellants had been dismissed by the impugned judgment of the High Court.

ISSUES

Whether proceedings for offence under Section 138 of Act could be regulated where Accused was willing to deposit cheque amount.

HELD

The Court held that:

A. When suspension of sentence by the trial court was granted on a condition, non-compliance of the condition had adverse effect on the continuance of suspension of sentence.

   The Court which had suspended the sentence on a condition, after noticing non-compliance of the condition could very well hold that the suspension of sentence stands vacated due to non-compliance.

B. B. While it is for the Appellate Court who had granted suspension of sentence to take call on non-compliance and take appropriate decision.

   What order was to be passed by the Appellate Court in such circumstances is for the Appellate Court to consider and decide. However, non-compliance of the condition of suspension of sentence was sufficient to declare suspension of sentence as having been vacated.

HAR SARUP BHASIN V M/S ORIGO COMMODITIES INDIA PVT. LTD.

Date : 07.01.2020

Citation : Delhi High Court [MANU/DE/0032/2020]

SYNOPSIS

The petitioner being an Independent and a Non-Executive Director, in the absence of any specific role attributed against the petitioner for his active participation in the day to day affairs of the company and of taking all decisions of the company, where the petitioner was not a signatory to the cheques in question, vicarious liability cannot be fastened on the petitioner in the absence of any specific role attributed to him.

FACTS

The petitioner vide the present petition sought the quashing of an order dated 20.02.2017 of the Trial Court and the quashing of the complaint vide which the petitioner was summoned for the alleged commission of an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 on the ground that the Petitioner was a non-executive director who was not involved in the daily workings of the Partnership firm.

The said complaint under Section 138 of the Negotiable Instruments Act, 1881 has been filed by the complainant M/s. Origo Commodities India Pvt. Ltd. arrayed as the respondent to the present petition against the persons arrayed as the accused nos. 1 to 7.

ISSUE

Whether proceedings for offence under Section 138 of Act could be regulated where Accused was willing to deposit cheque amount.

HELD

The Court while affirming a plethora of earlier judgements held that:

A. Merely being a Director of a company is not sufficient to make the person liable under Section 141 of the Act. A Director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business.

The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.

B. The Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act.

By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.

C. The petitioner being an Independent and a Non-Executive Director, in the absence of any specific role attributed against the petitioner for his active participation in the day-to-day affairs of the company and of taking all decisions of the company, where the petitioner was not a signatory to the cheques in question, vicarious liability cannot be fastened on the petitioner in the absence of any specific role attributed to him, in as much as, the contentions that have been sought to be raised during the course of the arguments and in the affidavit in reply to the petition on behalf of the respondent in relation to the petitioner being in a Key Managerial Person and the petitioner having participated in 100% all the meetings of the accused company, are not spelt out in the complaint that had been filed by the respondent.

KUSHAL KAWADUJI SINGANJUDE V RAMNARAYAN DURGAPRASAD AGRAWAL

Date : 23.08.2019

Citation : Bombay High Court [2019 CriLJ 4796]

SYNOPSIS

The Court held that, Section 378(4) of CrPC is confined to the order of acquittal passed in cases instituted upon complaint and thus the Appeal against acquittal in prosecution for offence punishable under Section 138 of NI Act would lie under Section 378(4) of CrPC.

FACTS

The case was initiated on a private complaint u/s. 138 of the Negotiable Instruments Act.

ISSUES

Whether the appeal against acquittal in prosecution for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881, would lie under Section 378(4) of the Code of Criminal Procedure or would be as per proviso below Section 372 of the Code of Criminal Procedure?

HELD

The Court held that:

A. The right to prosecute the defaulting party to the contract between the payee and the drawer cannot be considered as one conferred for the benefit of the community as a whole. The state has no role to play. The object is to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable. So also, the object of Section 138 is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instrument. Although, an omission to honour the cheque by the drawer is made an offence under the deeming fiction, it is basically in the realm of civil wrong and not the crime per se. The civil liability of a person has been converted into a criminal offence.

B. Section 372 of the Code is a general provision regarding appeals with wordings 'no appeal shall lie from any judgment or order of a Criminal Court except as provided by this Code or by any other law for the time being in force'.

Sections 373, 374, 377, 378, 379 and 380 of the Code provide for remedy of appeal to the accused, the State and the complainant under different situations. Prior to insertion of proviso to section 372, there was no right of appeal available to the victim of the crime, who is considered to be the prime sufferer. Insertion of proviso to section 372 of the Code, here, does not mean that it has been added only as an exception to Section 372 of the Code.

It is a substantive provision creating substantive right in favour of the victim to file an appeal against the order of acquittal or conviction for a lesser offence or imposing inadequate compensation.

C. Thus, the appeal against acquittal in prosecution for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881, would lie under Section 378(4) of the Code of Criminal Procedure.

G.J. RAJA V TEJRAJ SURANA

Date : 30.07.2019

Citation : Supreme Court [AIR 2019 SC 3817]

SYNOPSIS

Section 143A of Act, 1881 is prospective in operation and provisions of said Section 143A can be applied or invoked only in cases where offence under Section 138 of Act was committed after introduction of said Section 143A in statute book.

FACTS

Two cheques issued by the Appellant in the sums of Rs. 20,00,000 and Rs. 15,00,000 in favour of the Respondent/Complainant were dishonoured on account of insufficiency of funds. The Complaint was lodged on 4th November, 2016. With effect from 01.09.2018, Section 143A was inserted in the Act by Amendment Act 20 of 2018. Soon thereafter, the Trial Court ordered that 20% of the cheque amount be made over by the Appellant to the Respondent as interim compensation in accordance with the provisions of Section 143A of the Act.

The Appellant being aggrieved, filed Criminal O.P. in the High Court. By its order, the High Court found no illegality or infirmity in the order awarding interim compensation under Section 143A of the Act but reduced the percentage from 20% of the cheque amount to 15% of the cheque amount. The order of the High Court is presently under challenge.

ISSUES

Whether Section 143A of Act was retrospective in operation and could be invoked in cases where offences punishable under Section 138 of Act were committed much prior to introduction of Section 143A.

HELD

The Court held that:

A. The provisions contained in Section 143A have two dimensions. First, the Section creates a liability in that an Accused can be ordered to pay over upto 20% of the cheque amount to the complainant. Such an order can be passed while the complaint is not yet adjudicated upon and the guilt of the Accused has not yet been determined.

Secondly, it makes available the machinery for recovery, as if the interim compensation were arrears of land revenue. Thus, it not only creates a new disability or an obligation but also exposes the Accused to coercive methods of recovery of such interim compensation through the machinery of the State as if the interim compensation represented arrears of land revenue.

B. Prior to the insertion of Section 143A in the Act, there was no provision on the statute book whereunder even before the pronouncement of the guilt of an Accused, or even before his conviction for the offence in question, he could be made to pay or deposit interim compensation. The imposition and consequential recovery of

fine or compensation either through the modality of Section 421 of the Code or Section 357 of the CrPC could also arise only after the person was found guilty of an offence. That was the status of law which was sought to be changed by the introduction of Section 143A in the Act.

It now imposes a liability that even before the pronouncement of his guilt or order of conviction, the Accused may, with the aid of State machinery for recovery of the money as arrears of land revenue, be forced to pay interim compensation. The person would, therefore, be subjected to a new disability or obligation.

C. Section 143A is prospective in operation and its provisions can be applied or invoked only in cases where the offence under Section 138 of the Act was committed after the introduction of said Section 143A in the statute book.

RANGABASHYAM AND ORS. V RAMESH

Date : 23.07.2019

Citation : Madras High Court [2019-2-LW (Crl) 291]

SYNOPSIS

The Court held that, firstly, action under Section 138 of the Negotiable Instruments Act, is not a Suit to enforce a right arising out of a contract, and therefore, the bar under Section 69(2) of the Partnership Act cannot operate in such cases. Secondly, that the registration or non-registration of the Partnership Firm has no bearing insofar as Section 141 of the Negotiable Instruments Act is concerned.

FACTS

The respondent had filed a complaint against the petitioners for an offence under Section 138 of the Negotiable Instruments Act on the ground that he was a partner in the firm named 'Laxmi Agencies' and was compelled to retire from the it. There were certain amounts due and payable to the respondent and towards the discharge of said liability, the petitioners issued a cheque for a sum of Rupees three lakhs. The said cheque was dishonoured on the ground of in-sufficiency of funds and after the issuance of a statutory notice, the respondent proceeded to file a complaint against the petitioners. The petitioners who are shown as accused persons in this complaint, have filed this petition to quash the proceedings primarily on the ground that the cheque in question was drawn in favour of the respondent only on behalf of the partnership firm.

Therefore, the complaint cannot be maintained without issuing the statutory notice to the partnership firm and making the partnership firm as an accused in the complaint.

ISSUES

The issues for consideration before the Court were as follows:

A. Whether an unregistered Partnership Firm can be brought within the purview of Section 141 of the Negotiable Instruments Act, and

B. Whether the Partnership Firm must be made as an accused along with the other partners, in order to maintain a complaint for an offence under Section 138 of the Negotiable Instruments Act?

ISSUES

The Court held that:

A. The action under Section 138 of the Negotiable Instruments Act, is not a Suit to enforce a right arising out of a contract, and therefore, the bar under Section 69(2) of the Partnership Act will not operate in such a case. The word "Suit" envisaged under Section 69(2) of the Indian Partnership Act, cannot be stretched to criminal prosecutions.

A criminal prosecution by its very nature is instituted not for recovery of money or for enforcement of any security. Section 138 of Negotiable Instruments Act is a penal provision, the commission of which offence entails a conviction and sentence on the proof of guilt. Chapter XVII of the Negotiable Instruments Act, 1881 is a code by itself which deals with penalties in case of dishonour of cheques.

B. Section 141 of the Negotiable Instruments Act deals with the concept of vicarious liability, wherein for the offence committed by the Company or a partnership firm, the

directors or the partners, as the case may, are deemed to be guilty of the offence when it is shown that they are in charge of and responsible for the conduct of the day-to-day affairs of the business or the firm, as the case may be. While interpreting the provision, the Hon'ble Supreme Court has categorically held that the complaint cannot be maintained against the directors of the Company, without making the company as an accused person.

This concept has been extended even for Partnership Firms. The registration or non-registration of the Partnership Firm will have no bearing insofar as 141 of the Negotiable Instruments Act is concerned.

BIRENDRA PRASAD SAH V THE STATE OF BIHAR & ORS.

Date : 08.05.2019

Citation : Supreme Court [AIR 2019 SC 2496]

FACTS

The dispute arose over two cheques drawn on State Bank of India which were returned unpaid. Thereinafter a legal notice was issued on 31 December 2015 intimating the dishonour of the cheque. According to the Appellant, between 14 February 2016 and 23 February 2016, he made queries with the postal department but no proof of service was provided.

Accordingly, on 26 February 2016, a second legal notice was issued. This was replied to by the second Respondent. Eventually, a complaint under Section 138 was instituted. While taking cognizance, the CJM issued summons to the second Respondent. The High Court under Section 482 of CrPC, held that, the complaint under Section 138 was not filed within the statutory period of thirty days prescribed under Section 138 as a result of which the proceedings were quashed.

ISSUE

Whether Appellant established sufficient reasons for not being able to institute complaint within stipulated period.

HELD

The Court held that:

A. As the Appellant had issued a legal notice on 31 December 2015, which was within a period of thirty days of the receipt of the memo of dishonour. Consequently, the requirement stipulated in proviso (b) to Section 138 was fulfilled. Proviso (c) spells out a requirement that the drawer of the cheque has failed to make payment to the holder in due course or payee within fifteen days of the receipt of the notice.

B. Under Section 142(1), a complaint has to be instituted within one month of the date on which the cause of action has arisen under Clause (c) of the proviso to Section 138. The proviso however stipulates that, cognizance of the complaint may be taken by the court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

In complaint, the Appellant indicated adequate and sufficient reasons for not being able to institute the complaint within the stipulated period. The CJM condoned the delay on the cause which was shown by the Appellant for the period commencing from 6 April 2018. High Court has merely adverted to the presumption that, the first notice would be deemed to have been served, if it was dispatched in the ordinary course.

Even if that presumption applies, sufficient cause was shown by the Appellant for condoning the delay in instituting the complaint taking the basis of the complaint as the issuance of the first legal notice dated 31 December 2015.

BASALINGAPPA V MUDIBASAPPA

Date : 09.04.2019

Citation : Supreme Court [AIR 2019 SC 1983]

SYNOPSIS

Under Section 118(b), a presumption shall be made as to date that every negotiable instrument was made or drawn on such date.

FACTS

The Complainant gave a notice to Accused, stating that there had been a dishonour of a cheque for an amount of Rs. 6,00,000 for want of sufficient funds. Thereafter, on non-payment of amount, a complaint was filed by complainant under Section 138 of Act, 1881.

The Trial court after considering evidence and material on record held that, if Accused was able to raise a probable defence which created doubts about existence of a legally enforceable debt or liability, prosecution could fail. By judgment, Accused was acquitted for offence under Section 138. The Complainant aggrieved by said judgment filed a Criminal Appeal under Section 378(4) of Code of Criminal Procedure, 1973. The High Court set aside the judgment of trial court and convicted Accused for offence under Section 138. The Accused aggrieved by the judgment of the High Court had come up in present appeal.

HELD

The Court held that:

A. Once the execution of cheque was admitted Section 139 of Act mandated a presumption that, the cheque was for the discharge of any debt or other liability. The presumption under Section 139 was a rebuttable presumption and onus was on the Accused to raise a probable defence.

   Standard of proof for rebutting presumption was that of the preponderance of probabilities. To rebut the presumption, it is open for the Accused to rely on evidence led by him or the Accused could also rely on materials submitted by the Complainant in order to raise a probable defence.

   Inference of the preponderance of probabilities could be drawn not only from the materials brought on record by parties but also by reference to the circumstances upon which they rely. It is not necessary for the Accused to come in the witness box in support of his defence, Section 139 imposes an evidentiary burden and not a persuasive burden.

G. RAMESH V KANIKE HARISH KUMAR UJWAL & ORS.

Date : 05.04.2019

Citation : Supreme Court [AIR 2019 SC 2595]

SYNOPSIS

In view of the basic averment process issued, the complaint must proceed against the Directors. But, if any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only an averment is made in the complaint and that he is really not concerned with the issuance of the cheque, he must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his contention.

FACTS

The Respondent firm was dealing in data entry work. After obtaining contracts for data entry, sub-contracts were entered into by the firm for the completion of the assignments. The Accused persons have given sub contract of data entry to the complainant in the month of August 2010 by taking a caution deposit of Rs. 1,00,000 which has paid through two cheques which were credited into their account.

Thereafter, they assigned the job of data entry to the complainant from the month of September 2010 to December 2010. The complainant did the data entry work for said four month's worth of Rs. 8,50,000 as per rates of understanding.

The complainant presented two cheques for collection through his bank i.e., HDFC, Mahabubnagar but the cheques were returned unpaid due to insufficient balance in their

bank account. The complainant informed the Accused about the return of cheque and they assured to honour both cheques on re-presentation in the month of July 2011. As per their request, the complainant presented cheques but both cheques again returned unpaid for insufficient funds in their bank account. Since then the complainant tried to contact the Accused for the payment of cheques amount along with entire due amount but they avoided the complainant.

A notice of demand was issued within 30 days of the dishonour of the cheque on 1 August 2011 in spite of which payment was not made. A complaint was instituted before the Special Judicial Magistrate whereinafter, non-bailable warrants were issued against the first Respondent as he failed to appear in the proceedings. The warrants were recalled.

The first Respondent instituted proceedings under Section 482 of CrPC. The High Court quashed the proceedings by its impugned judgment and order. The High Court held that, the averments contained in complaint were not sufficient to implicate criminal liability upon the first Respondent for an offence punishable under Section 138. It is this view of the High Court which falls for consideration in the present appeal.

ISSUE

Whether there were sufficient averments in complaint to meet requirement of Section 141(1) of Act.

HELD

The Court held that:

A. In terms of the explanation to Section 141, the expression "company" has been defined to mean anybody corporate and to include a firm or other association of individuals. Sub-section (1) of Section 141 postulates that where an offence is committed under Section 138 by a company, the company as well as every person who, at the time when the offence was committed, was in charge of and was responsible to the company for the conduct of the business shall be deemed to be guilty of the offence.

B. In the present case, it is evident from the relevant paragraphs of the complaint which have been extracted above that the complaint contains a sufficient description of (i) the nature of the partnership; (ii) the business which was being carried on; (iii) the role of each of the Accused in the conduct of the business and, specifically, in relation to the transactions which took place with the complainant.

   At every place in the averments, the Accused have been referred to in the plural sense. Besides this, the specific role of each of them in relation to the transactions arising out of the contract in question, which ultimately led to the dishonour of the cheques, has been elucidated.

C. The complaint contains a recital of the fact that the first set of cheques were returned for insufficiency of funds. It is alleged that the first Respondent transferred an amount of Rs. 1,00,000 on 8 February 2011 and 10 February 2011.

   The complaint also contains an averment that after the second set of cheques were dishonoured, the Accused assured the complainant that they will be honoured on re-presentation in the month of July 2011. The averments are sufficient to meet the requirement of Section 141(1).

BIR SINGH V MUKESH KUMAR

Date : 06.02.2019

Citation : Supreme Court [(2019) 4 SCC 197]

SYNOPSIS

The onus to rebut the presumption Under Section 139 that the cheque has been issued in discharge of a debt or liability is on the Accused and the fact that the cheque might be post-dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.

FACTS

The Respondent-Accused issued a cheque drawn on Axis Bank, Branch, Palwal in the name of the Appellant towards repayment of a "friendly loan" of Rs. 15 lakhs advanced by the

Appellant-complainant to the Respondent-Accused. Thereafter, the Appellant-complainant deposited the said cheque in his bank, but the cheque was returned unpaid with the endorsement "Insufficient Fund".

On 23-5-2012, after the assurance of the Respondent-Accused, that there would be sufficient funds in his bank account to cover the amount of the cheque, the Appellant-complainant again presented the cheque to his bank on, but it was again returned unpaid with the remark "Insufficient Fund".

The Appellant-complainant filed a Criminal Complaint against the Respondent-Accused, being Case No. 106 of 2012 before the Judicial Magistrate 1st Class, Palwal, Under Section 138 of the Negotiable Instruments Act, who held the him guilty as a result of which, through various appeals, the Accused approached the Hon'ble SC.

HELD

The Court held that:

A. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the Accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

B. Even a blank cheque leaf, voluntarily signed and handed over by the Accused, which is towards some payment, would attract presumption Under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

C. In the absence of any finding that the cheque in question was not signed by the Respondent-Accused or not voluntarily made over to the payee and in the absence of any evidence with regard to the circumstances in which a blank signed cheque had been given to the Appellant-complainant, it may reasonably be presumed that the cheque was filled in by the Appellant-complainant being the payee in the presence of the Respondent-Accused being the drawer, at his request and/or with his acquiescence. The subsequent filling in of an unfilled signed cheque is not an alteration. There was no change in the amount of the cheque, its date or the name of the payee. The High Court ought not to have acquitted the Respondent-Accused of the charge Under Section 138 of the Negotiable Instruments Act.

11 METERS AND INSTRUMENTS PRIVATE LIMITED AND ORS. V KANCHAN MEHTA

Date : 05.10.2018

Citation : Supreme Court [2018 (102) ACC 953]

SYNOPSIS

The Court while disposing the Appeal held that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers Under Section 143 of the Act read with Section 258 Code of Criminal Procedure.

FACTS

The Respondent filed complaint alleging that the Appellants were to pay a monthly amount to her under an agreement. Cheque was given in discharge of legal liability but the same was returned unpaid for want of sufficient funds. In spite of service of legal notice, the amount having not been paid, the Appellants committed the offence under Section 138 of the Act.

The Magistrate in his order observed that the case could not be tried summarily as sentence of more than one year may have to be passed and be tried as summons case. Notice of accusation was served, 2nd Appellant, made a statement that he was ready to make the payment of the cheque amount. However, the complainant declined to accept the demand draft. The case was adjourned for evidence. The Appellants filed an application under Section 147 of the Act. The application was dismissed. The High Court did not find any ground to interfere with the order of the Magistrate, thus the impugned appeal was filed before the SC.

ISSUES

Whether proceedings for offence under Section 138 of Act could be regulated where Accused was willing to deposit cheque amount.

HELD

The Court held that:

A. Where the cheque amount with interest and cost as assessed by the Court was paid by a specified date, the Court was entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 Code of Criminal Procedure, normal Rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure could be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357(3) Code of Criminal Procedure with sentence of less than one year would not be adequate, having regard to the amount of cheque, conduct of the Accused and other circumstances.

B. B. In every complaint under Section 138 of the Act, it may be desirable that the complainant gives his bank account number and if possible e-mail ID of the Accused.

If e-mail ID was available with the Bank where the Accused has an account, such Bank, on being required, should furnish such e-mail ID to the payee of the cheque. In every summons, issued to the Accused, it may be indicated that if the Accused deposits the specified amount, which should be assessed by the Court having regard to the cheque amount and interest/cost, by a specified date, the Accused need not appear unless required and proceedings may be closed subject to any valid objection of the complainant.

If the Accused complies with such summons and informs the Court and the complainant by e-mail, the Court can ascertain the objection, if any, of the complainant and close the proceedings unless it becomes necessary to proceed with the case. In such a situation, the Accused's presence could be required, unless the presence was otherwise exempted subject to such conditions as may be considered appropriate. The Accused, who wants to contest the case, must be required to disclose specific defence for such contest. It was open to the Court to ask specific questions to the Accused at that stage.

In case the trial was to proceed, it would be open to the Court to explore the possibility of settlement. It would also be open to the Court to consider the provisions of plea bargaining. Subject to this, the trial can be on day to day basis and endeavour must be to conclude it within six months. The guilty must be punished at the earliest as per law and the one who obeys the law need not be held up in proceedings for long unnecessarily.

SUCCESSION LAWS

VICKRAM BAHL & ANR. V SIDDHARTHA BAHL & ANR.

Date : 25.04.2020

Citation : Delhi High Court [CS(OS)78/2016 & IA Nos.2362/2016]

SYNOPSIS

'Mutual Will' becomes effective on the death of either of the joint testators and that the rights in favor of the ultimate beneficiary under such a will are crystalized on the demise of either of the executants and during the lifetime of the other executant.

FACTS

The second defendant and Late Wing Commander N N Bahl had executed a joint will, dated March 31, 2006. According to the clause of the will, if one of the executors dies, the entire property shall go to the other executant. Here, Mr. N N Bahl had predeceased the second defendant and according to the clause, the property goes to second defendant and no one else had the interest or right in the share of the deceased person.

The eldest son and his daughter had filed a suit against his mother and brother who sought relief of permanent injunction, possessing them their respective share of the suit property. It is clarified that there is no vagueness of agreement between testators and qualifies as a mutual will. For applicability of Section 14(1) of the Hindu Succession Act, 1956, possession of the property by Hindu female on the date of commencement of the Act is sine qua non.

ISSUES

The first issue is whether the Will executed on 31.03.2006 qualifies as a mutual Will and the second with respect to the effect of Section 14(1) of the Hindu Succession Act, 1956 upon the bequeath.

HELD

The Court held that the principle of a Mutual Will coming into effect and binding on the testator who may still be alive, on the death of one of the two testators, is well enshrined in the Indian Law. Resultantly, the Decree was passed, in favor of the Plaintiffs and jointly and severally against the two Defendants. There is no ambiguity or uncertainty of the agreement between the testators and incumbent for the Hindu female to plead that the subject property was bequeathed to her in lieu of a pre-existing right and since in the present case Mrs. Sundri Bahl has not pleaded so, she cannot claim an absolute right to the suit property under Section 14(1).

KALINDI DAMODAR GARDE (D) BY LRS V MANOHAR LAXMAN KULKARNI (D) & ORS.

Date : 07.02.2020

Citation : Supreme Court of India [Civil Appeal Nos. 6642-6643 of 2010]

SYNOPSIS

Children born to Adoptee before his adoption are also entitled to inherit his property in the adoptive family.

FACTS

Laxman and his wife Padmavati had three sons namely, Gangadhar, Dattatraya, and Manohar, when Laxman (the father) was given in adoption to one Saraswathi in the year 1935. After adoption, a girl child named Kalindi, was born to them. Followed by the death of Laxman and his wife, a suit for partition was filed by one of the sons. In furtherance, an appeal was raised from the order of the High Court of Bombay and was filed by the daughter of the adoptee.

In the present appeal, the natural-born son of the adoptee (appellant) has been excluded from the right, title, and interest of the suit property on the ground that he was born before the date of the adoption of the adoptee. The adoptee has owned the property of his adoptive parents and the three sons of the adoptee have been deprived of the right, title and interest on the property as they were born before the adoption of the adoptee and their rights and interests extend to the ancestral property. The only daughter of the adoptee has been given rights, interest over the property because she was born after the adoption of the adoptee.

ISSUES

Whether the three sons, born before the adoption of the adoptee, have rights over the property of the adoptive family?

HELD

The appeal against the order of the High Court has been dismissed. The contention of the only daughter of the adoptee to inherit the entire property along with her mother as she was the only one who was born after the adoption of the adoptee, has been rejected. All the children of the adoptee are entitled to inherit the property of the natural father as there is no provision which bars the natural-born son to inherit the property of the natural father, the Court relied upon Section 8 of the Hindu Succession Act, 1956.

M.ARUMUGAM V AMMANIAMMAL AND ORS.

Date : 08.01.2020

Citation : Supreme Court of India (Civil Appeal No. 8642 of 2009)

SYNOPSIS

On death of a Hindu male, notional partition of his property will take place and it will devolve on the legal heirs based on their respective shares. Thus, such property will no longer retain the character of a 'Joint Family Property' after the partition.

FACTS

One Moola Gounder died in 1971, leaving behind his widow, two sons and three daughters and had not executed any will before his death. Then in 1989, the youngest daughter filed a suit for partition. The sons opposed the suit saying that a release deed was executed by the mother and the daughters by giving up their shares in favor of the sons.

Later subsequently, a partition deed was executed amongst the sons, of which one of the witnesses was the husband of the plaintiff. The plaintiff then raised a plea that the release deed was void ab initio as the mother was not competent to relinquish her share by acting as her guardian. The Trial Court then dismissed the suit by stating that the plaintiff should have challenged the release deed within three years of attaining majority. The High Court set aside the dismissal of suit and listed that the property continued to be joint family property in the hands of legal heirs even after the death of Moola Gounder and since it was joint family property, mother could not have acted as a guardian of the minor plaintiff to relinquish her shares.

ISSUES

Whether property was to be distributed to Class I legal heirs in accordance with Section 8 of the Act?

HELD

The Supreme Court observed that it is apparent that after the death of Moola Gounder, his interest in the coparcenary property would devolve as per the provisions of Section 8 since he left behind a number of female Class I heirs. The Court also referred to Section 30 of the Act, which says that coparcenary share was capable of being disposed of by testament. As per Section 6 of the Hindu Minority and Guardians Act, natural guardian of the minor cannot act in respect of minor's undivided interest in joint family property.

The Court noted that at best, the release deed was a voidable document under Section 8 of the Hindu Minority and Guardianship Act, which should have been challenged within 3 years of the plaintiff's attainment of majority. The Court also noted that when the release deed was executed in 1973, the plaintiff was only 17 years. The partition deed amongst the sons was executed in 1980, in which the husband of the plaintiff was an attesting witness.

The suit was filed nine years later. Based on all these finding, the Supreme Court allowed the appeal, to restore the trial court's dismissal for the suit.

GOVINDBHAI CHHOTABHAI PATEL & ORS V PATEL RAMANBHAI MATHURBHAI

Date : 23.09.2019

Citation : Supreme Court of India (Civil Appeal No. 7528 of 2019)

SYNOPSIS

Father's self-acquired property given to son by Will/Gift retains character of self-acquired property unless the deed intends otherwise.

FACTS

Chhotabhai Ashabhai Patel executed a gift deed in favour of his son Ramanbhai Mathurbhai Patel in year 1977. Chottabhai died in 2001. The other sons of Chhotabhai filed a suit challenging the gift and claiming share of the property. They claimed that Chottabhai had inherited the property from his father, and therefore it was ancestral property.

Another contention was raised that the attestation of the gift deed was not proved. The Trial Court held that the gift deed is valid as requirements under Section 123 of Transfer of Property Act, 1882 have been fulfilled. The Court further held that examination of attesting witnesses of the deed is also necessary.

The High Court however set aside the Trial Court decree by holding that the property was not ancestral and that Chhotabhai was within his rights to give property as gift to the defendant Ramanbhai. This was on the basis of finding that the property was self-acquired by Chhotabhai's father.

ISSUES

Whether the father of a joint Hindu family governed by Mitakshara law has full and uncontrolled powers of disposition over his self-acquired immovable property and whether property received by son from father by way of gift or will is self-acquired property or ancestral property?

HELD

It was held that father, governed by the Mitakshara Law, has absolute right of disposition over his self-acquired property to which no exception can be taken by his male descendants. It was held that, it was not possible to hold that such property bequeathed or gifted to a son must necessarily rank as ancestral property. It was further held that a property gifted by a father to his son could not become ancestral property in the hands of the donee simply by reason of the fact that the donor got it from his father or ancestor.

ARSHNOOR SINGH V HARPAL KAUR

Date : 01.07.2019

Citation : Supreme Court of India (Civil Appeal No.5124 of 2019)

SYNOPSIS

Property inherited by a male will remain as coparcenary property for descendants upto three degrees below him, under the Mitakshara Law.

FACTS

The bench allowed an appeal filed by one Arshnoor Singh, to set aside the sale deeds executed by his father, Dharam Singh, in 1999. As per the impugned sale deeds, Dharam Singh alienated joint family property to the respondent Harpal Kaur, whom he subsequently married as second wife. Dharam Singh got the properties as per the partition deed executed by his father Inder Singh in 1964. Inder Singh had got the property by way of inheritance from his father Lal Singh when he died in 1951.

The sale deeds were challenged by Arshnoor Singh in a suit filed in 2004, after he attained majority in 2003. He claimed that the properties were coparcenary properties, which were alienated by Dharam Singh without any legal necessity and without receiving any consideration from the respondent. The trial court decreed the suit which was confirmed in appeal filed by the respondent. However, the Punjab and Haryana High Court set aside the decree in second appeal, on the reasoning that the property ceased to be coparcenary property after Inder Singh effected partition in 1964. Therefore, Arshnoor Singh had no locus to challenge the sale deeds, the High Court held. Challenging this, he came in appeal before the apex court.

ISSUES

Whether Succession opened prior to 1956 makes the property coparcenary?

HELD

The Supreme Court holds that if succession opened under the old Hindu law, that is, prior to the commencement of the Hindu Succession Act, 1956, the parties would be governed by Mitakshara law. The property inherited by a male Hindu from his paternal male ancestor shall be coparcenary property in his hands vis-a-vis his main descendants up to 3 degree below him. The nature of property will remain as coparcenary property even after the commencement of the Hindu Succession Act 1956, which was the case in this matter.

Further held that it is well settled that the share which a co-sharer obtains on partition of ancestral property is ancestral property as regard his male issues. They take an interest in it by birth whether they are in existence at the time of partition or are born subsequently.

In view of the said legal position, it was held in the said case that the suit property which came to the share of Late Dharam Singh, through partition dated 4 November 1964, remained coparcenary property, qua his son(appellant) who became coparcener in the suit property on his birth i.e. 22nd August 1985.

In the said case, the sale deeds executed were set aside by the Supreme Court and subsequent sale deeds executed by Respondent no. 1 in favor of Respondent no. 2 and Respondent No. 3 were also set aside, being illegal, due to doctrine of Lis pendens. The appeal was accordingly allowed.

RADHAMMA AND ORS V H.N. MUDDUKRISHNA AND ORS

Date : 23.01.2019

Citation : Supreme Court of India (Civil Appeal No.7092 of 2010)

SYNOPSIS

Undivided share in joint family can be disposed by Will as per Section 30 of the Hindu Succession Act.

FACTS

The matter arose out of a suit for partition of the estate of one Mr.Patel Hanume Gowda, filed in 1976 by his second wife and his daughter from second marriage. After the death of Gowda in 1965, his estate came under the control of his children from first marriage, who were made defendants in the suit. In the suit proceedings, they produced a Will stated to have been executed by Gowda in 1962, by which his undivided interest was bequeathed to them.

Though the plaintiff contested the validity of the Will contending that it was a result of undue influence and coercion exercised by defendants on Gowda, the Trial Court found that the Will was proved to have been validly executed in terms of Section 68 of the Evidence Act. The trial court however invalidated the disposition of undivided share in coparcenary interest as per the Will, on the ground that Hindu Personal Law prohibited it.

The plaintiffs were therefore given 1/10th share in the undivided interest. In appeal, the High Court of Karnataka reversed this declaration of the trial Court, relying on Section 30 of the Hindu Succession Act which makes it clear that a Hindu testator may dispose of any property which is capable of being disposed of by him by Will or other testamentary disposition in accordance with Indian Succession Act, 1925. Challenging this, the plaintiffs approached the Supreme Court.

ISSUES

Whether the will of the testator is valid and whether the judgment of High Court for reversing the order of Trial Court for giving 1/10th share of joint family properties in favor of plaintiff is valid?

HELD

The apex court observed that rule against disposition of undivided coparcenary interest was relaxed by Section 30. The provision is an exemption to the general rule that the interest of a Male Hindu in joint family property will devolve by survivorship upon the surviving members of the coparcenary after his death. The interest of a Hindu male in Mitakshara

coparcenary property can be disposed of by him by Will or any other testamentary disposition. Therefore, the judgment held that the testator Patel Hanume Gowda was qualified to execute a Will bequeathing his undivided share in the joint family properties by Will executed in 1962 and that no further independent share could be claimed by the appellants. The Court dismissed the appeals.

MOHAMMED SALIM AND ORS V SHAMSUDEEN AND ORS

Date : 22.01.2019

Citation : Supreme Court of India (Civil Appeal No. 5158 of 2013)

SYNOPSIS

Child born of Muslim father and Hindu mother is legitimate and can claim share in father's property.

FACTS

The husband is a Muslim man and the wife is a Hindu by religion at the time of marriage. Her name was later changed to Sauda Beebi. The mother was not legally wedded and she had been a Hindu at the time of marriage. The details of their son are recorded by a public servant and given in the birth registration, thereby details of the plaintiff establishes beyond doubt that he is the legitimate son of the Muslim-Hindu couple.

It was argued that the plaintiff's mother, being a Hindu at the time of marriage, would not have any right over the property of her husband, nor her son (the plaintiff) had any right over his father's property. However, in this case, the Kerala High Court held that the plaintiff was born out of an irregular marriage (fasid) but he is not illegitimate. Shamsudeen's claim over property was opposed by his cousins, who alleged that his mother was not the legally wedded wife of Ilias (plaintiff's father) and she was a Hindu by religion, at the time of marriage.

They claimed that she had not converted to Islam at the time of her marriage and thus, Shamshudeen being the son of Valliamma(her old name), is not entitled to any share in Ilias's property. The Court said that it was not disputed that Valliamma was the wife of Ilias and contrary to the claims, birth register records maintained by statutory authorities indicate that Shamsudeen was their son. The legal effect of an irregular marriage is that in case of consummation, though the wife is entitled to get dower, she is not entitled to inherit the properties of the husband. But the child born in that marriage is legitimate, just like in the case of a valid marriage and is entitled to inherit the property of the father.

ISSUES

Whether the marriage between a Muslim male and a Hindu female is void? Whether the child born in that relationship is legitimate and if so whether, the child will inherit the estate of the father?

HELD

The apex court said that it was not disputed that Valliamma was the wife of Ilias and contrary to the claims, birth register records maintained by statutory authorities indicate that Shamsudeen was their son. The Court in this case has held that both the Trial Court and the Kerala High Court were justified in concluding that the plaintiff is the legitimate son of the Muslim-Hindu couple and is therefore entitled to a share in his father's property as per the law.

SNG & PARTNERS
Advocates & Solicitors

TRANSFER OF PROPERTY ACT

1882

SHANKAR SAKHARAM KENJALE V NARAYAN KRISHNA GADE & ANR.

Date : 17.04.2020

Citation : Supreme Court [Civil Appeal No. 4594 of 2010]

SYNOPSIS

Right to redeem mortgage can be extinguished only by process known to law.

FACTS

The disputed land in question was watan property, which was governed by the Bombay Hereditary Offices Act, 1874 (**"Watan Act"**). Mr. Ramachandra (predecessor of the respondent/mortgagor), being the permanent tenant of the land, executed a mortgage deed in favour of the appellant/mortgagee in 1947. As per the terms of the deed, the mortgage period was ten years and the mortgagee was placed in possession of the land.

Meanwhile, the Bombay Paragana and Kulkarni Watans (Abolition) Act, 1950 (**"Abolition Act"**) came into force, which abolished the watan lands and resumed it to the Government, subject to Section 4, which empowered the holder to seek re-grant of the land upon payment of the requisite occupancy price. Instead of the mortgagor, the mortgagee obtained the re-grant of the land in his favour in 1960.

The mortgagor filed suit for redemption of the mortgage, which was dismissed twice, before the High Court decreed the suit for redemption of mortgage. Aggrieved by the order, an appeal was filed before the Supreme Court by the mortgagee.

ISSUES

Whether the mortgagor's right of redemption ceased to exist by virtue of the resumption of the land under the Abolition Act and its subsequent re-grant in favour of the mortgagee.

HELD

It was held that the rights of the mortgagor survived the resumption of the land to the Government, even after the coming into force of the Abolition Act and his rights, as a permanent tenant over the watan lands were intended to subsist by virtue of the Bombay Tenancy and Agricultural Lands Act, 1948. Further, it was held that failure on the part of the mortgagor to pay the occupancy price for re-grant was not fatal to his rights as a tenant and consequently, the relationship of mortgagor-mortgagee between the parties didn't cease to exist.

It is well-settled that the right of redemption under a mortgage deed can come to an end or be extinguished only by a process known to law, i.e., either by way of a contract between the parties to such effect, by a merger, or by a statutory provision that debars the mortgagor from redeeming the mortgage, which emanates from the legal principle applicable to all mortgages – "Once a mortgage, always a mortgage".

It was observed that if a mortgagee, by availing himself of his position as a mortgagee, gains an advantage which would be in derogation of the right of the mortgagor, he must hold such advantage for the benefit of the mortgagor as enumerated u/s 90 of the Indian Trusts Act, 1882. Thus, the Supreme Court upheld the decision of the High Court and the appeal was dismissed.

SRIDHAR & ORS. V N. REVANNA & ORS.

Date : 11.02.2020

Citation : Supreme Court [Civil Appeal No.1209 of 2020]

SYNOPSIS

Condition of a gift deed restricting alienation of property by the donee is void.

FACTS

The respondent received the suit properties by way of registered gift deed dated 05.06.1957 from his grandfather, Muniswamappa, who was the absolute owner of the suit schedule property. The gift deed also contained a condition that donee i.e. the respondent and his younger brothers hereafter, had no right to alienate the scheduled property. However, the respondent executed sale deeds dated 07.10.1985, 08.10.1985 and 10.10.1985 in

favour of the tenants of the premises. Thus, a suit was filed before the High Court by the appellants against the respondent to declare that the appellants, being the great grandsons of Muniswamappa, were the absolute owners of the suit schedule properties and to declare the alienation as null and void. T

he High Court held that the condition of the gift deed was not void, but didn't annul the sale deed and granted limited relief to the appellants, by holding that the appellants were entitled to receive the consideration amount of the sale. Aggrieved by the order, an appeal was filed before the Supreme Court.

ISSUES

Whether a condition restricting the right of the donee to alienate the property is good in law.

HELD

A reference was made to Section 10, which expressly provides that, where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void.

Thus, it was held that the condition in the gift deed was void. Furthermore, the condition put on person unborn is entirely different from execution of gift deed in favour of a person who is not born. It was held that the gift was clearly an absolute gift in favour of the respondent and not in favour of any unborn person and thus, Section 13 had no application in the facts of the present case. In light of above, the appeal was dismissed and it was held by the Supreme Court that the respondent was entitled to transfer the property which he had received by way of gift deed.

VINAY EKNATH LAD V CHIU MAO CHEN

Date : 18.12.2019

Citation : Supreme Court [Civil Appeal No. 4726 of 2010]

SYNOPSIS

The landlord's derivative title is to be established in some form, when the same is challenged by the tenant.

FACTS

The appellant had entered into a lease agreement with the mother of the respondent on 10th May,1978, when the ownership of the premises vested with a partnership firm. The firm got dissolved with effect from 7th December, 1978 and the partners along with their relatives, formed a co-ownership firm, by the same trade name.

The respondent became the tenant in 1996, after the demise of his mother. The appellant issued a notice for termination of the lease agreement u/s 106 in 2006. The Trial Court ruled in favour of the appellants, who claimed that they had derived the title to the subject premises from the partnership firm, after its dissolution, as residue property u/s 48 of the Indian Partnership Act, 1932.

However, the order of Trial Court was reversed in appeal filed by the respondent. Hence, the appeal was filed before the Supreme Court.

ISSUES

Whether the appellant had the locus to institute the suit or not.

HELD

No jural relationship could be established between the partnership firm and the co-ownership firm. It was noted that the principle of estoppel bars a tenant from questioning the title of the landlords as given u/s 116 of the Indian Evidence Act, 1872. But the said principle was not applicable in the present case as the tenant had acknowledged the partnership firm as the landlord, but questioned the locus standi of the appellant, who operated under the same trade name as a co-ownership firm.

In the absence of attornment or public notice of the dissolution of the firm, it could not be ascertained as to how the appellant derived the title to the property. It was opined that sufficient material was not there before the first two Courts to establish the appellants' claim of ownership of the premises, on the basis of a family arrangement, after dissolution of the firm. In a landlord-tenant suit, the landlord is not required to prove his title in the property as in a title-suit. But, when the landlord's derivative title is challenged, the same has to be established in some form. On this point the appellant had failed before the first two Courts. Thus, the Supreme Court set aside the judgment under appeal and remanded the matter to the High court to re-adjudicate the matter on the basis of new evidence which was being submitted by the appellant to prove the journey of the title of the subject premises.

SOPAN (DEAD) THROUGH HIS L.R. V SYED NABI

Date : 16.07.2019

Citation : Supreme Court [Civil Appeal No.3506 of 2010]

SYNOPSIS

A sale with a mere condition to retransfer is not a mortgage by conditional sale.

FACTS

The respondent had received five thousand rupees from the appellant, which was construed as consideration for the land owned by the respondent. Subsequently, a registered sale deed was executed in favour of the appellant, who had already been put in possession of the said property. A separate agreement was also entered between the parties whereby the respondent had agreed to repay the said amount to secure the re-conveyance of the property.

Another agreement was entered between the parties, where the respondent agreed that he had taken money from the appellant and the possession of the land was given to the appellant and that if the amount was not repaid, then the deed would be considered to be a sale deed. In 1980, the respondent filed a suit to reclaim the property, stating that the said transaction was a mortgage and he was ready to repay the amount to retrieve the property, which was disputed by the appellant. After a series of suits, the present appeal was filed before the Supreme Court.

ISSUES

Whether a sale with a mere condition of retransfer would amount to a mortgage by conditional sale.

HELD

Section 58(c) stated that no transaction could be deemed to be a mortgage unless the condition was embodied in the document that effected or purported to effect the sale. Therefore, any recital relating to mortgage or the transaction being in the nature of a conditional sale should be an intrinsic part of the sale deed which would be the subject matter. Relying on the judgment in Dharmaji Shankar Shinde v. Rajaram Sripad Joshi, it was held that if the sale and agreement to repurchase are embodied in separate documents, then the transactions could not be a mortgage by conditional sale irrespective of whether the documents were contemporaneously executed.

Even in the case of a single document, real character of the transaction had to be ascertained from the provisions of the deed, viewed in the light of the surrounding circumstances and intention of the parties. After examining the sale deed, it was held that the deed didn't indicate any clause to demonstrate it as a mortgage, but, on the other hand, referred to the sale consideration and the manner in which it was received. Furthermore, the respondent as the vendor by executing the document had ensured that the title of the property stood transferred to the appellant, which was an absolute conveyance in the eyes of the law.

Thus, the appeal was allowed and the Supreme Court held that a sale with a mere condition of retransfer is not a mortgage.

V. T. VIJAYAN V U. KUTTAPPAN NAIR

Date : 01.03.2019

Citation : Kerala High Court [R.F.A. Nos. 657 and 660 of 2015]

SYNOPSIS

Sale agreement executed during the pendency of suit hit by "lis pendens".

FACTS

The issue in the present case was referred to the full bench of the Kerala High Court for an authoritative pronouncement by way of a reference order by the division bench, which doubted the view of the decision of an earlier division bench in Wellingdon B. v. D. Shyama Prasad (**"Wellington"**), which had held that agreement of sale would not be hit by Section 52 of the Transfer of Property Act, as the sale agreement didn't create any right, title or interest in the property by itself.

ISSUES

Whether an agreement for sale executed by a party to the lis, during the pendency of the suit is hit by the doctrine of lis pendens or not?

HELD

It was observed that the decision of a court in a suit should be binding not only on the litigating party, but also on those who derive title pendente lite. Section 52 didn't not render such transfers as void, but rendered such transfers subservient to the right of the parties to such suit, eventually determined in the suit. It was held that the expression "otherwise dealt with" by any party had a very wide meaning and any act or any mode of dealing with the subject-matter of the suit, by any party to the lis, which would adversely affect the rights of any other party under any decree that may be passed, would be subject to the result of the suit.

Although an agreement for sale does not create any interest in or charge on the property, but the buyer does get the right to enforce sale deed in his favour u/s 19 of the Specific Relief Act. On a combined reading of Section 5A of the Transfer of Property Act, Section 37 of the Indian Contract Act and Section 19 of the Specific Relief Act, it was held that a contract for sale of the subject-matter of the suit, during the pendency of the suit, is a dealing with the subject matter of the suit, which would adversely affect the parties to the suit, and others claiming right under them.

Hence, an agreement for sale executed by the parties to the lis, during the pendency of the suit is hit by the doctrine of lis pendens. Further, it was held that the ratio laid down in Wellington (supra) in respect of Section 52 was not good in law.

VIDYA DROLIA & ORS. V DURGA TRADING CORPORATION

Date : 28.02.2019

Citation : Supreme Court [Civil Appeal No. 2402 of 2019]

SYNOPSIS

Matter referred to a larger bench to decide if Transfer of Property disputes are arbitrable.

FACTS

The appellant was supposed to deliver the vacant and peaceful possession of the leased property to the respondent, on the expiry of the lease period as per the lease agreement. Arbitration was invoked by the respondent when the appellant didn't vacate the said property. Subsequently, the High Court allowed the application by the respondent to appoint a sole arbitrator, rejecting the appellants' objections on the arbitrability of the dispute between the parties.

A review petition was filed in 2018 by the appellants before the High Court, in the light of the judgement of the Supreme Court in Himangni Enterprises v. Kamaljeet Singh Ahluwalia (**"Himangni"**), in which it was held that where the Transfer of Property Act, 1882 (**"Act"**) applied between landlord and tenant, disputes between the said parties would not be arbitrable. The said review petition was dismissed and thus, an appeal was filed before the Supreme Court.

ISSUES

Whether disputes governed under Transfer of Property Act, 1882 could be referred to arbitration.

HELD

It was noted that there was nothing in the Act to show that a dispute as to determination of a lease arising u/s 111 could not be decided by arbitration.

It was observed that none of the provisions of the Act had been discussed by the two judgments which were referred to in the case of Himangni and thus, they could not be relied on to conclude that disputes governed under the Act were inarbitrable. Furthermore, it held that the ratio in Himangni was not correct and required a relook by a larger bench of this court.

It was noted that when it came to the grant of specific performance, there was no prohibition in the Specific Relief Act, 1963 that issues relating to specific performance could not be referred to arbitration. Applying the same reasoning in case of the Act, it held that one could arrive at a similar conclusion that disputes under the Act could be referred to arbitration as the said Act didn't expressly exclude arbitration.

Lastly, reference was made to the provisions of the Indian Trusts Act, 1882 to demonstrate as to how it was concluded that disputes under the Indian Trust Act, 1882 could not possibly be the subject matter of arbitration, which provided an excellent instance of how arbitration was excluded by necessary implication. It noted that these could be the tests which could be applied to decide whether the disputes under the Act could be resolved by arbitration or not.

Hence, the appeal was dismissed and the said case was referred to a bench of three Hon'ble judges of this court.

DR. H. K. SHARMA V SHRI RAM LAL

Date : 28.01.2019

Citation : Supreme Court [Civil Appeal Nos. 12371238 of 2019]

SYNOPSIS

Mere Agreement to sale would not result in termination of the landlord-tenant relationship.

FACTS

The respondent was the owner of the house in question and had let out the house to the appellant as per the lease agreement entered between the parties. In 2008, the respondent filed a suit of eviction against the appellant, which was contested by the appellant by stating that the parties had entered into an agreement of sale for the purchase of the said house, pursuant to which, the relationship of landlord-tenant ceased to exist between them.

This dispute lead to a series of suits, before the High Court ruled in favour of the respondent that he had the right to evict the appellant from the house. Aggrieved by the order, an appeal was filed before the Supreme Court.

ISSUES

Does the landlord-tenant relationship cease to exist, on entering into an agreement for sale of the tenanted property.

HELD

It was observed that the conditions as set out in the sale agreement didn't recognize the intention of the parties to surrender the tenancy rights, either expressly or impliedly. If the parties while entering into the agreement to sell the house in question, intended to surrender their tenancy rights then they would have made necessary provision to that effect by providing a specific clause in the agreement as contemplated in clauses (e) or (f) of Section 111 of the Transfer of Property Act.

However, in the present case, the tenancy rights in question between the parties didn't result in determination as there was no specific clause to that effect under the

sale agreement. Additionally, since the sale agreement in question was not a registered document, the plea of part performance made by the appellant, based on Section 53A was rejected. Therefore, the Supreme Court upheld the judgment of the High Court, observing that the landlord was entitled to file an application u/s 21(1)(a) of the U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act, 1972 to evict the appellant. Hence, the appeal was dismissed.

S. SAROJINI AMMA V VELAYUDHAN PILLAI SREEKUMAR

Date : 26.10.2018

Citation : Supreme Court [Civil Appeal No. 10785 of 2018]

SYNOPSIS

Conditional gifts are incomplete until conditions are complied with; such gift deeds can be cancelled by the donor.

FACTS

A gift deed was executed by the appellant in favour of the respondent, which stated that it would take effect after the death of the appellant and her husband, with a condition that the donee should look after them. However, the appellant executed the deed of cancellation later on, cancelling the gift. Subsequently, the respondent filed a suit to declare the cancellation deed as null and void, which was allowed by the Munsif Court.

Thereafter, the district court allowed the appeal filed by the appellant against the order of the Munsif Court. However, the judgment of the district court was set aside on an appeal by the respondent. Aggrieved by the decision, an appeal was filed before the Supreme Court.

ISSUES

Whether a conditional gift deed can be cancelled by the donor.

HELD

It was noted that gift means to transfer certain existing moveable or immovable property voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. The execution of a registered gift deed, acceptance of the gift and delivery of the property, together made the gift complete. Thereafter, the donor is divested of his title and the donee becomes absolute owner of the property. In light of above, it was held that a conditional gift with no recital of acceptance and no evidence in proof of acceptance, where possession remains with the donor as long as he is alive, does not become complete during lifetime of the donor.

When a gift is incomplete and title remains with the donor, the deed of gift might be cancelled. It was held that in the present case, the deed of transfer was executed for consideration and was in any case conditional, subject to the condition that the donee would look after the appellant and her husband and subject to the condition that the gift would take effect after the death of the donor. Thus, it was held that there was no completed gift of the property in question by the appellant to the respondent and the appellant was within her right to cancel the deed. Thus, the appeal was allowed.

STATE OF KERALA V V. D. VINCENT

Date : 03.08.2018

Citation : Kerala High Court [W.A. No. 1082 of 2018]

SYNOPSIS

Dissolution deed of partnership doesn't confer title in immovable property to partners.

FACTS

The partners of a firm had brought their individual properties into the common stock of the firm, which was dissolved by a deed of dissolution.

As per the deed, the properties of the firm were distributed among the partners, and in the process, the properties brought in by the partners at the time of the formation of the firm, got exchanged amongst them.

When the partners approached the revenue authorities, seeking a transfer of the registry of the property obtained by them consequent

to dissolution of the firm in their names, the same was refused. Thus, a writ petition was filed by the respondent, which was allowed. Aggrieved by the order, an appeal was filed before the High Court.

ISSUES

Whether the partners were entitled to a transfer of registry in respect of the properties that were allotted to them under the deed of dissolution of the firm.

HELD

It was noted that the dissolution deed, while effecting a distribution of the partnership assets, allotted particular items of immovable property to partners, other than those who had brought the property into the partnership.

Relying on previous judgments, it was noted that the agreement which recorded the dissolution of the firms and the allotment of machines etc. to a particular partner, could not be said to convey any immovable property to the partner either expressly or by necessary implication.

The interest that a partner, who is allotted any item of immovable property towards his share in the assets of the partnership, on its dissolution, is only in the monetary value of the immovable property, which represents his share in the assets of the firm on its dissolution.

The interest that he obtains is to be treated as movable property, and not immovable property since he does not get an absolute title to the immovable property. Thus, such an interest could not be seen as one that conveyed the title in the immovable property, necessitating a registration under the Registration Act.

It was held that in the present case, the partners sought rights, which were superior to those that they had obtained through the allocation of the items of the immovable property in the dissolution deed.

Lastly, it was observed that going by the express provisions of the Transfer of Property Act and the Transfer of Registry Rules, their existing rights in relation to the immovable property in question could mature into an absolute title only if there was a formal conveyance of the title in the immovable property to them either in the deed of dissolution or through a deed of conveyance that was recognized by law. Thus, the appeal was allowed and it was held that only a valid deed could convey the title over the immovable property to the respondents.

END

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