Indian Legal Impetus

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Preface

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Founding Partner

We are pleased to present to our esteemed readers with yet another edition of our monthly newsletter **Indian Legal Impetus** covering recent developments as well as commentaries on practice of law. In this "August" Edition, in-line with Monsoons in India resulting in colourful environment around, we have covered varied aspects of Indian laws- ranging from procedural perspectives, new legislations introduced for transparency, arbitration, issue of damages, and towards the case analysis of recent judgments. Indeed, as full-practice law firm and with so much going on in growing Indian market and economy, it is a challenge to cover all developments from our various departments, but we endeavour to bring to our readers a nice mix of new and settled practices.

Starting with a well-reasoned decision by the Hon'ble Delhi High Court explaining the prescribed procedures to be followed by the adjudicating Officers under SEBI while exercising their statutory powers carefully and consciously and only after satisfying that the necessary conditions allowing the exercise of powers have been met.

Next, we discuss salient features and genesis of The Arbitration and Conciliation (Amendment) Bill, 2018. Continuing with the growing practice of arbitrations in India, we cover an analysis of designating (neutral) seat in domestic arbitration followed with a commentary on applicability of the provisions of the Limitation Act, 1963, to appeals under Section 37(2) of the Arbitration and Conciliation Act, 1996.

Next in line are articles focusing on the road infrastructure and real estate sectors. The July 2018 judgment by the Hon'ble Supreme Court in the matter - *National Highways Authority of India versus Gwalior Jhansi Expressway Limited* deals with the issue of procedure and conduct by the government and the parties during a tender/bidding process of road highway projects which is of much importance to the large-scale infrastructure companies. In the same industry of road infrastructure, the next article discusses the process of land acquisition by MORTH under National Highways Act. Further, a recent judgment by Hon'ble Bombay High Court is analysed whereby the Court has spelled out an interesting decision holding that Housing Society is not an industry under the Industrial Disputes Act, even if it earns profit.

Onto the Commercial law practice, the next article discusses the objective, implementation and advantages of Additional Surveillance Measures (ASM) Framework introduced by Securities and Exchange Board of India (SEBI).

One of the pain-points in a suit is ascertaining damages, and in this edition, we present two different perspective relating to "damages". The first article discusses different methods adopted by Courts for calculation of damages and next article discusses about mitigation of damages, providing principle of mitigation of damage, case-laws and also its application under Arbitration law.

The next article focuses on the concept of Discovery by Interrogatories in a lucid and pointwise manner. Moving on, the following article describes about the procedure and recordal of events by an Investigating Officer (IO) in form of "Panchnama" under several statutes and regulations. The ending article discusses a recent judgment by Hon'ble Supreme Court in *NCT of Delhi vs. Union of India* whereby the Court has delved into the federal spirit of the Constitution while defining the duties and limitation of a Governor or Lt. Governor vis-à-vis elected Government.

I sincerely hope that this edition would be an informative and interesting read. We welcome all suggestions, opinions, queries, or comments. You can also send us your valuable insights and thoughts at newsletter@singhassociates.in

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Delhi High Court on SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995

–Harsimran Singh

Case 1 snippets:

- SEBI issues show cause notice to the Petitioner & others for violating insider-trading norms ;
- Hon'ble High Court sets aside SEBI's order in the Himalaya Granite matter;
- Directs SEBI board to re-examine the case if required and pass fresh order;
- The Hon'ble Court observed that adjudicating proceedings were not followed under prescribed norms;
- The Hon'ble Court held that the Whole-Time Member (WTM) has not formed an independent opinion required to adjudging the matters

The Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (the "Rules"), were promulgated under the Securities and Exchange Board of India Act, 1992 (the "Act"), for cases where the Board is of the opinion that there are grounds for adjudging under any of the provisions in Chapter VI-A 2 of the Act; the Board may appoint any of its officers not below the rank of Division Chief to be the adjudicating officer for holding an inquiry for the said purpose.

As per Rule 4 of the Rules, for the purpose of holding an enquiry, following procedure is required to be followed:

1. For holding an inquiry for the purpose of adjudging, under sections of Chapter VI-A of the Act, whether any person has committed contraventions as specified in any of such sections, the adjudicating officer shall, in the first instance, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than 14 days from the date of service thereof) why an inquiry should not be held against him.

2. Every notice, as stated above, to any such person shall indicate the nature of offence alleged to have been committed by him.

3. After considering the cause, if any, shown by such person, the adjudicating officer is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person before the adjudicating officer, either personally or through his lawyer or other authorized representative.

4. On the date fixed, the adjudicating officer shall explain to the person proceeded against or his lawyer or authorized representative, the offence, alleged to have been committed by such person indicating the provisions of the Act, rules or regulations in respect of which contravention is alleged to have taken place.

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[1] *Amit Jain Vs. Securities and Exchange Board of India and Ors. (MANU/DE/2408/2018)*
[2] *Chapter under the Act for Penalties and Adjudication*

5. The adjudicating officer shall then give an opportunity to such person to produce such documents or evidence, as he may consider relevant to the inquiry and if necessary the hearing may be adjourned to a future date and in taking such evidence the adjudicating officer shall not be bound to observe the provisions of the Evidence Act, 1872; *Provided that the notice and the personal hearing, referred to above may, at the request of the person concerned, be waived.*

6. While holding an inquiry under this rule the adjudicating officer shall have the power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which, in the opinion of the adjudicating officer, may be useful for or relevant to, the subject-matter of the inquiry;

7. If any person fails, neglects or refuses to appear as required before the adjudicating officer, the adjudicating officer may proceed with the inquiry in the absence of such person after recording the reasons for doing so. Further, the Board can (if required) in its discretion, appoint a presenting officer in an inquiry;

Upon consideration of the evidence produced before the adjudicating officer, if the officer is satisfied that the person has become liable to penalty under any of the sections specified in section 15-I(1), he may, by order in writing, impose such penalty as he thinks fit in accordance with the provisions of the relevant section or sections specified in section 15-I. However, while adjudging the quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; (b) the amount of loss caused to an investor or group of investors as a result of the default; and (c) the repetitive nature of the default. Further, every order (dated and signed by the adjudicating officer) made under sub-rule (1) shall specify the provisions of the Act in respect of which the default has taken place and shall contain brief reasons for such decisions.

The adjudicating officer is required to send a copy of every order made by him under the Rules to the person concerned and to the Board.

Further, Rule 7 of the Rules prescribes the manner in which a notice or an order issued under the Rules has to be served on the person. These include:

(a) by delivering or tendering it to that person or his duly authorized agent;

(b) by sending it to the person by fax or electronic mail or courier or speed post with acknowledgement due or registered post with acknowledgement due to the address of his place of residence or his last known place of residence or the place where he carried on, or last carried on, business or personally works, or last worked, for gain;

(c) if it cannot be served as per (a) or (b) above, then by affixing it on the outer door or some other

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[3]Power to Adjudicate

[4]Rule 5 *(Order of the adjudicating officer)* of the Rules

[5]Rule 6 *(Copy of the Order)* of the Rules

[6]Provided that a notice sent by Fax shall bear a note that the same is being sent by fax and in case the document contains annexure, the number of pages being sent shall also be mentioned. Provided further that a notice sent through electronic mail shall be digitally signed by the competent authority and bouncing of the electronic mail shall not constitute valid service.

(d) if it cannot be affixed on the outer door, by publishing the notice in at least two newspapers, one in an English daily newspaper having nationwide circulation and another in a newspaper having wide circulation published in the language of the region where that person was last known to have resided or carried on business or personally worked for gain.

As it can be seen from above, the Rules prescribe a robust and a clear roadmap on how an inquiry is to be made and its outcome is to be handled.

Case-at-hand before Hon'ble Delhi High Court[7]

The case pertains to a showcause notice issued by SEBI to the petitioner, who held over 5% stake in a listed-company named Himalaya Granites (the 'Company'), but failed to make disclosures under the Prohibition of Insider Trading (PIT) norms. The petitioner contested the move on the ground that the SEBI Board didn't follow the prescribed procedure provided under the Rules. It was averred by the Petitioner that the group of assistant managers of SEBI recommended proceedings against the entities without taking WTM's opinion and therefore, the appointment of adjudicating officer was without jurisdiction. Further, the penalty was imposed without a prior order under the PIT regulations.

Ruling by the Hon'ble Court

After deliberating upon the merits of the case in light of the applicable laws, the Hon'ble Court set aside SEBI's impugned order and asked the SEBI board or a WTM to examine the case as per the laws and accordingly pass a fresh order. The Hon'ble Court held that:

(i) A WTM had not formed "independent opinion' on whether there are grounds for adjudication in the said matter;

(ii) As per the mandate of the Rules, it is apparent that formation of an opinion by the board is a pre-condition for the appointment of the adjudicating officer. In other words, in absence of such an opinion, an adjudicating officer cannot be appointed and any such appointment will be without jurisdiction;

(iii) Typically, a whole-time member independently takes a call whether the case is fit for the adjudication, irrespective of the suggestion expressed by his juniors;

(iv) If the board/member is of opinion that there are grounds for adjudging, then accordingly it appoints an adjudicating officer to hold an inquiry.

(v) While the SEBI pleaded that the adjudication was initiated after the member was prima facie satisfied that there are sufficient grounds to inquire into the matter and adjudicated upon the alleged violations; the Hon'ble Court held that there was no scope for inferring formation of such opinion merely for reason that an adjudicating officer has been appointed and other officers have forwarded their recommendations for such an action.

(vi) The Hon'ble Court[8] held that:

[7] *Amit Jain (supra) – Order dated 09.07.18*
[8] *Para 36 of order dated 09.07.18*

"The formation of an opinion that there are grounds for adjudging under Chapter VIA of the Act is the necessary pre-requisite for the Board to exercise its jurisdiction. Absent such opinion, the Board would have no jurisdiction to appoint an Adjudicating Officer. There is no dispute as to the above proposition. The only controversy is whether the fact that the Board (Whole Time Member) had formed such opinion can be inferred from appointment of the Adjudicating Authority. Plainly, there is no scope for inferring formation of such opinion merely for the reason that an Adjudicating Officer has been appointed and other officers have forwarded their recommendations for such an action. As stated above, the Board has to form an independent opinion that there are grounds for adjudging under Chapter VIA of the Act. It is not necessary for the Board to elaborate its opinion or to provide reasons for the same. However, the least that is required for the Board is to state in unequivocal terms that in its opinion, there are grounds for adjudging under Chapter VIA of the Act before proceeding to appoint an Adjudicating Officer. It is necessary that the record clearly bears out that there is an application of mind on the part of the Board. The power to appoint an Adjudicating Officer has been delegated to the Whole Time Member. Therefore, it was necessary for him to have formed such opinion before proceeding further."

The judgment, if seen in the right perspective, is worthy of appreciation as it confirms the position that prescribed procedures need to be followed to ensure that authorities exercise their statutory powers carefully and consciously after satisfying themselves that the necessary conditions allowing exercise of powers have been met.

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Genesis of the Arbitration and Conciliation (Amendment) Bill, 2018

–Mahip Singh Sikarwar

Introduction

Alternate dispute resolution (ADR) has gained prominence in the country in recent times; arbitration being the forerunner amongst all such ADRs. Even the Courts have been encouraging ADRs citing several benefits. Thus, to keep pace with the international arbitration practices, improving and hence instilling value and trust in India's arbitration procedure, certain amendments were proposed in the Arbitration (Amendment) Bill, 2018. The said change would surely help in promotion of India as a preferred seat of arbitration. The proposed amendment bill inter alia intends to bring about 6 prominent changes in the existing Arbitration and Conciliation Act, 1996. The proposed amendment are in-line with the recommendations of the Sri Krishna Committee Report, 2017. The proposals are discussed as under:

1. **Creation of an Arbitration Council of India** The Bill proposes creation of an Arbitration Promotion Council of India (APCI) to formalize the processes. The said Council would work towared suggesting effective corrections and/or improvements in the practice to promote India's recognition as an Arbitration Centre internationally, which will ease the process of multiparty international arbitration as well. The Council will help laying down professional guidelines for progression of the jurisprudence of arbitration law and practices in India. The Council is proposed to be an autonomous body free from any governmental intervention which will will help maintain neutrality even in cases where the Government is party to an arbitration.

Genesis – India, currently has more than 35 arbitral institutions which work differently without having a common minimum standard. This coupled with lack of good infrastructure, facilities and services have acted as a deterrent in India being chosen as a seat for international arbitration. In view of the same, the Committee has recommended constitution of the said Council to establish a benchmark to assess arbitral institutions in India and to prescribe a minimum common standard.

2. **Appointment of Arbitrators** Presently, Section 11 of the Act provides for the appointment of arbitrators by the Courts. With the objective to reduce the burden on the Courts and to make the process quicker and hassle-free, in accordance to the doctrine of Competence as provided for under Section 16 of the Act, the amendment bill proposes appointment of arbitrators by designated arbitral institutions.

3. **Exclusion of International Commercial Arbitrations from the purview of Section 29A** Section 29A as appended by the 2015 Amendment to the Act, inter alia mandates the completion of arbitral proceedings within a period of 12 months. The Amendment Bill proposes to exclude the International Commercial Arbitrations from the purview of the said timeline as it has been subjected to a lot of criticism from the international community on the grounds that it is not practically possible. For other arbitrations too, the amendment Bill proposes that the 12-month period should be calculated after the completion of pleadings.

Genesis – The grounds on which the International Commercial Arbitrations are proposed to be excluded from the 12-month timeline are:

- Arbitration, in its entirety is based on party consent and autonomy. The current S. 29A is argued to take away party autonomy by prescribing a mandatory time limit where the parties have no say, which is contrary to Art. 19 of the UNCILTRAL model law from which the Arbitration Act is inspired. Every arbitration has its own nature, size and complexity and this one-size-fits-all approach taken under S. 29A is not suitable in all cases.

- S. 29A pushes for greater judicial intervention by forcing parties to approach the court where the arbitral proceedings are not completed within 12 months. This again, may act contrary to the objective of the Arbitration Act of limiting judicial intervention.

- Another factor for this proposal is that established arbitration jurisdictions across the world like that of UK, Singapore and Hong Kong do not contain provisions similar to S. 29A. Timelines for arbitral proceedings are usually agreed between the parties themselves or between the parties in consultation with the arbitral tribunal and the arbitral administration, which is administering the arbitral process.

With regards to domestic arbitration proceedings, the Report opined that the timeline of 12 months should be fixed post the completion of pleadings as it was increasingly seen that the one-year period to be calculated from the date of constitution of the tribunal was proving to be insufficient for the purposes of completing arbitrations. However, this too has faced much criticism as it is difficult to determine the exact date of completion of pleadings as parties can amend pleadings at any later date and also provide for rejoinders at any stage.

4. **Confidentiality in Arbitral proceedings** Currently, the Act provides for confidentiality only in cases of Conciliation. However, the Amendment Act, 2018, proposes for an incorporation of a new S. 42A by which confidentiality will be provided in arbitration proceedings as well (barring awards).

Genesis – The international community, if not explicitly, at least impliedly provides for confidentiality clauses in the agreement. The Indian legislation provides for no such recognition. Keeping the objective of the enactment in mind, the Report proposed for recognition of confidentiality in arbitration proceedings.

5. **Immunity for the Arbitrator** The Amendment Bill proposes to provide more freedom to the arbitrators by granting immunity to them from any legal proceedings for acts and omissions done during the course of the arbitration proceedings so that they can exercise their function to the best of their ability without any compulsion or fear.

Genesis - The immunity of arbitrators from liability for acts or omissions in the discharge of their functions as arbitrators except in cases of bad faith is a well-accepted principle internationally. It is necessary to ensure independence of the arbitrators and to preserve the integrity of the arbitral process from interference by protecting arbitrators from unnecessary harassment by parties. However, the present Arbitration Act does not provide for such immunities. With the objective to bring Indian legislation at par with the international practices, such proposal has been made.

6. **Applicability of the 2015 Amendment** The Amendment Bill proposes the incorporation of a new Section 87 to the Act. The object of the section will be to clarify that unless otherwise agreed by the parties, the 2015 amendment will not apply to:

    (a) Arbitral proceedings that have commenced before the Amendment Act, 2015,
    (b) Court proceedings arising out of or in relation to such arbitral proceedings;

and shall apply only to Arbitral proceedings commenced on or after the commencement of the Amendment Act, 2015 and to court proceedings arising out of or in relation to such Arbitral proceedings.

Genesis - Section 26 of the Amendment Act was in discussion. There have been contrasting judgments[1] on the issue whether the 2015 Amendment Act will apply to court proceedings (i) filed after the amendments came into force in 2015, but in respect of arbitrations commenced before the amendments; and (ii) court proceedings which were pending at the time the amendments came into effect but were decided thereafter. In this context there were conflicting decisions of various courts.

Recently in the case of *BCCI v. Kochi Cricket Private Ltd*[2], the Supreme Court opined that the 2015 amendments would apply to all court proceedings filed after the amendments came into effect (October 23, 2015), regardless of when the arbitration was commenced. Crucially, it was also held that the 2015 amendments would apply to pending proceedings that may have been filed prior to the amendments but were pending at the time amendments came into force.

Conclusion

The Ordinance is long due and is awaiting the approval of the houses right now. However, the genesis of the amendments reflect the international best practices approach being adopted by our legal regime. Only once the amendment is enacted will we come to know whether the Government took note of the Supreme Court's interpretation.

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[1]Rendezvous Sports World v. Board of Control for Cricket in India 2017 (2) BomCR 113, Ardee Infrastructure Pvt. Ltd. v. Ms. Anuradha Bhatia 2017 (2) ArbLR 163 (Delhi), in Electrosteel Casting v. Reacon Engineers AIR 2016 (NOC 764) 349, New Tirpur Area Devp Corp v. Hindustan Construction O.S.A. Nos.21 & 22 of 2016 (30.08.2017 – Madras High Court), Enercon v. Yogesh Mehra, 2017 SCC OnLine Bom 1744

[2]2018 (4) SCALE 502

Implications of Designating 'Seat' in Domestic Arbitration

–Prashant Daga

'Seat' or 'place of arbitration' or 'locus of arbitration' is quintessential component of any International Commercial Arbitration[1]. It is the seat of arbitration which determines the proper law ("**lex arbitri**") governing the arbitration (in absence of any express agreement) and which court will exercise the supervisory jurisdiction over the whole arbitration process[2]. The importance of seat of arbitration is very well known in the world of International Commercial Arbitration ("**ICA**")[3]. Although the position in Indian law is settled with regard to the importance and consequences of designating seat in ICA[4], however, its importance in Domestic arbitration is widely contested. This Article particularly analyses the implications of designating 'seat' in Domestic Arbitration only and will refrain from commenting its significance in ICA

Indus Case

The Hon'ble Supreme Court in *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited & Ors*[5], ("**Indus case**") got the chance to comment upon the significance of 'seat' in domestic arbitration

The brief facts that gave rise to controversy in this case were that the arbitration agreement between the parties provided that "…dispute shall be finally settled by arbitration conducted under the provisions of Arbitration and Conciliation Act, 1996….shall be conducted in **Mumbai only**". Further, there was an exclusive jurisdiction clause also: "all disputes and differences of any kind whatever arising out of or in connection with this agreement shall be subjected to **exclusive jurisdiction of Mumbai only**." It is pertinent to note that the Respondent no. 1 and Appellant has their registered offices in Amritsar, contract was of supplying of goods from Delhi to Chennai. Due subsequent disagreement between the parties, the respondent no. 1 filed a section 9 application and section 11 application in Delhi high court. Delhi high court granted relief under the aforesaid application to the respondent no. 1 and hold that Delhi High court has the jurisdiction to hear the matter. Against this decision the Appellant moved a Special leave petition before the Supreme Court ("**Court**"). The Court while disposing the matter held that Delhi High court will have no jurisdiction as the "the moment the seat is determined, the fact that the seat is at Mumbai would vest Mumbai courts with **exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties**".

Antrix case

Effect of seat, forum selection (or absence of forum selection clause) also came before the Delhi High Court in *Antrix Corporation ltd v. Devas Multimedia Pvt Ltd.*[6]. In this case Antrix before the initiation of arbitral proceedings has filed a section 9 application ["**the first Section 9 Application**"] before the

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[1]Reliance India Limited v. Union of India, (2014) 7 SCC 603; Enercon (India) v. Enercon Gmbh, (2014) 5 SCC 1; Harmony Innovation Shipping Limited v. Gupta Coal India Limited and Another, (2015) 9 SCC 172[2]2018 (4) SCALE 502

[2]Sulamerica CIA Nacional De Seguros S.A. v. Enesa Engenharia S.A. [2012] EWCA Civ 638

[3]G. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1886 (KLUWER LAW ARBITRATION 2009).

[4]sire Balco

[5]Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited & Ors, Civil appeal nos. 5370-5371 of 2017.

[6]FAO(OS) (Comm) 67/2017, CMA 11214 & 17730/2017

High Court of Karnataka in Bangalore for the restraining the Devas from proceeding for arbitration in ICC. Meanwhile during the pendency of the first Section 9 Application, arbitral tribunal was already constituted and proceedings were initiated before ICC tribunal. ICC tribunal passed arbitral award in favour of Devas a sum of $562.5 million with simple interest at 18% p.a. from the date of award to the date of payment. Antrix applied under Section 34 of the Act challenging the Award dated 14.09.2015. Devas filed a Section 9 application in the Delhi high court [**the Second Section 9 Application**]. It was in the Second Section 9 application that single judge of the Delhi High Court (Commercial Division) passed an interim order granting certain reliefs in to Devas. Antrix preferred appeal against last mentioned interim order. Antrix preferred appeal against last mentioned interim order passed under the Second Section 9 application. Before the Commercial Appellate Division, inter alia, the issue was raised whether Delhi High Court has the requisite jurisdiction to pass the said order?

The Court went into the detail analysis of Section 2(1)(e), Section 42, and BALCO judgment. It is pertinent to note that the court lays down the correct interpretation of Section 42 in light of practice of designating 'seat' of arbitration in Domestic Arbitration. Below are the findings of the court:

A) Section 42 presupposes that the existence of two or more competent courts. Hence, when one competent court seizes of the jurisdiction of the dispute the other courts no longer can exercise the jurisdiction on the same matter. (This is the rule of convenience and also for preventing conflicting decision arising out of parallel proceedings.)

B) If the designating seat is equated with designating an Exclusive Jurisdiction clause it will render the purpose of Section 42 otiose as there will be only one competent forum left to hear all the applications in relation to anarbitration every time either parties or an Arbitrator/Arbitral Tribunal designates a seatThus, such an interpretation in domestic arbitration will run contrary to the intent of parliament.

C) Finally, the court held that mere designating seat is not enough to cloth a particular court with exclusive jurisdiction. Only in case where 'exclusive jurisdiction clause' and 'seat' are one and same then only Seat will have the exclusive jurisdiction otherwise both seat and other courts will have the concurrent jurisdiction over the arbitration and Section 42 will come into play.

Analysis

International Commercial arbitration is mostly delocalized; seat is important factor that is used to localize the arbitration. In contrast, domestic arbitration is already localized. Further, is it possible, under the scheme of the Act, to construe Section 2(1)(e) and Section 42 in isolation without considering the general principle of law governing the jurisdiction of court?

It is trite that 'consent can neither confer (in case court doesn't have an inherent jurisdiction)[7] nor take away the jurisdiction of the court which it inherently (or exclusively) has'.[8] Thus, it has been a settled law in India that by mutual consent one cannot give jurisdiction to the court which it inherently lacks. Thus, first question before exercising jurisdiction is "whether the court has inherent subject matter jurisdiction or not?" Thus, which court in India will exercise Jurisdiction has to be decided as per

[7] *Vithalbhai (P)Ltd v. Union of India, (2005) 4 SCC 315.*
[8] *P. Dasas Munni Reddy v. P. Appa Rao, (1975) 2 SCR 725.*

the settle principle of laws laid down in Section 15 to Section 20 of Code of Civil Procedure, 1908("**CPC**"). ("**First principle**")

Second principle of law is, it two or more courts inherently have jurisdiction then parties by consent can confer jurisdiction on one of those courts.[9] It is this part which gives contractual freedom to parties to decide the court which will govern their dispute before hand in a commercial contract in the form of exclusive jurisdiction clause. Such a practice is to make the resolution of contractual dispute more certain and absolve parties from future (legal) deliberations with regard to place to sue. ("**Second principle**")

Third principle is the foundation of all arbitration. It deals with separatability of arbitration agreement. [10] This principle has been well recognized in Section 16 of the Act. The basic premise of this is that arbitration agreement is a separate agreement within the main agreement. Thus, it can be subject to different law ("**lex arbitri**") than the law of main or matrix contract. Extension of this principle is that Different courts can have jurisdiction with regard to one commercial agreement: one supervising the whole contract and the other supervising only Arbitration agreement. [11] ("**Third principle**")

Fourth, 'seat' and 'venue' are two different concepts. Seat determines the substantive and procedural law governing arbitration while venue has no substantial role than the suiting the convenience of parties and arbitral tribunal. [12] Further, venue has no role in determining the supervisory jurisdiction of the courts even in domestic arbitration [13] ("**Fourth Principle**")

Lastly, the whole controversy revolves around the observation made in para 96 of *Bharat Aluminium v. Kaiser Aluminium* [14], ("**BALCO**") by the Hon'ble Supreme Court. In which the court held that Section 2(1)(e) has to be construed in light of Section 20. Thus, recognizes two courts to have jurisdiction one where arbitration takes place and the other where cause of action arises. It is the illustration which the court has given in para 96 which has created whole controversy with regards to the applicability of concept of seat in domestic arbitration. It is clarified that BALCO has its applicability in the context of ICA and has to be construed in that light only. :

Applicability of Antrix and Indus case		
S.No.	**Situation(s)**	**Which court (s) will have jurisdiction**
1	Where Seat is not designated by the parties (or arbitral tribunal as the case may be) and there is no exclusive jurisdiction clause in the contract:	Court which will have jurisdiction as per first and second principle.[15]
2	Where seat is not designated by the parties (not decided by the Arbitral tribunal as well) but there is an exclusive jurisdiction clause in the contract:	Court as per First, Second and third principle will have the jurisdiction. It is submitted since lex arbtri in a domestic arbitration which is necessarily between Indian parties, governed by Indian Law, third principle loses its force as law governing arbitration agreement and law governing the matrix contract will necessarily be the same.[16] Thus, the result of situation no. 2 will be similar to that of Situation no. 1

3	Where seat of arbitration is designated and there is exclusive jurisdiction clause as well and both designate the same place or the court	This is situation is well governed by Indus case. In this case the court which will have jurisdiction will have to be decided keeping in the mind first, second and third principle. As per Indus case, **Courts in Seat will have the exclusive jurisdiction.** However, for legal analysis, this situation required further elaboration: • As noted in BALCO and Indus courts in seat will also have jurisdiction over the subject matter of suit and will be a court within the meaning of Section 2(1)(e). • The purpose of designating seat is to confer jurisdiction over the court which it otherwise doesn't have. It was evolved because in ICA parties chose to have a neutral seat, which is not related to contract, a place where no cause of action has arose.[17] • It is trite that arbitration has to be parties oriented but it is also settled that express consent of parties cannot override the intent of a statute especially, Section 42 which starts with a non obstante clause, that is irrespective what is mentioned in Section 20 of the Act which confers parties autonomy to designate a place of arbitration (which was read to mean Seat in BALCO) • Every forum selection clause has to pass through the First principle test. • As noted in third principle that Arbitration agreement and matrix contract is different. Thus, Voidability of matrix agreement will not affect the arbitration agreement. Going by this (applying principles in BALCO) exclusive jurisdiction clause of contract may or may not apply to arbitration. In the early case of *Sumitomo Heavy Industries Ltd v. ONGC Ltd* [18] it was held that law governing matrix contract and Arbitration agreement is one and the same. However this position has been changed since BALCO and other cases.[19] • It is the submission of the author that exclusive jurisdiction clause in matrix contract has no relation to arbitration agreement unless such clause is made applicable to arbitration agreement by express or implied consent of parties. • It is submitted that courts will have to check the enforceability of exclusive jurisdiction clause in light of first principle, since exclusive jurisdiction clause, which otherwise is unenforceable (being contradictory to first principle), will be enforceable because parties have designated seat at that place. It is trite that which law forbids to do directly, it is also not allowed to do indirectly. It has to be kept in mind that SEAT is evolved to localize ICA not domestic arbitration (where parties have same background).

4	Where Seat of arbitration designated by parties is different and exclusive jurisdiction clause is different.	This situation is also to be determined by joint application of first, second and third principles. This was the situation in ***Antrix case. Accordingly, both Courts will have concurrent jurisdiction over the subject matter and the Court which will seize jurisdiction first by virtue of Section 42 will be the Court for subsequent applications.*** In this case, however the court has failed to answer what will happen in a situation where exclusive jurisdiction is void because of first principle, then whether the court at seat will have the exclusive jurisdiction. this question will be answered in situation no. 5
5	Where only seat is designated and there is no exclusive jurisdiction clause	This situation is not covered within *Antrix* and *Indus case*. *Antrix* said seat only has concurrent jurisdiction, while going by *Antrix case* the situation will be that seat, and courts as per first principle will have the concurrent jurisdiction. However as per *Indus* it is the seat which will have the exclusive jurisdiction. It is view of the author that 'seat' in domestic arbitration is not equivalent to exclusive jurisdiction clause. It will have to be decided on the case to case basis whether parties intended it to be exclusive jurisdiction clause in the light of surrounding circumstances. Hence, the view in **Antrix will apply in this situation.**

Conclusion

It is beyond doubt that in arbitration the parties have to be accorded maximum autonomy, but as it is said, autonomy has restrictions. This view is consistent with the scheme of Act where some provisions are mandatory; some provisions are party autonomy oriented. Designating seat as exclusive jurisdiction clause in domestic arbitration is practically not feasible from commercial point of view. No party will bargain for dispute resolution process that will be burdensome for them and will ultimately run contrary to the intention of parties for entering into arbitration. It is because, once the court decides that a particular court will have a jurisdiction then by virtue of section 42, that court will be the 'designated' court for all application be it may Section 27,Section 9 or Section 34…etc. The situation is be not 'commercially' beneficial specifically when seat is neutral seat and there is no correlation between the place of arbitration and subject matter in disputes. The courts in earlier situations like Swastic gas have enforced the exclusive jurisdiction clause because it passed the first and second principle test.

However, whatever theoretically or legally situation may be with regard to concept of seat in domestic arbitration, its implications are wide ranging. On the basis of Law as it stands as of now (in light of Antrix and Devas), it is concluded that:

If parties want to designate a neutral seat (keeping in mind the future implications on arbitration process and application of section 42), should designate the same as exclusive jurisdiction clause as well.

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Applicability of the Limitation Act, 1963, to Appeals under Section 37(2) of the Arbitration and Conciliation Act, 1996

–Vageesh Sharma

Introduction

Different substantive and procedural laws in India such as the Code of Civil Procedure, 1908 (CPC), Criminal Procedure Code, 1973 (CrPC), etc. provide for a mechanism of an appeal in cases of an unfavorable order/ judgement. The preferred appeals are subject to the bar of limitation under the Limitation Act, 1963 ('Act')[1]. This essay highlights the contentious issue of the applicability of the provisions of the Act to the appeals under sub-section (2) of section 37 of the Arbitration and Conciliation Act, 1996 ('A&C Act').

Appeals under section 37(2) - no prescribed time limit

Section 37(2) of the A&C Act prescribes that appeals shall lie for orders passed by the Arbitral Tribunal either accepting the plea referred to in Section 16(2) or 16(3) or granting/refusing to grant an interim measure under Section 17. Though there is no prescribed limit for filing an appeal under this provision, but the Act is applicable to arbitrations as it applies to the proceedings in court [2]. The Act stipulates that the period of limitation for filing an appeal shall be as prescribed under the Schedule [3]. The Bombay High Court in Oil and *Natural Gas Corporation Ltd.* v. *Jagson International Ltd.* [4], held that since the schedule does not provide for the limitation period for filing an appeal under section 37, the Limitation Act is not applicable to such appeal.

Though the Schedule in the Act does not provide for a limitation period to file an appeal under section 37, but the savings clause of the Act stipulates that in cases where a special/local law does not expressly bar the application of sections 4 to 24 of the Act, the same shall be applicable [5]. This position of law has been ignored by the Bombay High Court in *Jagson International case*, wherein it was held that if a special law does not provide for a period of limitation, then the applicability of the general law of limitation is implicitly excluded [6].

The Supreme Court, in *ITI Limited v. Siemens Public Communications Network Ltd.* [7], held that merely because the A&C Act does not provide for the applicability of the CPC, the inference that the latter is inapplicable, cannot be accepted. Thus, the provision of the CPC shall be applicable to the appeals preferred under the A&C Act. [8] Justice Raveendran, in his concurring judgement in *Consolidated Engg. Enterprises and Ors. v. Principal Secy. Irrigation Dept. and Ors.* [9] remarked that the objective of section 29(2) and 43(1) of the Limitation Act is to ensure that the provisions contained in sections 4 to 24 apply

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[1]The Limitation Act, 1963 §3

[2]The Limitation Act, 1963 §43(1)

[3]The Limitation Act, 1963 §2(j)

[4]AIR 2005 Bom 335

[5]supra note 3

[6](2002) 5 SCC 510

[7]Id.,

[8](2008) 7 SCC 169

to appeals under special/local laws, unless they are expressly excluded. Over-ruling the judgement in *Jagson International*, the Court, in *Consolidated Engg.*, held that the provisions of the Limitation Act applies to all proceedings under the A&C Act, unless expressly excluded by the provisions of the A&C Act.

The Court, in *Consolidated Engg.*, clarified that the 'appeals under CPC' as per Article 116 of the schedule also refer to the appeals where the procedure of filing such appeals and the powers of the court for dealing with such appeals are governed by the CPC, in addition to the appeals preferred under the CPC, the period of limitation being 90 days from the date of the order.

Current Position

Relying upon the judgements as laid down in *Consolidated Engg.* and *Siemens Public Communications*, the Kerala High Court in *Prembushan v. Thulasidas*[10], has held that the period of limitation for filing an appeal under Section 37(1) (c) of the A&C Act, shall be 90 days from the date of the order. A similar stance has been adopted by the Meghalaya High Court in *North-Eastern Electric Power Corporation Ltd. v. Patel Unity Joint Venture (PUJV)*[11] wherein it has been held that the provisions of the Limitation Act are applicable to the court proceedings under the A&C Act and the period of limitation for an appeal under section 37 would be governed by Article 116 of the schedule to the Limitation Act.

Conclusion

A conjoint perusal of section 43(1), 29(2) of the Act and the Supreme Court decisions in *Consolidated Engg.* and *Siemens Communications* leads to a conclusion that the period of limitation of 90 days, as prescribed in the schedule to the Act is applicable to the appeals preferred under section 37 (2) of the A&C Act, though there is no specific court ruling in this regard.

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[10] *ILR 2017(3)Kerala 379*
[11] *MC (Arb. A) No. 4 of 201*

Case Analysis

–Rupesh Gupta

Case Title:

National Highways Authority of India versus Gwalior Jhansi Expressway Limited (Decision by Hon'ble Supreme Court of India in Civil Appeal No. 3288 of 2018 on 13.07.2018)

Facts:

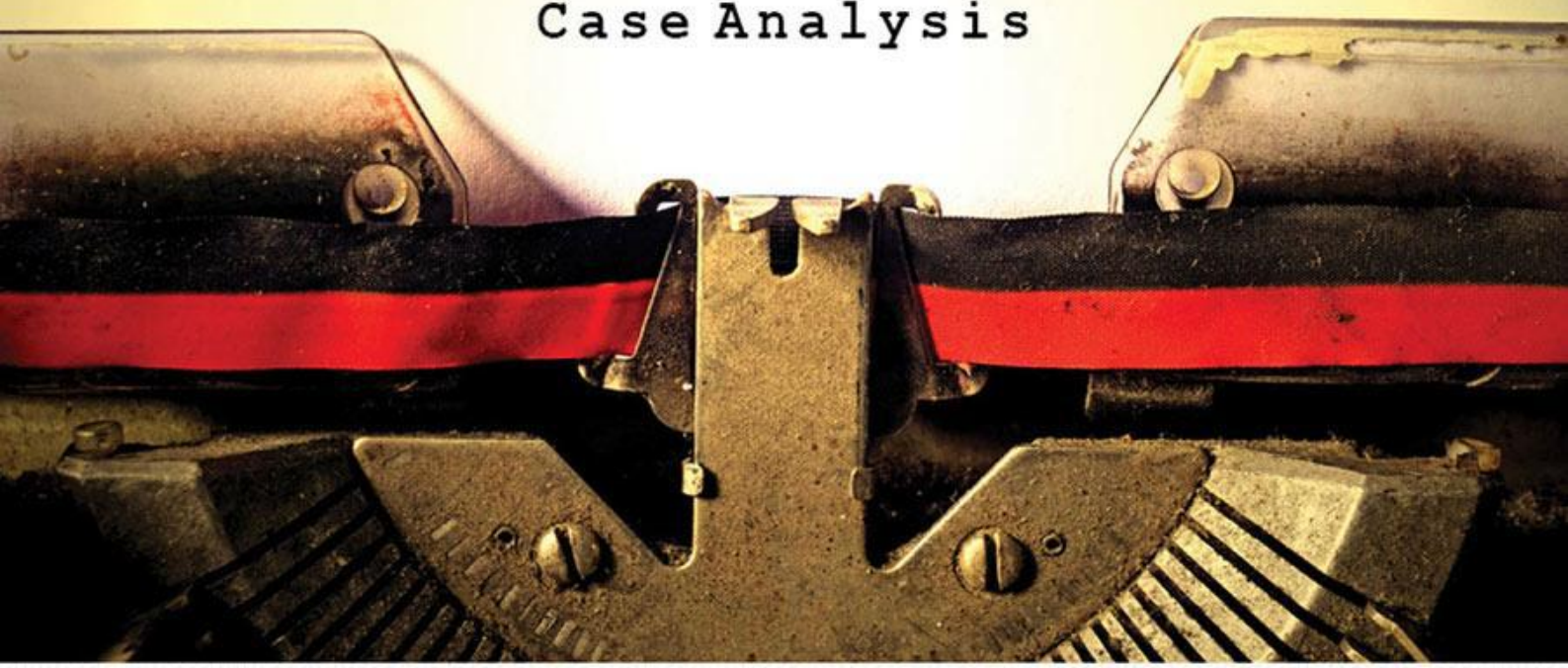
On December 17, 2006, National Highways Authority of India ('NHAI') entered into a Concession Agreement with Gwalior Jhansi Expressway Limited ('GJEL') for the work of widening of existing two-lane portion, from Km 16.000 to Km 96.127, to four lanes in the States of Uttar Pradesh and Madhya Pradesh. NHAI asserted that GJEL failed to undertake the project work at the requisite pace, inter alia, due to inadequate deployment of machinery, plant, material and manpower. GJEL had achieved only 62% progress and eventually abandoned the project site in March 2012. NHAI then issued a Cure Period Notice on October 19 2013, requiring GJEL to cure the breaches within 30 days from receipt of the notice. GJEL denied the notice by a written reply. NHAI thereafter, issued letters expressing its intention to issue termination notice of the Concession Agreement. GJEL then filed a petition under Section 9 of the Arbitration and Conciliation Act 1996 *('Act of 1996')* seeking stay of Cure Period Notice dated October 19 2013, as well as the notice expressing the intention to issue termination notice. The High Court of Delhi passed an interim stay on March 12, 2014, restraining the appellant from taking any coercive action and the petition was finally disposed-off on April 22, 2015 with a direction to the Arbitral Tribunal, which was already constituted in the meantime, that the interim order dated March 12, 2014 would continue during the pendency of the arbitral proceedings with liberty to the parties to seek its modification or revocation before the Arbitral Tribunal *('AT')*.

GJEL filed an application under Section 17 of the Act, on May 17, 2016, before the AT seeking interim directions including an interim measure to permit GJEL to invite tender/bid for executing the balance work under the Concession Agreement on Engineering Procurement and Construction basis subject to Claimant being granted the Right of First Refusal (ROFR) for matching the lowest bid and in the event the Claimant matches the said lowest bid permit the Claimant to complete the said balance/remnant works on the terms and conditions of the tender/bid invited on Engineering Procurement and Construction basis except for the provision, if any, for furnishing Bank Guarantees. By an Order dated July 23, 2016, the relief of ROFR was allowed by the AT.

Subsequently, tender was floated by NHAI for the balance work and bids were invited in public domain. However, on April 25, 2017, GJEL moved an application before the AT under Section 17 of the Act, seeking, inter alia, permission of the AT to complete the balance work at its risk and cost. It was asserted that NHAI did not give option of ROFR and match the lowest bid, in line with the order dated July 23, 2016. Its contended that NHAI was proceeding to conclude the tender process by issuing LOI/LOA in favour of the L-1 bid working behind GJEL's back. NHAI asserted that GJEL chose to remain silent during the entire bidding process and since GJEL did not participate in the bidding process, it would not get the right to match the lowest bid.

The AT, vide order dated May 24,, 2017 allowed the application filed by GJEL. NHAI filed an appeal under Section 37(2)(b) of the Act of 1996 before the High Court of Delhi but the same was dismissed on August 21, 2017.

The said decision was challenged before the Hon'ble Supreme Court of India on the ground that GJEL cannot be permitted to exercise ROFR sans participation in the bidding process and notwithstanding the terms and conditions of the tender documents.



Issues involved:

(a) Whether the interim order dated May 24, 2017, passed by the AT under Section 17 of the Act of 1996 and order dated August 21, 2017, passed by the Hon'ble High Court are justified and legal?

(b) Whether the right of GJEL to match the bid of L-1 or to exercise ROFR would have come into play only if GJEL was to participate in the tender process pursuant to the notice inviting tenders from the interested parties?

Decision:

The Hon'ble Supreme Court took note of the tender conditions and observed that the plain wording of the eligibility clause in the tender documents and the incidental stipulations made it explicitly clear that GJEL was required to participate in the tender process by submitting its sealed bid (both technical and financial). GJEL neither participated in the tender process despite the express terms in the tender documents nor challenged the validity of the tender conditions which stipulated the requirement for GJEL to participate in the tender process.

The Hon'ble Court further observed that no specific and express exemption from participating in the tender process was sought by GJEL while seeking the interim order dated July 23, 2016. Since no specific exemption was granted to GJEL from participation, GJEL was obliged to comply with the terms and conditions of the tender documents publicly notified by NHAI.

The Hon'ble Court therefore, opined that since GJEL failed to participate in the bidding process in consonance with such notified terms and conditions of the tender, GJEL lost the opportunity granted to it under the order dated July 23, 2016, to match the lowest bid or to exercise ROFR. Another aspect that led to the conclusion was that the tender notice was disclosed before the Arbitral Tribunal on December 10, 2016. GJEL did not follow up the tender documents which were placed in public domain. The application under Section 17 of the Act of 1996 was filed on April 25, 2017, after the opening of technical bids on January 05, 2017, and financial bids on March 29, 2017. Further, the third parties who participated in the bidding process, were likely to be prejudiced by allowing GJEL to match the lowest bid or exercise ROFR, without participating in the bidding process despite the express stipulation in this regard in the tender documents.

The aforesaid findings gave the conclusion that the decision of the AT as confirmed by the High Court falls foul of the fundamental policy of Indian law.

This decision of the Hon'ble Supreme Court has its impeccable strength in as much as the Hon'ble Court has given prime consideration to the terms and conditions of the tender floated by NHAI which were neither acted upon nor challenged by GJEL during the relevant time. The interim relief was sought from AT after the financial bids were opened. The Hon'ble Court gave importance to the express and true intent of the earlier interim order dated July23, 2016, and observed that since there was no specific direction in favour of GJEL not to participate in the tender process, GJEL could not be later allowed to assert the said understanding and seek interim relief from AT. In the facts and circumstances, to allow the relief to GJEL to match the lowest bid or exercise ROFR was held to be against the public policy of Indian law.

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Housing Society is not an Industry under the Industrial Disputes Act, even if it earns Profit: Bombay High Court

–Divya Harchandani

In a recent judgment in *Arihant Siddhi Co. Op. Hg. Soc. Ltd. Vs. Pushpa Vishnu More and Ors.* (MANU/MH/1927/2018), the Bombay High Court has held that a co-operative housing society cannot be said to be an 'industry' within the meaning of Section 2(j) of the Industrial Disputes Act.

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 with effect from 1st November, 2000. The Petitioner stated that the termination was with mutual consent and that the Watchman (Respondent) was paid ex-gratia/retirement benefit, which was accepted by him. The Respondent, thereafter, raised a demand for reinstatement.

Contentions of the Parties

The watchman (respondent no.1) contended that he was a permanent employee of the Petitioner and was terminated without any enquiry or offering proper retrenchment compensation. The reference was resisted by the Petitioner on the ground that the Petitioner was a housing society; that the services rendered by Respondent No. 1 were personal services; and that the society not being an industry nor Respondent No. 1 its Workman within the meaning of the term under the Industrial Disputes Act, the reference was not maintainable.

Impugned Order of the Labour Court

While allowing the plea of the Respondent in the impugned order, the Labour Court had held that though the Petitioner was a co-operative housing society, it earned profits by way of additional income from its members and accordingly, fell within the definition of Industry. The Court held that the profit motive was proved and that the society could not be termed merely as a housing society. Accordingly, it held the reference to be maintainable and then proceeded to decide the other issues concerning legality of the termination and the reliefs to be granted to Respondent.

Observations

The High Court observed that the Labour Court seems to have been swayed by the fact that the society was charging advertisement charges for the neon signs put up by few members carrying on businesses such as coaching classes and dispensary in the society. The Court also observed that the services rendered by Respondent No. 1 to the society and its members in the premises could not be termed as personal services. The High Court stated that there was a fundamental fallacy in the reasoning of the Labour Court that since society was earning income in the premises, it could not be termed as a mere housing society. 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.

Decision of the High Court

This Court while setting aside the order of the Labour Court relied on in its judgment in the case of *M/s. Shantivan-II Co. Op. Hsg. Society vs. Smt. Manjula Govind Mahida* (W.P. No. 360 of 2007 dated June 21, 2018). In the said judgment, the court had held that a co-operative housing society cannot be termed as an industry within the meaning of Section 2(j) of the Industrial Disputes Act merely because it carries on some commercial activity, not as its predominant activity, but as an adjunct to its main activity. This Court has held that such society is not an industry. In a case like this, that is to say, where there is a complex of activities, some of which may qualify the undertaking as an industry and some would not, what one has to consider is the predominant nature of services or activities. This Court also relied on the true test laid down by the Apex Court in the case of *Bangalore Water Supply and Sewerage Board vs. A. Rajappa* MANU/SC/0257/1978 : 1978(ii) SCC Page 213, wherein it was held that if the predominant nature is to render services to its own members and the other activities are merely an adjunct, the undertaking is not an industry. Accordingly, the order of reinstatement and full back wages of the watchman as an industrial worker was set aside.

Conclusion

Section 2 of the Industrial Disputes Act, 1967, defines "industry" as any business, trade, undertaking, manufacture or calling of employers, and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen. However, as held by the Supreme Court in the case of Bangalore Water Supply mentioned above and re-iterated in the present case, when there are multiple activities carried on by an establishment, its dominant function is to be considered. If the predominant function of an undertaking/ establishment is not commercial, its employees shall not be entitled to the benefits of a workman of an industry under the Industrial Disputes Act, 1947.

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Land Acquisition by MORTH under National Highways Act

–Kritika Angirish

Land required by MORTH for National Highway projects is acquired under the provisions contained in Section 3 of the National Highways (NH) Act 1956. The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (RFCTLARR) Act, 2013, became applicable to the other related acts mentioned in the Fourth Schedule, including the NH Act, 1956 w.e.f. 01.01.2015 in terms of Section 105(3) of the RFCTLARR Act of 2013.

The process of land acquisition

Competent authority (CALA) is defined under **Section 3(a)**.

Under **Section 3A**, the Central Government may declare its intention to acquire land (defined under Section 3(b)). This notification will give a brief description of the land and shall cause the substance of the notification to be published in two local newspapers, one of which is in vernacular language.

Section 3B gives the person authorized by the Central Government, authority to conduct inspection, survey, measurement etc.

Any person who is interested in the land may within 21 days from the date of publication of the notification under Section 3A, submit his objections under **Section 3C**. These objections have to be made to the competent authority in writing and shall state the grounds thereof. After giving a proper opportunity of being heard, competent authority may either allow or disallow the objections.

Under **Section 3D**, if no objections have been made, or the objections have been disallowed; the competent authority may submit a report to the Central Government and on receipt of such report the government shall declare by notification in the official gazette that the land should be acquired under Section 3A. Where in respect of a land, a notification has been published under Section 3A but no declaration has been published within 1 year from the date of publication, the notification shall cease to have any effect.

Section 3E has vested the power in the competent authority to issue a notice in writing, directing the owner as well as any other person who may be in possession of the land to surrender or deliver possession of the land to the competent authority or any other authorized person within 60 days. It also lays down the steps to be followed if the same is refused.

Section 3F gives the lawful person authorized by the Central Government, authority to enter and perform other necessary acts upon the land for carrying out the building, maintenance, management or operation of the national highway or a part thereof, or any other work connected with it.

Section 3G and **3H** lay down the procedure for the determination and the deposit of the amount of compensation payable.

Section 3I gives the competent authority certain powers of a civil court and **Section 3J** states that Land Acquisition Act, 1894 shall not apply to the acquisition under this Act.

Date of determination of market value of land

With reference to the first, second and third schedule of the RFCTLARR Act, 2013, the following is clarified:

(a). All cases which have not been announced under Section 3G of the NH Act till 31.12.2014 or where such awards had been announced but compensation had not been paid in respect of the majority of the land holdings under acquisition as on 31.12.2014, the compensation would be payable in accordance with first schedule of the RFTCLARR Act, 2013.

(b). In cases where the land acquisition process was initiated and the award for compensation under Section 3G had been announced before 01.01.2015, but the full amount was not deposited with the CALA, the compensation amount would be determined in accordance with the first schedule of the RFTCLARR Act, 2013.

(c). Where the process stood complete as on or before 31.12.2014, the process would be deemed to be completed and settled.

12% on market value

The proviso of Section 26 of the RFCTLARR Act stipulates that the date for the determination of the market value shall be the date of notification issued under Section 11 of the Act, which is corresponding to Section 3A of the NH Act. Similarly, Section 69(2) of the RFCTLARR Act also stipulates that an additional amount has to be calculated @12% on such market value for the period commencing on and from the date of publication of the preliminary notification under Section 11 in respect of such land to the date of the award of the collector or the date of taking possession of the land, whichever is earlier. As the NH Act is exempt from the Social Impact Assessment, it is by harmonious reading of all related provisions that the calculation of such amount shall be made w.e.f the date of publication of the notification under Section 3A of the NH Act.

Furthermore, the pronouncements of the courts on payment of compensation under Section 23(1A), 23(2) and 28 of the Land Acquisition Act, 1894, in respect of land acquired under the NH Act r/w Section 105(3) of the RFCTLARR, show that payment of amount of 12% of the market value of land from the date of publication under Section 3A till the announcement of the award under Section 3G or taking possession of land (whichever is earlier) is payable.

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ASM Framework: A Value Added Check to Curb Volatility in Stock Market

–Kumardeep

Introduction

A number of measures and actions have been introduced by the Securities and Exchange Board of India (SEBI) in order to protect the investors of stock markets in India. These measures are in the nature of surveillance on working of the stock market, exchanges, market participants and companies. Various surveillance measures already implemented by SEBI and Stock Exchanges are including but not limited to reduction in price band, periodic call auction and transfer of securities to Trade for Trade category from time to time etc.

Further, in order to enhance market integrity and safeguard interest of investors, SEBI, in consultation with Stock Exchanges, has introduced Additional Surveillance Measures (ASM) to be implemented by the stock exchanges as tools for reconnaissance in addition to other existing surveillance measures already in force.

The ASM framework monitoring has come into force with effect from March 26, 2018. Initially the list under ASM comprised 36 stocks consisting both high beta scripts and scripts with low volume levels. But as per the latest updated list issued by SEBI and Exchanges, approximately 109 scripts are now covered under the ASM. Some of the stocks which are included in the list include: ABG Shipyard, Amtek Auto, Bhushan Steel, IVRCL, Jaypee Infratech, Monnet Ispat & Energy, Lanco Infratech, Orchid Pharma, Ruchi Soya Industries, Viceroy Hotels, etc.

Implementation of ASM

Under the ASM, the stocks are short listed for subjecting them to additional surveillance actions. The stocks are shortlisted based on market surveillance and such stocks are considered for the following surveillance actions by the stock exchanges:

(a) Securities shall be placed in Price Band of 5% (Profit and Loss) in one trading session to protect the interest of investors and to limit the loss for both investors and traders.

(b) Margins shall be levied at the rate of 100% on such stocks i.e. while investing in such stocks, the investor or trader would be required to pay full amount, as against the earlier provision, which allows investors to settle the trades even at a low margin level.

(c) The shortlisted securities shall be further monitored on a pre-determined objective criteria and would be moved into Trade for Trade segment. The objective criteria is yet to be decided by SEBI and exchanges.

(d) Further, the shortlisted securities placed under the ASM would be reviewed on bimonthly basis (either twice a month or once in every two months).

Objective of ASM

The ASM has been introduced with the objective of checking any inorganic growth of stock prices in a short period without any corresponding and considerable changes in the financials of the company.

The main objectives of ASM may be listed as per below:

1. To alert and advice investors to be extra cautious while dealing with securities covered under ASM.

2. To advise market participants to carry out necessary due diligence while dealing in securities which are under the ASM ambit.

Parameters used by SEBI and Stock Exchanges for inclusion of stocks in ASM List:

As decided by SEBI and Stock Exchanges, the following parameters are considered for inclusion of stock in ASM list:

1. High Low Variation
2. Client Concentration
3. No. of Price Band Hits
4. Close to Close Price Variation
5. PE ratio

The aforementioned criteria are dynamic in nature and subject to change from time to time and any such change will be duly notified by SEBI to investors.

Advantages of ASM to traders and investors:

Though the ASM has been introduced with the aim of protecting interests of investors, it will also benefit investors in the following manner:

(a) There would be limited profits or losses as the share prices of ASM shortlisted stocks cannot go up or down by more than 5%.

(b) The investor can keep an eye on these stocks now as due to the ASM framework, some of the stock prices have already started falling (some cases have fallen up to 14% in the last few days). Therefore, there is less scope for speculation in the market.

(c) The long term investors who do not believe in such short term fluctuations, may continue to invest in such stocks for long term benefits.

Therefore, ASM is a good measure for investors as the volatility in the stock prices of shortlisted scrips are being tracked by SEBI and stock exchanges, but it should also be noted that the shortlisting of securities under ASM is purely on account of market surveillance and it should not be construed as an adverse action against the concerned company.[1]

[1] *https://www.bseindia.com/markets/MarketInfo/DispNoticesNCirculars.aspx?Noticeid=%7B7B9991B8-0897-4971-B0C7-CD53025EA5AC%7D&noticeno=20180321-46&dt=03/21/2018&icount=46&totcount=54&flag=0*

Conclusion

As the name suggests, the ASMs are additional or enhanced measures to curb the volatility in the stock market and protect the investors' interest. India is one of the world's fastest growing economies and is one of the most prominent emerging markets for investors and traders. The ASM Framework is an additional tool to check market volatility and the Framework is without prejudice to the rights of SEBI and Stock Exchanges to take any other surveillance measures. In a nutshell, the ASM is expected to play an effective role in safeguarding the interest of investors, traders, exchanges and the market as a whole.

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Mitigation of Damage

–Rohit Singh Raghuwanshi (Law Intern)

Introduction

The word **"damage"** simply means a sum of money given as compensation for loss or harm of any kind.[1] In other words, "damages" is compensation for causing loss or injury through negligence or a deliberate act, or an estimate of Court or award of a sum as a fine for breach of a contract or of a statutory duty. It is the amount of money which the law awards or imposes as pecuniary compensation, recompense, or satisfaction for an injury done or a wrong sustained as a consequence of a breach of a contractual obligation. According to Black Law Dictionary, a damage is *"Money compensation awarded as a remedy for a breach of contract or tortuous acts."* [2]

Liquidated Damages and Unliquidated Damages

"Liquidated Damages" mean a sum which the parties have assessed by the contract as damages to be paid notwithstanding whatever may be the actual damage. The parties to a contract, as part of the agreement between them, fix an amount which is to be paid by way of damages in the event of breach. A sum stipulated in this way is classified as liquidated damages where it is in the nature of a genuine pre-estimate of the damage which would probably arise from breach of the contract. [3]

The term **"Unliquidated Damages"**, means a sum of money not established in advance by the contracting parties as a compensation for a breach of contract, but determined by a court after such breach occurs. Such damages are unascertained in advance. [4]

Mitigation of Damage

The principle of Mitigation of Damage can be traced from Halsbury's Laws of England (4th Edn.) Vol. 12, para 1193 page 477, which runs thus [5]-

"1193. ***Plaintiff's duty to mitigate loss. The plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant's wrong, and, if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided.*****"**

Again, in **para 1194** at page 478 the following statement occurs under the heading 'Standard of conduct required of the plaintiff:

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[1] A.S.Sharma v. Union of India, 1995ACJ 493 at 498(Guj.)

[2] Black"s Law dictionary, ed.6th at.p. 389

[3] Ram Lal Jain vs Central Bank Of India Ltd, AIR 1961 P H 340

"The plaintiff is only required to act reasonably, and whether he has done so is a question of fact in the circumstances of each particular case, and not a question of law. ***He must act not only in his own interests but also in the interests of the defendant and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter.*** *In cases of breach of contract the plaintiff is under no obligation to do anything other than in the ordinary course of business, and where he has been placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the defendant whose breach of contract has occasioned the difficulty. The plaintiff is under no obligation to destroy his own property, or to injure himself or his commercial reputation, to reduce the damages payable by the defendant. Furthermore, the plaintiff need not take steps which would injure innocent persons."*

The general principles deducible from the above stated Principle are:[6]

- As far as possible a party who has proved a breach of the contract, is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.
- A statutory duty is cast on the plaintiff who has proved the breach of the contract of taking all reasonable steps to mitigate the loss consequent on the breach of the contract.
- If the plaintiff, who proves the breach of the contract but fails to prove that he took all reasonable steps to mitigate the loss consequent to the breach of the contract, he will be debarred from claiming damages to the extent he could have mitigated the same by taking such steps.

Case Laws

In ***M/s. Murlidhar Chiranjilal vs. M/s. Harishchandra Dwarkadas & Anr*** [7], the Supreme Court examined the scope of Section 73 of the Indian Contract Act and observed, *"The two principles on which damages in such cases are calculated are well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second,* ***which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach*** *and debars him from claiming any part of the damage which is due to his neglect to take such steps".*

In the case of ***Pannalal Jugatmal vs. State of Madhya Prades***h [8], the Court observed, *"Mitigation of Damage is incorporated in the explanation to Section 73 of the Contract Act. The explanation casts a burden upon the person complaining of breach of the contract to show that he did not possess means of remedying the inconvenience caused by the non-performance of the contract. The law, for wise reasons, imposes upon a party subjected to injury from breach of a contract, the active duty of making reasonable exertions to render the injury as light as possible".*

In ***M. Lachia Setty & Sons Ltd. vs. Coffee Board, Bangalore*** [9], the Supreme Court held that the principle of **mitigation of loss does not give any right to the party who is in breach of the contract** but it is a concept that has to be borne in mind by the Court while awarding damages.

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[6] M. Nanjappa vs M.P. Muthuswamy, AIR 1975 Kant 146

[7] AIR 1962 SC 366

[8] AIR1963 MP 242

[9] (1980) 4 SCC 636

Method for Computation of Damages

–Tanuka De

The parties to a contract must either perform or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of the Indian Contract Act, or of any other law.[1] A contract is not a property. It is only a promise supported by some consideration upon which either the remedy of specific performance or that of damages is available. [2] The Supreme Court came to a conclusion that in ordinary cases, the extent of liability is what may be foreseen by "the hypothetical reasonable man," as arising naturally in the usual course of things. Since works and building contracts are undertaken only with an intention to earn profits, the party committing the breach would be liable for the contractor's loss in terms of expected profits. [3]

Sections 55 and 73 of the Indian Contract Act, 1872, do not lay down the manner or the mode in which the computation of damages or compensation has to be made. The Supreme Court has held that the method used for computation of damages will depend upon the facts and circumstances of each case. [4] In the assessment of damages, the court must consider only **strict legal obligations, and not the expectations**, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do. [5]

Formulae for Computation Of Damages

In 2006, in the case of *McDermott International Inc. v. Burn Standard Co. Ltd.* [6], the Supreme Court had the opportunity to discuss some of the formulae for computation of damages in detail.

(i) **Hudson Formula:** In Hudson's Building and Engineering Contracts, Hudson formula is stated in the following terms:

(Contract Head Office overheads profit %) x (contract sum ÷ period in weeks) x delay in weeks

***Where Contract Head Office (head office overheads) and profits percentage submitted in tender.*

****Dividing the total overhead cost and profit of the organisation as a whole by the total turnover of the organisation normally arrives at the head office percentage.*

In the Hudson formula, the head office overhead percentage is taken from the contract. Although the Hudson formula has received judicial support in many cases, it has been criticized principally because it adopts the head office overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor.[7]

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[1] § 37 of the Indian Contract Act, 1872

[2] Sunrise Associates v. Govt. of NCT of Delhi. (2006) 5 SC 603; AIR 2006 SC 1908

[3] A.T. Brij Paul Singh v. State of Gujarat. AIR 1984 SC 1703; (1984) 4 SCC 59

[4] M.N. Gangappa v. Atmakur Nagabhushanam Setty & Co. and Anr. MANU/SC/0019/1972 AIR1972SC696

[5] Lavarack v. Woods of Colchester Ltd (1967) 1 QB 278

[6] (2006) 11 SCC 181

[7] See Supra 6

This formula has been highlighted in Ellis-Don Ltd v. The Parking Authority of Toronto.[8]

(i) **Emden Formula:** In Emden's Building Contracts and Practice, the Emden formula is stated in the following terms:

(Head Office Overhead & Profit ÷ 100) x (Contract Sum ÷ Contract Period) x Delay Period

***The formula divides the total overhead cost of the contractor's organisation by the total turnover. This results in a percentage based on the contractor's actual head office overhead, instead of one contained in an isolated contract.*

Using the Emden formula, the head office overhead percentage is arrived at by dividing the total overhead cost and profit of the contractor's organization as a whole by the total turnover. This formula has the advantage of using the contractors actual head office and profit percentage rather than those contained in the contract. [9]

This formula has been widely applied and has received judicial support in a number of cases including *Norwest Holst Construction Ltd. v. Cooperative Wholesale Society Ltd.* [10], decided on February 17, 1998, *Beechwood Development Company (Scotland) Ltd. v. Mitchell*, decided on February 21, 2001 and *Harvey Shoplifters Ltd. v. Adi Ltd.*, decided on March 6, 2003.

Other major case laws are Nicon Inc. v. United States decided on June 10, 2003 (USCA Fed. Cir.), *Gladwynne Construction Company v. Balmimore*, decided on September 25, 2002 and *Charles G. William Construction Inc. v. White.*[11]

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[8] (1978) 28 B.L.R. 98

[9] See Supra 6

[10] [1997] EWHC Technology 356

[11] 271 F.3d 1055

(i) **Eichleay Formula:** The Eichleay formula was evolved in America and derives its name from a case heard by Armed Services Board of Contract Appeals, Eichleay Corp. It is applied in the following manner:

Step 1: Overhead Allocable to the Contract. This is a calculation to determine the portion of the Office Overhead that should be allocated to this project. This is a way of calculating that amount.

(Contract Billings ÷ Total Billings for contract Period) x Total Overhead for Contract Period)

Step 2: Daily Allocable Overheads/ Daily Overhead Rates

This is a calculation to determine the daily rate for the allocation of Office Overhead

(Allocable Overheads ÷ Total Days of Contract)

Step 3: Daily Overhead Rate/ Amount of Unabsorbed Overhead

This is simply a matter of multiplying the number of compensable delay days by the daily allocable overhead rate.

Daily Allocable Overheads/ Daily Overhead Rates x No. of days of delay

This formula is used where it is not possible to prove loss of opportunity and the claim is based on actual cost. It can be seen from the formula that the total head office overheads during the contract period is first determined by comparing the value of work carried out in the contract period for the project with the value of work carried out by the contractor as a whole for the contract period. A share of head office overheads for the contractor is allocated in the same ratio and expressed as a lump sum to the particular contract. The amount of head office overhead allocated to the particular contract is then expressed as a weekly amount by dividing it by the contract period. The period of delay is then multiplied by the weekly amount to give the total sum claimed.

The Eichleay formula is regarded by the Federal Circuit Courts of America as the **exclusive means for compensating a contractor for overhead expenses.**[12]

Conclusion: Determination of Actual Loss

There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India. [13]

As computation depends on circumstances and methods to compute damage, how the quantum thereof should be determined is a matter which to be decided by the arbitrator.

The Supreme Court of India has held that- *"We, however, see no reason to interfere with that part of the award in view of the fact that the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law"* [14]

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[12] See Supra 6

[13] ibid

[14] Ibid, Para 70

Discovery by Interrogatories

–Manish Singh Lakhawat

What is Interrogatory and Discovery by Interrogatories?

► Interrogatories are covered under Section 30 and Order XI Rule 1 to 11, 21 and 22 of the Code of Civil Procedure, 1908.

► Interrogatories are a set of questions which a party administers on the other party with the leave of the Court.

► The party to whom interrogatories are administered, must answer them in writing and on oath. The party to whom interrogatories are administered, discovers or discloses by his affidavit, in answer to the interrogatories, the nature of its case. This is called Discovery by Interrogatories.

► Interrogatories have to be confined to the facts which are relevant to the matters in question but not as to conclusions of law, inference from facts or construction of words or documents.

► The Application for leave to administer interrogatories is as a rule made ex parte and the Court shall decide the said application within 7 days from its filing. (Rule 2)

► Interrogatories shall be in Form 2 of Appendix C. (Rule 4)

Purpose of Interrogatories

Interrogatories are allowed for the following purposes:

1 To ascertain the nature of the opponent's case or the material facts constituting his case

2 To support one's own case, either
   a. Directly, by obtaining admissions, or
   b. Indirectly, by destroying the opponent's case

Which types of Interrogatories may not be allowed

1 Interrogatories for obtaining discovery of facts, may not be allowed, which
   a. constitute the evidence of the opposite party
   b. contain any confidential or privileged communication
   c. involve disclosures injurious to public interests

2 Interrogatories in the nature of fishing or roving enquiries are not allowed

Interrogation of a body corporate

► Where the party to be interrogated is a body corporate, the interrogatories should specify the officer or member on whom the interrogatories are to be served. (Rule 5)

Objections to Interrogatories by answer can be made on following grounds, if the interrogatory is: (Rule 6)

a. Scandalous
b. Irrelevant
c. Not exhibited bonafide
d. Premature i.e. not material at that stage
e. Privileged communications
f. Any other ground such as provided under Rule 7 or the answers are likely to be incriminating in offences.

► These objections must be taken by the answering party in its affidavit of answers to the interrogatories in Form No. 2, Appendix C. (Rule 8&9)

Setting aside and Striking off Interrogatories can be made on the following grounds (Rule 7)

a.Unreasonably or vexatiously exhibited
b.Prolix, Oppressive, Unnecessary or Scandalous

► The Application for setting aside or striking off interrogatories shall be made within 7 days after service of interrogatories.

Interrogatories not answered or insufficiently answered (Rule 11)

► If the interrogatories are not answered or insufficiently answered, then the interrogating party may apply to the Court for an order requiring the other party to answer or answer further.

► The Court may direct the party to answer either by affidavit or by viva voce examination

Consequence of failure to answer interrogatories (Rule 21)

If a party fails to comply with an order to answer interrogatories, then:

- ► If the failing party is a Plaintiff, its suit is to be dismissed for want of prosecution

- ► If the failing party is a Defendant, its defense to be struck out and be placed in a position as if it had not defended.
    a. The party which served the interrogatories may apply to the Court for an order to this effect.
    b. The Court shall pass such order after notice to the other party and giving them an opportunity of being heard.

- ► The Rajasthan High Court in a recent judgment of Govind Narayan and Ors. vs. Nagendra Nagda and Ors. MANU/RH/0832/2017 has held the following:

- ► The whole purpose of interrogatories is to seek admission of a party on matter in dispute so that the issues can be accordingly framed, minimizing the contentious issues or disputes left for the adjudication of the Court, with the ultimate object of facilitating an early and expeditious disposal of the suit.

- ► A perusal of the corresponding substantive provisions contained in Section 30 of the Code of Civil Procedure shows that the Court has been clothed with a power to order discovery or permit interrogatories at any time. Order XI Rule 1 of the Code contemplates service of interrogatories on the opposite party, with a leave of the Court. A close and conjoint reading of these two provisions make it clear that the Court can allow service of interrogatories, at any stage of the suit, for which it has been conferred wide discretion, but at the same time, the discretion must be exercised judiciously.

- ► The information sought to be furnished must have some nexus or relevancy with the dispute in question.

- ► The stage of the suit is a very significant aspect to be borne in mind, while deciding an application admitting or permitting interrogatories. As stated above, the whole idea or purpose of the provisions contain in Order XI Rule 1 of the Code is to save time and cost by confining the controversy or narrowing down the points of differences or disputes.

- ► Hence, the Court can be a bit liberal in admitting the interrogatories at the initial stage of a suit but the same standards cannot be applied at the advanced stage of the trial, when the evidence of the parties has begun. Interrogatories cannot be permitted, once the evidence of the concerned opposite party is over.

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Different Types of Panchanama in Law

–Pushkraj Deshpande

The word Panchanama is not used as such or defined particularly anywhere in any book of Law, but the same can be read into **Section 100** under Chapter VII of The Code of Criminal Procedure, 1973, (Cr.P.C.). The said Section 100 (with portions highlighted in bold alluding that an Investigating Officer is bound to make a Panchanama) is reiterated below.

100. Persons in charge of closed place to allow search

(1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in the manner provided by sub- section (2) of section 47.

(3) Where any person, in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.

(4) ***Before making a search under this Chapter, the officer or other person about to make it, shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situated or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.***

(5) ***The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.***

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search and a ***copy of the list prepared under this section, signed by the said witnesses,*** shall be delivered to such occupant or person.

(7) ***When any person is searched under sub- section (3), a list of all things taken possession of, shall be prepared, and a copy thereof shall be delivered to such person.***

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code (45 of 1860).

The power to carryout search of particular places and of the persons is given to officers as laid down in Section 93, 95, 97 and 98 of the Cr.p.C.

What is the need of the Panchanama? Panchanama is one of the essential parts of criminal as well as civil investigation procedures. In criminal investigation it is used to support evidence of the investigation conducted at the crime scene, seizure if any from accused, identification of accused etc. In civil cases it is used to show that the decree has been executed by handing over possession of the property as directed in the decree. The provision of the Panchanama is made to convince the Court that the Officer-in-charge has in fact carried out the investigation, search, or any seizure or have acted upon the directions of the Court if so directed.

Reason behind the word "Panchanama" In the ancient judicial system in India, the justice system at the lowest rung, i.e. village level, which is still the case in in certain kinds of issues, was in form of Panch, which is a group of 5 elected learned members of the village who would preside and decide over a dispute amongst the villagers. In the said system, the proceedings before the Panch that were recorded on paper, was often called as a Panchanama and from this practice, the word was adopted for a document prepared by the investigating office noting facts and proceeds of an investigation.

Contents of Panchanama There is no guidance or prescription about the contents of Panchanama under CrPC or any other statute. The witnesses are called "Panchas". It is to be noted that the Panchas are to be two or more independent and respectable persons i.e. persons who are not of disrepute. If there is no eyewitnesses to an offence and the case is totally based on circumstantial evidence, then such a Panchanama is of immense value. The Panch (witness) can refresh his memories while giving evidence in the Court as per section 159 of the Indian Evidence Act, 1872. Following things can be said to be important to be incorporated in a Panchanama:

- Name and Place of Police Station or any other Authority conducting the same
- Name, age and address of Panchas (Witness)
- Record of time when it was commenced and when ended
- Name and Rank of the officer conducting the Panchanama
- Details of particular place or persons
- Signature of the officer and all the panchas
- Details of the seizure if any
- Details of the place where panchanama is to be done.

Kinds of Panchanamas

Panchanamas in Criminal Trials

1. **Spot Panchanama** This panchanama is generally drawn by Investigating officer (IO) when he visits the crime scene. This Panchanama contains details of the crime scene during the visit of the IO and the Panchas (Witness). The details may include description of the place, how big or small the place is if it's a room, whether it's an isolated place or a public space with open sky. The position of the things lying in the room/spot/place - for instance if the allegation is of murder then the Panchanama shall consist of the details of where the dead body of victim was lying, the weapon of the crime is lying anywhere at the spot, other articles lying at the spot, the condition of the room, the light in the room, etc. all these things shall be noted in the panchanama for effective corroboration during the time of Cross Examination of the Pancha Witness.

2. **Seizure Panchanama** As the name suggests, this Panachnama is drawn when the IO seizes some articles from the accused person or from any other person at the crime scene and/or articles seized from the crime scene or from any other place. There can be number of seizure Panchanamas in one single case depending on the articles seized from several spots/places.

3. **Inquest Panchanama** The inquest Panchanama has to be done in accordance with Section 174 of the Cr.P.C., when any person dies under any suspicious circumstances, i.e. suicide, murder, accident etc. In this Panchanama, the details of how the dead body was lying and descriptions such as of any mark of injuries found on person of deceased, apparent cause of death or by what weapon or instrument such marks appear to have been inflicted are to be mentioned. This Panchanama helps to find out whether at the first sight of dead body it can be gathered that cause of death is unnatural.

4. **Memorandum Panchanama** also known as "Nivedan Panchanama" in Maharahstra. As per Section 25 and 26 of the Indian Evidence Act, 1872, any statement made before the Police Officer has no value and is not admissible before the Court. But exception to Sections 25 & 26 are given in Section 27, which states that if any information/document is received from the accused or any discovery is made on account of accused, then such fact(s) can be placed before the court. The statement made by the accused is recorded before the Pancha (Witness) while the accused is in police custody. The accused mostly informs the Police in front of the witness, any information he has about the crime in question, which can be the location of the hidden weapon, or other articles used in the course of crime, he may even admit of committing the crime. These Panchas (Witnesses), before whom the Memorandum Panchanama is drawn, will be summoned to court during course of evidence in order to prove that such a confession of the accused was made in their presence by the accused.

5. **Arrest Panchanama** As the name suggests, this Panchanama is drawn when the suspected person/ accused is arrested by the police. It notes the appearance of the accused when he was arrested, his identification marks and articles found with him. Details of the clothes he is wearing etc. This helps in identifying the accused when he is produced in the Court.

Panchanamas in Civil Law

1. **Panchanama of execution of Decree** In civil law the Panchanma is made by the Decree Executing officer like the Court Receiver, Official Liquidator, Thalsildar, Thalathi. When the decree of handing over the possession is executed the panchanama is to be drawn in from of the decree holder bearing his/ her signatures. This panchanma notes details of condition of the property while giving the possession, the time and date when the process of possession handing over started. The same is to be made in front of at least 2 Panchas (Witnesses). A report along with the said Panchanma has to be submitted to the Court informing that the said decree has been executed.

2. **Panachnama of Inspection of Sealed** Property This kind of Panchanama is drawn when the Court instructs for inspection of a property which has been sealed by its order. Such a process is conducted under the supervision of an officer from the office of the concerned department who has been directed to conduct such an act of sealing the property. This Panchanma will note the name of the persons represented by the sides, the details that the seal has been broken, and the condition of the property from inside and the details of the inspection taken. It will be signed by the representative of the parties to the litigation as well as by the Panchs (Witnesses).

3. **Panchanama under Food Adulteration Act** The Food Inspectors in order to give authentication to their act of inspection of restaurants, godowns, shops etc prepare a Panchanama in presence of 2 Panchas (Witnesses) and conduct all the actions in their presence.

Other panchanmas, in addition to the above mentioned, would include panchanamas prepared upon inspections and raid under Forest Act, under IT Tax Act, under Essential Commodities Act, etc. It is necessary to draw a Panchanama of the inspection or raid conducted in order to prove in the Court of Law or Other Authority that the said raid and inspection has been conducted in appropriate manner and to authenticate the information recorded therein under the signatures by the Panchs (Witnesses) to such raid and inspection.

A Panchanama is a record of what the Panchs (Witness) see and the same can be proved only when the said Panchs stand in the witness box and testify on oath as to what they saw during the Panchanama. The main intention behind conducting Panchanama is to guard the case from unfair dealings on the Part of the Officers. The Panchanama can be used as a corroborative piece of evidence. It cannot be said to be a substantive piece of evidence, and hence relying only on the Panchanama in absence of any substantive evidence cannot attract conviction. In case no Panchs (Witness) are available when required, the Officer-in-charge shall conduct the search and seize the articles without Panchs (Witness) and draw a report of entire such proceedings which is called a Special Report

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Democracy and Federalism Preserved - Analyzing the Supreme Court's Judgment in NCT of Delhi vs. Union of India

–Prabudh Singh

The Supreme Court of India in its recent verdict has held that Lieutenant Governor of NCT of Delhi is bound by the aid and advice of the elected Government of Delhi. While holding so, the Court has observed that in a democracy, real power must vest in the elected representatives and Lt. Governor cannot interfere in every decision of the Delhi Government. Further, noting that there is no need for the Delhi Government to seek the permission of Lt. Governor in all matters.

Delhi, although a Union Territory, it having a special constitutional status through 69th Amendment Act of the Constitution. The Supreme Court, in New Delhi Municipal Corporation v. State of Punjab, stated that though Delhi has a unique constitutional status with an elected legislature and council of ministers, there are however few restrictions on the law-making power of the Delhi Legislature. As per the article 239(A)(A) of the Constitution, the elected government of Delhi has the power to make laws on any of the subjects in the State and Concurrent List except land, public order and police. This limited restriction on the powers of the government makes sense since Delhi is the National Capital and the Union Government has the offices and residences of all its Ministers and Senior Officials, including foreign dignitaries, in Delhi. Hence, it is Union Government's responsibility to ensure law and order and manage effective allocation of land. Delhi can be called a Quasi-State with certain restrictions on law making powers of its government.

The Balakrishnan Committee Report, basis on which the said 69th Constitutional Amendment was made by inserting Articles 239(A)(A) and 239 (A)(B), recommended that the Administrator of Delhi shall act on the aid and advice on the Council of Ministers in respect to which the Legislative Assembly has powers to enact. Going by the recommendations of the Committee, it can be reasonably inferred that the intention of the committee was to have an elected government in Delhi, which will have the powers to make decisions on any of the subjects in the State and Concurrent List except those specifically excluded from the powers of the Government. Therefore, the Lt. Governor shall be bound by the aid and advise of council of ministers of Delhi except in the case of matters relating to public order, police and land.

The Supreme Court, in its judgment in Ram Jawaya Kapur v. State of Punjab, has held that Executive Power of the State is exclusive with respect to any of the entries mentioned in List II (State List) of the Seventh Schedule and List III (Concurrent List), subject to any laws passed by the Parliament on it and the President of India or the Governor of the State shall work only on the aid and advice of the Council of Ministers. The same was reiterated by the Supreme Court in Shamsher Singh v. State of Punjab, where the court said that the Governor has to act on the aid and advise of the council of ministers of the state except in the cases where the Statute explicitly requires the Governor to exercise his powers in discretion.

As pointed out by the court, in a democratic system like ours, which is based on the Westminster Model of the United Kingdom, the elected government should be able to exercise all the executive powers. The Supreme Court thus clearly ordered that the elected government of the State shall have the decision-making powers with respect to functioning of the state and the same applies to Delhi as it has been specifically conferred that power by the Constitution.

However, in the recent past, the Lt. Governor of Delhi was acting critically in day-to-day affairs of the Delhi Government and stalling the functioning of the elected government, which was quite alarming as it was abrogating the decision-making powers of the government. This issue posed a threat to the federal spirit of our Constitution. In a democracy, the real power should lie with the elected representatives of the people. The

implications of good or bad decision making of the government are to be faced by people, who in-turn express their views regarding such decisions through their elected representatives, making the elected government directly responsible to the people. Each member of the cabinet is both individually as well as collectively (through the council of ministers) responsible to the people. The people at large is having the power to decide in whom to vest such a decision-making authority. Democracy is enshrined as a core and fundamental value of the Indian Constitution and by encroaching upon the democratic right of the people by administering the government through a nominated representative of the Union actually destroys the heart and spirit of the Constitution. Article 239 (A)(A) of the Constitution confers upon the people of Delhi, the right to elect their own representatives to manage and run the affairs of the State.

Similarly, the concept of federalism is sacrosanct to the Indian Constitution. Part XI of the Constitution, divides the executive, legislative and administrative powers between the Union and the State. Justice Ahmedi, in S.R Bommai v. Union of India, had opined that the essence of federalism is demarcation and distribution of powers between the Union and States. The fundamental feature of federalism is that the legislature in each state is supreme within that state. Therefore, in order to preserve the federal spirit of the Indian Constitution it is imperative to not interfere with the functioning of state governments by the Governors or the Lt Governors who are only the titular head of the states.

The order of the Supreme Court can be said to have preserved the federal spirit of the Constitution and preserved the sacrosanct value of democracy in the country by vesting the law-making powers in the hands of the elected representatives.

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