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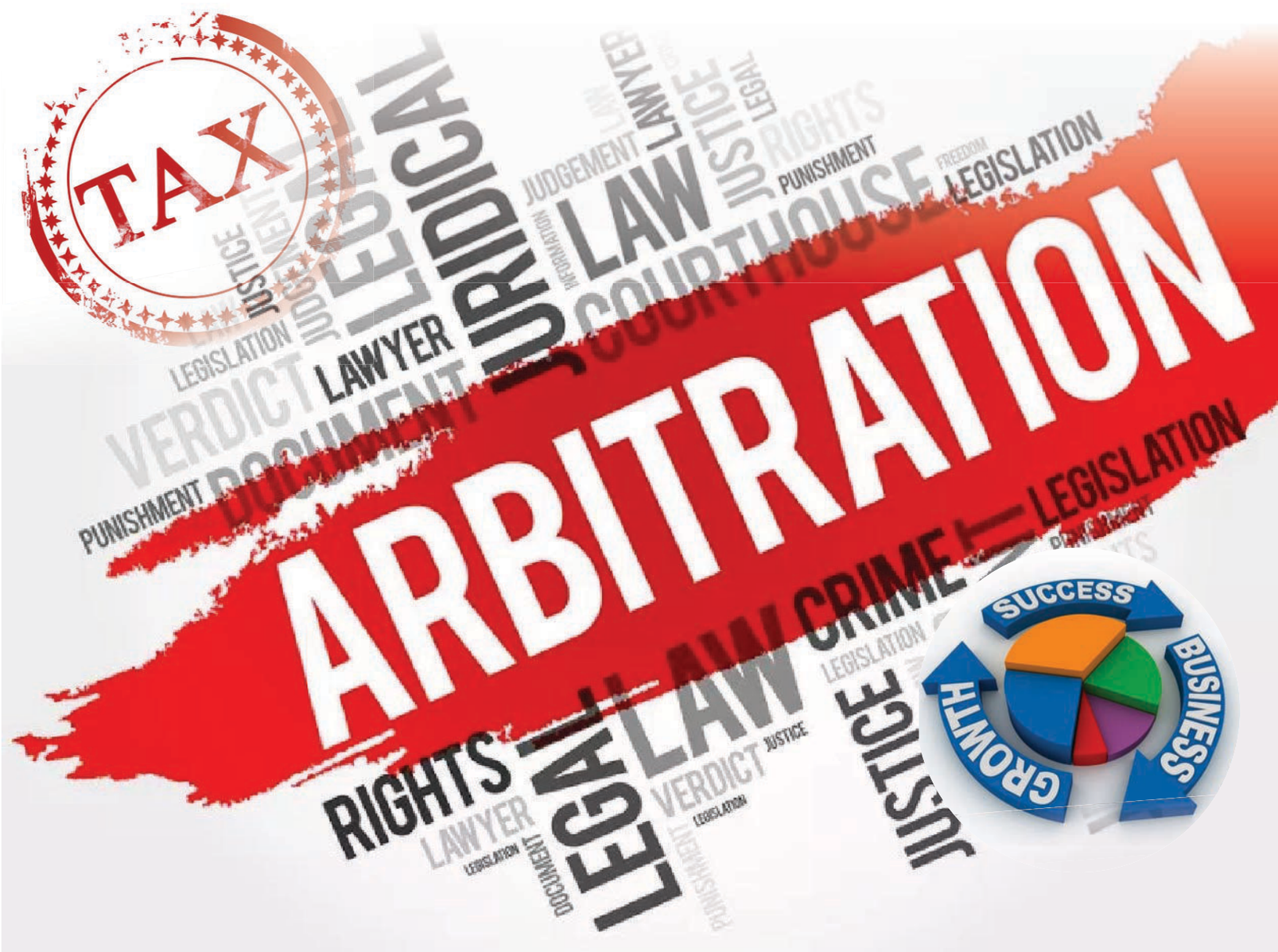
JUNE 2018. Vol. XI, Issue VI

INDIAN LEGAL IMPETUS®



EDITORIAL

Manoj K. Singh
Founding Partner

Dear Friends,

It is with extreme pleasure that we bring to you the June edition of the Indian Legal Impetus which is filled with enlightening articles dealing with a catena of legal subjects such as Arbitration, Contract Law, Constitutional Law and Income Tax. We sincerely hope that you will find this issue of Indian Legal Impetus informative and helpful!

First up we have the article on Income Tax. It is an article on the case law, Commissioner Of Income Tax, Chennai Versus S. Ajit Kumar Civil Civil passed in Appeal Nos. 10164, 10165 of 2010, 10917 of 2013 and 4449, 5255 of 2015 by the Hon'ble Supreme Court on May 02, 2018. The author has discussed the special procedure which is provided under the Income Tax Act to deal with undisclosed income.

Next is our segment of articles on arbitration. The first article is a case law analysis discussing the latest judgment in Union of India vs. Hardy Exploration and Production (India) Inc. passed by the Hon'ble Supreme Court. The said judgement discusses the issue qua the "seat" and "venue" in International Commercial Arbitration matters.

Next is an article which deals with the issue of multi-tier dispute resolution clauses which provide a forum for alternative resolution of disputes at each stage which finally escalate to arbitration. The author in the said article discusses with various judgments passed by the Courts on the pertaining issue.

Further on, we have an article which discusses the ratio as laid down by the Hon'ble High Court of Delhi in the cases NHAI vs. M/S Bsc-Rbm-Pati Joint Venture and Delhi Metro Rail corporation Limited vs. Delhi Airport Metro Express Private Limited.

The next article deals with the issue - whether the relief of specific performance and injunction can be sought in the same suit. The author has analysed various judgments such as Gurbux Singh vs. Bhooralal and Sucha Singh Sodhi vs. Baldev Raj Walia passed by the Courts on the pertaining issue.

Next up we have a case law analysis on the judgment passed by the Hon'ble Supreme Court in the case of "Devidayal Castings Private Limited vs Haryana Financial Corporation and Ors" wherein the Court has held that the OTS proposal circulated by the Corporation / Financial Institution / Bank has to be non-discriminatory and non-discretionary.

Finally, we have an article recent talking about the reforms introduced by the Government of India and its various instrumentalities for making it simpler and easier to do conduct business operations in India.

Please feel free to send your valuable inputs / comments at newsletter@singhassociates.in

Thank you.

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Volume XI, Issue VI

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CASE STUDY: COMMISSIONER OF INCOME TAX, CHENNAI VERSUS VS. AJIT KUMAR

Kritika Angirish

In an appeal filed before the Hon'ble Supreme Court i.e Civil Appeal Nos. 10164, 10165 of 2010, 10917 of 2013, 4449, 5255 of 2015, the question raised for consideration was, whether the material found in the course of a survey, in the premises of a builder can be included in Block Assessment of the assessee.

FACTS

The office and residence of a Tamil cine actor were searched on July 17, 2002. This search was concluded on August 21, 2002. Evidence was found during the search that the assessee had indulged in an understatement of his real income relating to the block period from 01.04.1996 to 17.07.2002. On the same day, a survey under section 133A of the Income Tax Act, 1961, was also conducted on the premises of M/s. Elegant Constructions and Interiors Ltd. (hereinafter referred to as "Elegant Constructions"). Elegant Constructions was also the builder and interior decorator who had constructed and decorated the assessee's residential house at Seaward Road, Valmiki Nagar, Thiruvanmiyur. The cost of this investment was disclosed to the Revenue department in the course of regular return filed by the assessee. In the course of survey operation, it was learned that Elegant Constructions had received payment in cash in addition to cheque payment and both cash and cheque payments were recorded in the books of Elegant Constructions. However, the books of accounts of the assessee showed only cheque payment. It was found that the assessee had paid a sum of Rs. 95.16 lakh in cash which was not accounted for. The Assessing Officer, vide order dated August 31, 2004, after having regard to the facts and circumstances of the case, completed the block assessment and, inter alia, held that the said amount is liable to tax as undisclosed income of the block period. Aggrieved by this order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals).

In the present case, it is admitted position that the cost of investment was disclosed to the Revenue department in the course of return filed by the assessee.

QUESTION OF LAW

The main contention was whether the material found in the course of the survey in the premises of the builder could be used in Block Assessment of the assessee?

The CIT (Appeals) held that it was due to the simultaneous search action, the Department had found that the assessee had engaged the services of Elegant Constructions and hence, the same is directly related to the information obtained in the survey proceedings. CIT confirmed the order of assessment and dismissed the appeal.

Aggrieved by the order of CIT (Appeals), the assessee filed an appeal to the Income Tax Appellate Tribunal (hereinafter referred to as the "Tribunal"). The Tribunal was of the view that information of materials found in the survey operation of the premises of M/s. Elegant Constructions was not related to any material found during the course of the search operation and hence, the same cannot be a basis for making any addition in the block assessment.

An appeal was moved against the Tribunals order to the High Court, The High Court dismissed the appeal vide order dated November 22, 2006 and upheld the decision of the Tribunal.

An appeal was preferred against the order dated November 22nd 2006 before the Hon'ble Supreme Court; The Hon'ble Supreme court held that it is a cardinal principle of law that in order to add any income in the block assessment, evidence of such must be found in the course of the search under Section 132 of the IT Act or in any proceedings simultaneously conducted in the premises of the assessee, relatives and/or persons who are connected with the assessee and are having transaction/dealings with such assessee.

LEGAL JURISPRUDENCE

In the present case, a survey was conducted, and the moot question was whether the cash payment of Rs 95.16 lakh can be added under the head of the undisclosed income of the assessee in block assessment.

The Hon'ble Supreme Court while deciding the said point for consideration, placed reliance on Section 158 BH, whereby, all other provisions of the IT Act were applicable to assessments made under Chapter XIVB except otherwise provided under this Chapter. Placing reliance on Hotel Blue Moon case[1] and upon the finding that the provisions under Chapter XIVB were devised to operate in the distinct field of undisclosed income and are clearly in addition to the regular assessments covering the previous year's falling in the block period.

Furthermore, the Hon'ble Supreme Court held that under the power of Survey under Section 133 A of the IT Act, any material or evidence found/collected in a Survey which has been simultaneously made at the premises of a connected person can be utilized while making the Block Assessment in respect of an assessee.

Under Section 158BB, read with Section 158 BH of the IT Act, the material or evidence found under survey was read within Section 158BB under the words "and such other materials or information as are available with the Assessing Officer and relatable to such evidence". The impugned orders were set aside, and the orders passed by the Assessing Officer making the Block Assessment were restored.

CONCLUSION

Chapter XIV-B of the Act provides a special procedure to deal with undisclosed income. Undisclosed income has been defined by Section 158B(b) to mean income which has not been disclosed for the purpose of the Act. Under the provisions of the Act, as it stood at the relevant point of time, assessment of undisclosed income for the block period of 10 years did not have the effect of abrogating the regular assessments that may have been made in any of the assessment year covered by the block period.

The computation of undisclosed income of the Block period has to be done in accordance with the provisions of Section 158BB. The income assessable in Block assessment under Chapter XIV-B is the income not disclosed but found and determined as the result of the search under Section 132 or requisition under Section 132A of the Act.

Section 158B defines "undisclosed income", and "block period" which are the two basic factors for framing the block assessments. Search is the *sine qua non* for the Block assessment. The special procedure in Chapter XIV-B is intended to provide a mode of assessment of undisclosed income, which has been detected as a result of the search. It is not intended to be a substitute for regular assessment.

In the present case, the assessment of undisclosed income is on the basis of Section 158BB of the Act, as it stood post the amendment by the Finance Act of 2002.

'BEFORE AMENDMENT

158BB(1) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, in accordance with the provisions of Chapter IV, on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with the Assessing Officer.

AFTER AMENDMENT

158BB(1) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, in accordance with the provisions of this Act, on the basis of evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence, as reduced by the aggregate of the total income, or as the case may be as increased by the aggregate of the losses of such previous years, determined,- . . .'

A reading of the provisions of Section 158BB, as it existed before and after amendment, amply discloses that prior to the amendment, Section 158BB authorized the Assessing Officer to make an assessment of undisclosed income on the basis of evidence found as a result of "search ... or other documents and such other materials … and relatable to such evidence". The use of the word "other such" clearly points out that such

1 2010 (3) SCC 259

materials or information must have some connection/ relatable with the search and do not constitute independent materials, i.e., independent of the search or not relatable to the search.

The Hon'ble Supreme Court placed reliance on Hotel Blue Moon case and interpreted the cannon of tax law strictly. The Apex Court created an arena in order to help ease the conflicting decisions on the point of law over the scope of Section 158BB of the IT Act. The Court held that any material or evidence found/collected in a Survey under Section 133 A that was undertaken simultaneously to the Search under the provisions of the IT Act, will be part of the computation of Block Assessment.

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SC LARGER BENCH TO SET PRINCIPLES ABOUT SEAT & VENUE IN AN ARBITRATION AGREEMENT

Rupesh Gupta

BACKGROUND

We often come across arbitration clauses that specify the 'Venue' for conducting the arbitration proceedings but do not specify the 'Seat' of the arbitration. This leads to a confusion regarding the applicable laws and since the issue goes to the root of the matter, the Court's intervention is sought by the parties for decision on this issue. A similar issue came before the Hon'ble Supreme Court of India in *Union of India Vs. Hardy Exploration and Production (India) Inc*. Vide a decision rendered on May 01, 2018, the Hon'ble Apex Court considered it appropriate to refer the issue to be decided by a larger bench of the Hon'ble Apex Court.

FACTS OF THE CASE

Union of India (UOI) filed application under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) challenging the legality, validity and correctness of an award passed in an international commercial arbitration proceeding. Hardy Exploration and Production (India) Inc. (Hardy) took the preliminary objection that Indian Courts do not have jurisdiction to entertain the application under Section 34 of the Act to question the legality of award rendered in international commercial arbitration proceedings. Hardy succeeded in its submissions before the Single Bench as well as the Division Bench of the Hon'ble High Court. UOI challenged the decisions and raised the issue before the Hon'ble Apex Court for their determination and conclusion.

ISSUE

When the arbitration agreement specifies the "Venue" for conduction and holding the arbitration proceedings by the arbitrator(s) but does not specify the "Seat", then on what basis and by which principle, the parties need to decide the place of "seat"? The Court noted that this issue has a material bearing for determining the applicability of laws of a particular country for deciding the post award arbitration proceedings.

RELEVANT CLAUSES IN THE AGREEMENT ENTERED BETWEEN THE PARTIES

32.1 - This contract shall be governed and interpreted in accordance with the laws of India.

33.9 - Arbitration proceedings shall be conducted in accordance with the UNCITRAL Model Law on International Commercial Arbitration of 1985 except that in the event of any conflict between the rules and the provisions of this Article 33, the provisions of this Article 33 shall govern.

33.11 - Prior to submitting a dispute to arbitration, a party may submit the matter for conciliation under the UNCITRAL conciliation, rules by a sole conciliator to be appointed by mutual agreement of the Parties. If the parties fail to agree on a conciliator in accordance with the said rules, the matter may be submitted for arbitration. No arbitration proceedings shall be instituted while conciliation proceedings are pending.

33.12 - The venue of conciliation or arbitration proceedings pursuant to this Article unless the parties otherwise agree, shall be Kuala Lumpur and shall be conducted in English language. Insofar as practicable the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitration proceedings and any pending claim or dispute.

FINDINGS

The Apex Court heard the arguments for few months in intervals with lucidity in order to appreciate the law being discussed and laid down by the several High Courts as well as the Apex Court in India on this issue.

The Apex Court observed that the aforesaid clauses in the agreement do not specify the place of the arbitration as only venue was stated to be Kuala Lumpur. The contract was stated to be governed and interpreted in accordance with the laws of India. The Apex Court recorded the series of judgments passed in

relation to this issue in both foreign cases and Indian cases.

RULING

Recognizing the importance of the issue qua the "seat" and "venue" and the fact that this issue arises frequently in International Commercial Arbitration matters, the Hon'ble Supreme Court considered it appropriate to refer the matter to be dealt with by the larger bench of the Supreme Court for hearing.

CONCLUSION

This issue has cropped up from time to time and it has confused parties to the arbitration agreement at the time of dispute. The parties then consult the legal experts on the subject to arrive at a conclusion. The issue gets into play at the primary stage of initiation of the arbitration dispute and remains a mystery until it is decided by the concerned court of law. The parameters that decide the 'Seat' in case of absence of specific mention of a 'Seat' in an arbitration clause in an agreement have seen several judicial pronouncements, be it the ruling rendered in *National Thermal Power Corporation vs. Singer Co. and Ors in the* year 1992 or the one passed in the year 2017 in *Roger Shashoua and Ors. vs. Mukesh Sharma & Ors.* Since the 'Seat' is an imperative factor in an arbitration and the issue needs the precision, the ruling to be rendered by the Larger Bench of the Hon'ble Supreme Court will be of great significance and importance.

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MULTI-TIER ARBITRATION CLAUSES: DIRECTORY OR MANDATORY?

Manish Gopal Singh Lakhawat

After the recent amendments in the Arbitration and Conciliation Act, 1996, inter alia, regarding fixation of time period within which a dispute must be adjudicated upon, more and more parties are flocking towards arbitration. Arbitration Clauses form part of almost all commercial contractual transactions. Often, these clauses provide for a pre-arbitration step called the process of amicable resolution to trigger the arbitration which are known as Multi-tier dispute resolution clauses.

Multi-tier dispute resolution clauses are also known as escalation clauses or filter clauses. They provide a forum for alternative resolution of disputes at each stage which otherwise finally escalates to arbitration. The inclusion of such clauses in commercial transactions is premised on the necessity to look for amicable modes of dispute resolution. These clauses generally contain pre-conditions of mediation and/or conciliation and/or negotiation before referring the disputes to arbitration. The inclusion of such clauses in today's commercial transactions are governed by recognition of the understanding that a number of disputes do get settled and scripting a multi-tier arbitration clause ensures that parties will at least look for alternative modes of dispute resolution before moving towards the process of arbitration. However, the contour of application of law becomes more complex when these multi-tier dispute resolution clauses are not fulfilled and the defaulting party proceededs with invocation of arbitration. The judicial view is divided on the enforceability of such clauses in such circumstances.
The Rajasthan High Court, in the case of *M/s Simpark Infrastructure Pvt. Ltd. Vs Jaipur Municipal Corporation; MANU/RH/1010/2012,* stated that where agreed procedure of dispute resolution has been made a condition precedent for invoking the arbitration clause, the same is required to be followed. The Court relied upon the judgment of Hon'ble Supreme Court in *SBP & Co. vs Patel Engineering Co*. and held that the agreed arbitral procedure is required to be followed and further, a defaulting party cannot be allowed to take advantage of its own wrong. A perusal of Sec.11(6) of the Act of 1996, also reveals that since a party is required to act upon the agreed arbitral procedure for dispute resolution by signing an agreement with open eye,s then it is not open to the party to ignore the same and invoke exercise of power under Sec. 11(6) of the Act.

Whereas the Delhi High Court in the case of *Ravindra Kumar Verma vs M/s BPTP ltd. & Anr. MANU/DE/3028/2014* held that the existence of conciliation or mutual discussion should not be a bar in seeking to file proceedings for reference of the matter to arbitration and this is necessary for preserving rights as envisaged by Section 77 of the Act. However, since in many contracts there is an effective need of conciliation etc in terms of the agreed procedure provided by the contract, the best course of action to be adopted is that existence of conciliation or mutual discussion procedure or similar other procedure though should not be held as a bar for dismissing of a petition which is filed under Sections 11 or Sec 8 of the Act or for any legal proceeding required to be filed for preserving rights of the parties. However, before formally starting effective arbitration proceedings, parties should be directed to take up the agreed procedure for conciliation as provided in the agreed clause for mutual discussion/conciliation in a time bound reasonable period, in which if they fail, the parties can thereafter be held entitled to proceed with the arbitration proceedings to determine their claims/rights etc.

In view of the above dividing judgments, it can be concluded that where the parties have agreed upon an arbitral procedure of dispute resolution, which has been made a condition precedent for invoking the arbitration clause, then it is required to be followed before filing an application under Sec, 11 of the Act of 1996. Sub-Section (6) of Sec. 11 of the Act of 1996 cannot be invoked directly on expiry of thirty days' notice under sub-sec. (4) of Sec. 11 of the Act of 1996, by the Applicant for appointment of the Arbitral Tribunal, ignoring the agreed arbitral procedure. However, a possible counter argument can be developed that when a

party is sure of the stand taken by the other party due to the facts and circumstances then agreed arbitral procedure need not be followed as the same would be futile and mere empty formality.

***

REAFFIRMING ALTERNATE DISPUTE RESOLUTION - GIVING TEETH TO THE ARBITRAL TRIBUNAL

Swati Sinha

In two recent judgments, the Delhi High Court dismissed the challenges to the decisions of Arbitral tribunal terming it as 'unnecessary challenges' and refrained from interfering with the decisions of the tribunal as the same led to immense waste of judicial time and energy. The ratio as laid down by the Hon'ble High Court in the cases - ***NHAI Vs. M/S Bsc-Rbm-Pati Joint Venture*** and ***Delhi Metro Rail Corporation Limited Vs. Delhi Airport Metro Express Private Limited***" was a humdinger and has provided a much-needed check on the unnecessary challenges to the awards especially by the Public Sector Undertakings.

A BRIEF FACTUAL MATRIX OF BOTH THE CASES IS ENUMERATED BELOW:

NHAI VS. M/S BSC-RBM-PATI JOINT VENTURE (THE NHAI CASE)

The matter related to a construction contract awarded by the National Highway Authority of India (NHAI) to a contractor. Disputes arose between the parties regarding the sums payable for the excavation of unsuitable construction material. The Tribunal issued an award against the NHAI in October 2014, directing the parties to adhere to the rates as was enumerated in the contract. NHAI assailed the award under Section 34 of the Arbitration and Conciliation Act 1996(Act). When this challenge was dismissed, NHAI appealed to the Division Bench under Section 37 of the Act.

DELHI METRO RAIL CORPORATION LIMITED (DMRC) VS. DELHI AIRPORT METRO EXPRESS PRIVATE LIMITED (DAMEPL) - (THE DMRC CASE)

The DMRC case is related to the construction and maintenance of a high-speed metro railway in New Delhi. DMRC, a state-owned corporation, and DAMEPL entered into a public–private partnership for the construction and operation of the metro railway. DAMEPL terminated the agreement when the DMRC allegedly failed to cure defects in the Civil Works within the notice period. DMRC disputed the validity of the termination and argued that the agreement was terminated due to other issues with the project and not any defects, and that DMRC had performed all the obligations on its part with respect to the repair and maintenance. The Tribunal passed an award upholding DAMEPL's termination and awarding it damages on May 2017. DMRC made an application to set aside the award under Section 34 of the Act in March 2018.

PERTINENT ISSUES THAT EMERGED FOR CONSIDERATION IN THE PRESENT JUDGMENTS UNDER DISCUSSION

1. Whether the Court can sit as a Court of appeal and is expected to re-appreciate the entire evidence and reassess the case of the parties?

2. To what extent can the Court interfere with the award passed by the Tribunal?

CONCLUSION

In both the cases the Hon'ble Court exercised circumspection in interfering with the award made by the Tribunal and held that it was the duty of the Court to see whether the view of the Tribunal is arrived at holistically after appreciation of the facts, pleadings and evidence placed before it. Further, it was held by the Court that if there were two possible views and the Tribunal had taken one of them, Court could not substitute its judgment for the judgment of the Tribunal just because there is a challenge to the award.

In the NHAI case, the Court reiterated the same view and held that the Tribunal was the final arbiter on factual and legal issues, and that errors "which stop short of perversity" must not be interfered by the court. The Court further went on to hold that as long as the Tribunal's view was "plausible and not merely possible" the court would not intervene.

The observation of the Hon'ble Court in both the NHAI and DMRC judgments signify the "minimalistic

intervention approach" of the Court to applications to set aside arbitral awards since the same is not always filed as a result of an apparent error of law but only as a routine exercise to delay the enforcement of the award. It was further noted in the two judgments that such frivolous challenges not only waste the precious judicial time but also demonstrates the high handedness of the public corporations which have financial might to assail the award on frivolous grounds. In a welcome step in both the cases, the Court awarded costs to the award creditor on the basis that the award debtor had perused a meritless and vexatious set aside application. To sum up, just because a right to challenge the award is provided under the statute it should not be a trend to file meritless and frivolous application to set aside the same simply because the award debtor has the means and financial ability to do so and such practices should be nipped in the bud.

***

CAN SPECIFIC PERFORMANCE AND INJUNCTION BE SOUGHT IN THE SAME SUIT?

Mahip Singh Sikarwar

INTRODUCTION

Specific Performance is mostly sought in case of a breach of contract resulting in damages or losses for one of the parties to the contract. Instead of compensation in lieu of the losses accrued, the aggrieved party may approach the Court in order to enforce a specific part of the contract. As the objective is to restitute the aggrieved party, the aggrieved party may be better restituted if a certain part of the contract is enforced, rather than receiving mere monetary compensation. In India, the position in this regard is covered by the Specific Relief Act, 1963.

The dictionary meaning of injunction as defined in the Black Law's Dictionary[1] is - "*A court order commanding or preventing an action - to get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted.*" Regarding the laws related to the issue, the statutory interpretations are provided by the Code of Criminal Procedure, 1973, Code of Civil Procedure, 1908 and also the Specific Relief Act, 1963.

This conundrum thereby revolving around the issue that whether specific performance and injunction be sought in the same suit is explained herein-under.

ANALYSIS

There is no explicit legislative mandate which relates to the above-mentioned issue. To find a solution, the effective mechanism is to delve in case laws and come to a conclusion. By placing reliance on various judgments, it can be concluded that the most relevant legislative provision is that of Order II, Rule II of the Code of Civil Procedure, 1908 (hereinafter " Code").

To briefly iterate, Order II, Rule II says that if there exist multiple remedies arising out of the same cause of action, the Petitioner will have to claim all the remedies in the first instance. The person is barred from claiming a new remedy or filing a new suit in order to claim a remedy (not claimed in the first instance) at later instances or in any other Court. However, the person can choose not to claim a particular remedy, if the person so desires.

Thus, from a careful reading of Order II, Rule II and the decision of the Division Bench of the Apex Court,[2] it becomes clear that above raised question can only be answered after placing reliance on the cause of action of the suits.

To determine the scope of Order II, Rule II and when a suit can be barred by the said provision, the judgment of the Constitution Bench of the Supreme Court in the case of **Gurbux Singh v. Bhooralal**[3] needs to be looked at. Ayyangar J. held that, "*In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based;(2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3)that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar.*"[4]

Therefore, we can come to conclusion that the bar under Order II, Rule II will only come into effect when the cause of action of the both the suits is the same.

1 *Black Law's Dictionary, 8th ed., Pg 2296.*

2 *Rathnavathi & Anr vs Kavita Ganashamdas, 2014 (6) CTC 333.*

3 *AIR 1964 SC 1810*

4 *Ibid.*

Recently, the Supreme Court, in the case of **Sucha Singh Sodhi v. Baldev Raj Walia**,[5] dealt with the given issue and allowed the Petitioner to file for specific performance after he had filed for a suit for permanent injunction (which he later withdrew with the permission of the Court). In this case, the Petitioner had first approached the trial Court only for an injunction against the Respondent. Subsequently, he decided to withdraw the suit by submitting the reason that he wanted to approach the appropriate forum. The Trial Court allowed the withdrawal. He then filed a suit for specific performance in the Court of Additional District Judge. To this, the Respondent objected and raised the claim that the suit was barred under Order II, Rule II. The Trial Court accepted the objection and dismissed the suit. The High Court also dismissed the appeal of the Petitioner and upheld the decision of the Trial Court. Hence, the appeal to the Supreme Court was made.

The Supreme Court went on to determine whether the Petitioner could have filed for specific performance along with the suit for injunction.

By looking into the facts of the case, the Supreme Court came to the conclusion that the cause of action resulting in the suit for injunction and the cause of action resulting in the suit for specific performance were different. Thus, the Plaintiff could not have claimed injunction and specific performance in the same suit. To substantiate, the Court held:

1. "The cause of action to claim a relief of permanent injunction and the cause of action to claim a relief of specific performance of agreement are independent and one cannot include the other and vice versa."[6]

2. Cause of action to claim injunction is governed by Order 39, Rule 1(c) of the Code. The limitation period of three years starts from the date of obstruction. In case of specific performance, the limitation period of three years starts from the date fixed for performance.

Based on such considerations, the Court opined that as both the reliefs are not identical, and have separate cause of action due to different factual matrices leading up to these suits and governed by different sections of the Limitation Act, 1963, it was not possible to claim both the reliefs together in one cause of action. Thus, they allowed the Petitioner to file a fresh suit claiming specific performance.

CONCLUSION

As has been mentioned earlier, the primary focus to determine the applicability of Order II, Rule II of the Code is solely based on the cause of action' of the suit. If the cause of action is different, Order II, Rule II will not be applicable, and a fresh suit can be filed, even if the pleadings are similar.[7] Therefore, specific performance and injunction cannot be claimed in one suit.

However, if a cause of action is such, that it can give rise to both - injunction and specific performance, the author is of the opinion that in such circumstances, there should not be any prohibition on filing injunction and specific performance in the same suit in accordance with Order II, Rule II of the Code.

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5 *2018 (5) SCALE 615.*

6 *Ibid.*

7 *Saraswathi vs P.S. Swarnalatha, MANU/TN/0640/2015.*

ENFORCEMENT OF OTS PROPOSAL

Tushar Roy

The Hon'ble Supreme Court, in ***Devidayal Castings Private Limited vs. Haryana Financial Corporation and Ors.***[1] has decided an issue as laid down here:

Whether the decision of the Executive Committee, dated December 22, 2005, as approved by the Board of Directors of the Corporation, not to accept the settlement amount under the policy under force in cases where the value of the secured properties is more than the said settlement amount, amounts to change of policy to the detriment of the borrower and, therefore, the Corporation should be held bound to accept the settlement amount as per policy in force?

FACTS

In 2005, the Corporation adopted and promulgated a policy known as "The Policy For Compromise Settlement of Chronic Non-Performing Assets (NPAs) Of Haryana Financial Corporation, 2005", whereby, the borrowers are given option to settle on the basis of the principal amount of the outstanding in the loan accounts as on the date on which the account was declared Non Performing Assets. Pursuant to the circulation of policy admittedly, letters were written and offers were given to the borrowers to deposit 10% of such dues as a pre-condition for consideration of their cases. The borrowers thereafter, accepted the said offer and responded accordingly. It is imperative to mention that in response, the same came to be rejected in a meeting of the Executive Committee of the Board held on December 22, 2015, the Board in principle held that where the secured properties were more than the settlement amount then in such situation the Corporation should resort to sale of the secured properties. The resolution of the Executive Committee was approved by the Board. The OTS proposal of the borrowers were rejected. Aggrieved by the decision of the Board, the borrowers had filed writ petition before the Hon'ble High Court of Punjab & Haryana.

JUDGMENT

The observation of the Court is laid down as under:

- If an offer has been made by the Corporation in terms of the OTS policy in force which did not contain the exception in question, there can be no departure from the policy and the exception acted upon is in detriment to the interest of the borrowers.
- The Court had quoted paragraph no. 36 of *Sardar Associates and Ors. vs. Punjab and Sind Bank and Ors.* wherein, this Court had dealt with the similar policy containing a similar power of deviation there from which was laid down by the RBI to govern the policy but only to the non – essential features thereof.

> *"36. While making a deviation, the Board of Directors of a public-sector bank could not have taken recourse to a policy decision which is per se discriminatory. The Respondent / Corporation could not have taken recourse to a policy decision which is per se discriminatory. The Respondent Bank is "State" within meaning of Article 12 of the Constitution of India apart from the fact that it is bound to follow the guidelines issued by the Reserve Bank of India. If therefore, the broad policy decisions contained in the guidelines were required to be followed, the power of the Board of Directors to make deviation in terms of Clause 4 of thereof would only be in relation to some minor matters which do not touch the broad aspects of the policy decision and in particular the one governing the non-discriminatory treatment. In a case of this nature, we are satisfied that the Respondent Bank is guilty of violation of the equality clause contained in the Reserve Bank of India guidelines as also Article 14 of the Constitution of India."*

- One Time Settlement allowed as per policy.

1 2016(8)SCALE697

ANALYSIS

From the aforementioned observation given by the Hon'ble Supreme Court, it can be concluded that the OTS proposal circulated by the Corporation / Financial Institution / Bank has to be non-discriminatory and non-discretionary. Even the circular dated September 03, 2005, circulated by Reserve Bank of India mandates that the One Time Settlement has to be non-discretionary and the same should be in the interest of the borrowers.

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EASE OF DOING BUSINESS IN INDIA – AN UPDATE

Harsimran Singh

The present write up[1] is to collate and present highlights of recent reforms introduced by the Government of India and its various instrumentalities for making it simpler and easier to do conduct business operations in India. In the states of Maharashtra and Delhi, notable reforms have been undertaken to ease out the processes involved and reduce the time taken in common issues/ heads attached for doing business.

EASY TO START A BUSINESS

The below stated developments aim to scale down the number of procedures and days taken to start a business which will slash the costs involved as well:

(i) The Government of India has, in collaboration with the State Governments of Delhi and Maharashtra, undertaken significant reform measures to improve our rank in Starting a Business parameter. The rank has improved from 164 to 155 over the last one year;

(ii) Registration with ESIC and EPFO has been made real-time by eliminating all physical touch-points;

(iii) The requirement of opening a bank account has been removed as a mandatory condition for registration with ESIC and EPFO;

(iv) The system of issuing PAN and TAN has been put in place together within T+1 days on an application using digital signatures on the ebiz platform. PAN and TAN numbers can be issued on CBDT's portal within T+3 days without digital signature.

(v) Maharashtra state has combined the process of registration with VAT and profession tax. The registration will now be granted in 24 hours and the same has been adopted by Delhi VAT;

(vi) Form INC 29 has been launched by Ministry of Corporate Affairs to avail 3 pre-registration services viz. 'Name Availability', 'Director Identification Number' and 'incorporation of company' with one form and one payment;

CONTRACT ENFORCEMENT[2]

The Arbitration and Conciliation Act as amended has considerably reduced the time taken in arbitration proceedings and grounds on which an award may be challenged. Commercial Appellate Division Bench and Commercial Division Benches are functioning in Bombay High Court and Delhi High Court.

EBIZ PLATFORM

(i) One-stop access for Investors to know more about Investment opportunities and Information on number of Licenses/approvals required from Government agencies;

(ii) User friendly features such as Payments through netbanking, credit & debit cards, status tracking, SMS alerts and Help-desk support enabled;

(iii) Single face of Government - Composite Application Form and one-time payment designed for obtaining approvals from multiple Ministries/Departments viz., Ministry of Corporate Affairs, Central Board of Direct Taxes, Ministry of Labour & Employment including Employees' State Insurance Corporation & Employees Provident Fund Organization;

(iv) Elimination of multiple visits to different agencies. Investor can apply for 20 Central Government services; 14 Andhra Pradesh, 14 Odisha and 2 Delhi state Government services, 24X7 has been integrated with eBiz IT platform;

DIGITIZATION PROCESS FOR PROPERTY RELATED RECORDS

Digitization will lead to efficiency and reliability of ownership and tenancy rights and will also boost investments:

(i) In Delhi, all sub-registrar offices have been digitized and sub-registrar's records have been integrated with the Land Records Department.

1 *The content has been gathered from http://dipp.nic.in/# and https://www.epfindia.gov.in*

2 *A separate detailed note will soon be circulated in the subsequent issue of the newsletter*

(ii) In Maharashtra, all property tax records have been digitized.

1. Changes in Import and Export procedures

(i) Under Trading across borders parameter, Central Board of Excise and Customs(CBEC) has implemented Single Window Interface for Facilitating Trade (SWIFT) (online single window for clearance of goods) on the ICEGATE portal by integrating FSSAI, Animal Quarantine, Plant Quarantine, Drug Controller and Wildlife Control Bureau for imports;

(ii) Customer risk management system has been extended to other regulatory agencies to ensure risk- based inspections;

(iii) Limit on the number of consignments released under direct delivery has been removed by Ministry of Shipping thereby facilitating prompt delivery of goods;

(iv) Terminal handling receipts have been eliminated from Jawaharlal Nehru Port Container Terminal which cuts down the time taken for the containers at the port;

GETTING ELECTRICITY[3]

(i) Maharashtra and Delhi have implemented the lump-sum charges for electric connection thereby removing the need of an estimate and an inspection for the same. They have also made online application for connections above 100KVA mandatory;

(ii) Delhi Electricity Regulatory Commission has revised the application format of Delhi Electric Supply Code and Performance Standards Regulations, 2007 for faster release of electricity connection;

(iii) The distribution licensees have been directed to process applications in the revised format along with the declaration form and only two documents required for getting electricity connection (namely, identity proof & proof of ownership/ occupancy of premises)

CONSTRUCTION PERMITS

These reforms will remarkably reduce compliance burden by reducing the processes and time taken in grant of construction permit as India's rank under Construction Permit parameter has improved marginally to 183th in 2016 from 184th in 2015.

(i) In the states of Maharashtra and Delhi, notable reforms have been undertaken to ease out the processes involved and reduce the time taken for grant of construction permit;

(ii) Municipal Corporation of Greater Mumbai (MCGM) has completed the process of single window approval by integrating with internal departments as well as, AAI and NMA through a common application form. NoCs from Maharashtra Industrial Development Corporation (MIDC), Director of Industries, Collector and Maharashtra Housing and Area Development Authority (MHADA) have been eliminated. It has also introduced digital signing of building

(iii) permit application, as well as sanctioned maps, thereby eliminating need of physical submission of documents. The manual application for grant of construction permits has been discontinued;

(iv) Municipal Corporations of Delhi has completed the process of single window approval by integrating with internal departments as well as DMRC, Delhi Fire Services, DUAC, AAI and NMA through a common application form. NOC from Labour Department of Delhi Government is not required if no manufacturing activity is undertaken in the building. It has also introduced digital signing of building permit application, as well as sanctioned maps, thereby eliminating the need of physical submission of documents. Manual submission of application for grant of construction permits has been done away with. Ministry of Urban Development and Delhi Development Authority (DDA) have notified the Unified Bye-laws.

(v) Color coded maps have been developed by AAI, NMA, DUAC and DMRC to enable applicants to determine whether NOC is required for the land for which permission is applied for;

3 This parameter witnessed a significant improvement in ranking from 99th in 2015 to 70th in 2016

SNAPSHOT OF DEVELOPMENTS INTRODUCED IN DELHI & MAHARASHTRA

Delhi	Maharashtra
(i) Unified building Bye-laws have been notified; (ii) Online registration of Value Added Tax (VAT) with real-time Tax Identification Number (TIN) allotment has been introduced; (iii) Commercial divisions and appellate divisions in Delhi High Court have been established; (iv) Municipal Corporations have introduced fast track approval system for building permits with features such as: a) Common application form, b) Use of digital signature for filing application and issue of permits, c) Online transfer of application and receipt of NOC, d) Online system has been integrated with Airport Authority of India (AAI), Delhi Urban Arts Commission (DUAC), Delhi Metro Rail Corporation (DMRC) & National Monument Authority (NMA), (v) DERC has rationalized LT and HT tariff thereby allowing LT connections upto 150 KVA; (vi) Implemented the lump-sum charges for electric connection thereby removing the need of an estimate and an inspection for the same; (vii) Online application for connections above 100KVA made mandatory	(i) Requirement of inspection has been removed to make registration of Shops and Establishments real- time; (ii) Commercial divisions and appellate divisions have been established in Bombay High Court; (iii) VAT and Profession tax registration has been integrated into a single process; (iv) Implemented the lump-sum charges for electric connection thereby removing the need of an estimate and an inspection for the same; (v) Online application for connections above 100KVA made mandatory; (vi) Municipal Corporation of Greater Mumbai has introduced fast track approval system for building permits with features such as: a) Common application form, b) Online transfer of application and receipt of NOC, c) Online system has been integrated with AAI & NMA

OTHER HIGHLIGHTS

(i) Requirement of minimum paid up capital and common seal under the Companies Act 2013 done away with;

(ii) Registration for Permanent Account Number (PAN), Tax Deduction Account Number (TAN), EPFO (Employees' Provident Fund Organization) and ESIC (Employee's State Insurance Corporation) and incorporation of company can be done through a single form on eBiz portal;

(iii) Time taken for obtaining PAN and TAN on eBiz portal has been brought down to T+1 days;

(iv) Provision made for applying for company name and Director Identification Number (DIN) at the time of incorporation with single Form-INC29;

(v) Online and real time registration of ESIC and EPFO has been introduced;

(vi) Provision for online payment of EPFO and ESIC contributions has been introduced;

(vii) Requirement of bank account for registration with EPFO and ESIC has been made optional;

(viii) Central Registry Rules have been amended to record security interests of all types of property;

(ix) Number of documents required for imports and exports have been reduced to three;

(x) All documents for export and import to be submitted electronically with digital signatures i.e. no physical submission of document;

(xi) Custom ICEGATE Portal has been integrated with Food Safety and Standards Authority of India (FSSAI), Animal & Plant Quarantine, Drug Controller & Wildlife Control Bureau for imports;

(xii) Shram Suvidha Portal launched to issue unique Labour Identification Number (LIN), submission of common electronic returns under 8 Labour Acts and facilitate risk based inspections;

(xiii) Insolvency and Bankruptcy Code with provision of easy and faster exit, passed by the Parliament;

(xiv) SARFAESI (Central Registry) Rules have been extended to register extended security interests.

These reforms are in wake of government's endeavor to better the position of country in the World Bank Doing Business Study and to meets its target for India to be ranked among the top 50 countries over the next 3 years. Fingers crossed!

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GLIMPSES OF SINGH & ASSOCIATES PARTICIPATION AT THE 140TH INTA ANNUAL MEETING IN SEATTLE, WASHINGTON

Singh & Associates, Founder Manoj K. Singh, Advocates & Solicitors attended the 140th INTA Annual Meeting held in Seattle, Washington from May 19, 2018 - May 23, 2018. The Annual Meeting was attended by almost 11,000 IP professionals from across the world. This event is of great importance to the Firm as it gives us a chance to meet our existing clients & acquaintances and at the same time make new professional connections. The Firm booked itself a booth within the Exhibition Area and was represented by Mr. Shrimant Singh, Sr. Principal Associate (Patents), Mr. Harsimran Singh, Principal Associate and Ms. Vijaya Singh, Principal Associate (Litigation). The Annual meeting was a success. Few pictures from the event are shared below for our readers.

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