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INDIAN LEGAL IMPETUS®

EDITORIAL

Manoj K. Singh
Founding Partner

Dear Friends,

It is with extreme pleasure that we bring to you the February 2018 edition of the Indian Legal Impetus which is filled with enlightening articles dealing with catena of legal subjects such as Arbitration, Criminal Law, Constitutional Law and Company Law. We sincerely hope that you will find this issue of Indian Legal Impetus informative and helpful!

First we have the article on Company Law which discusses the Vicarious Liability of Directors and Shareholders which have been specifically set forth in the Companies Act, 2013. The author of the article also draws the comparison between some common provisions of the 1956 and the 2013 Act.

Next is our segment of articles on arbitration. The first article is a case law analysis discussing the recent judgment namely Daiichi Sankyo Company Limited vs. Malvinder Mohan Singh and Ors. passed by the Hon'ble Delhi High Court discussing the Enforcement of the Foreign Arbitral Awards.

Next is an article which discusses and deals with the issue of Arbitration as an Alternative Dispute Resolution for Consumer Disputes. The author in the said article deals with various judgments passed by the Courts and Tribunals the said issue.

Further we have an article which discusses the judgment namely, Kandla Export Corporation vs. OCI Corporation & Anr deciding that whether an appeal against enforcement of a foreign award is maintainable under Section 50 of the Arbitration and Conciliation Act, 1996 or not.

Next we have an article pertaining to the features of the New Delhi International Arbitration Centre Bill, 2018. The author in the said articles deals with the objective of the Bill which is to provide for the establishment and incorporation of the New Delhi International Arbitration Centre (NDIAC), for the purpose of creating an independent and autonomous regime for institutionalized arbitration and for acquisition and transfer of undertakings of the International Centre for Alternative Dispute Resolution.

This edition of the Indian Legal Impetus also looks at pertinent issues in Criminal Law. The first article we have is titled as "Criminal Investigation for Trial", the author in the said article explains the relevant provisions of the Criminal Procedure Code pertaining to investigation in India.

Next we have an article dealing with the status of marital rape in India. The author deals with various provisions of the Indian Penal Code and several judgments passed by the Hon'ble Courts discussing the said issue.

We have an article on Criminalization of Adultery in India which the author of the article states to be a Gender Bias Approach in India. The author critically analysis Section 497 of the Indian Penal Code.

This edition of the Indian Legal Impetus also looks at pertinent issues in Contract Law, the article in this regard discusses the Laws for Recovery of Damages which pertains mainly to the interpretation of Section 73 and 74 of the Indian Contract Act.

On the issue of Constitutional Law, we have an article wherein the author has analyzed the scope, power and the difference between Article 226 and 227 of the Indian Constitution. The said article elaborates the judgment passed in Surya Devi Rai vs. Ram Chander Rai and Umaji Keshao Meshram and Ors. vs. Smt. Radhikabai and Anr.

We also have an article on Insider Trading Laws in India vis-à-vis the laws prevalent in US & the UK. The said article deals with the relevant provisions of the SEBI Act, Criminal Justice Act, 1993 and the Security and Exchange Commission Rules. Please feel free to send your valuable inputs /comments at newsletter@singhassociates.in

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Contents

NOTE ON VICARIOUS LIABILITY OF DIRECTORS AND SHAREHOLDERS

SIDDHANT MAKEN

The Companies Act, 2013 as well as the erstwhile Companies Act, 1956 contain a set of liabilities restricting the activities/actions of the Directors and also the Shareholders. The present article covers the various liabilities of the Directors and Shareholders under Companies Act, 2013 as well its comparison with the liabilities set forth in the erstwhile Companies Act, 1956.

The first set of liabilities is statutory in nature, being specifically set forth in the Companies Act, 2013 (*hereinafter referred to as* "**the 2013 Act**"). These could either be a civil liability requiring directors to make payments to victims or the state, or they could be criminal liability resulting in fines or imprisonment. The approach in the new regime has been to impose stiffer penalties in case of a criminal offence so as to act as a strong deterrent on directors' conduct when it falls short of the desired standards.

The second set of liabilities could arise from claims made against the directors either by the company or the shareholders for breach of directors' duties. Since directors owe the duties to the company, at the outset it is the company that can bring a claim. Where the company is unable (or does not wish) to do so, it is open to the shareholders to bring a derivative claim on behalf of the company to recover monies for breach of directors' duties. Under the 2013 Act, there is a mechanism that allows a group of shareholders (constituting a minimum of 100 shareholders or those holding 10% shares in the company) to bring an action on behalf of all affected parties, which includes claims for compensation from directors for any fraudulent, unlawful or wrongful act or omission or misconduct on their part. The term "officer who is in default" has been defined under Section 2 (60) of the 2013 Act as: "*officer who is in default for the purposes of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely – (vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the board or participation in such proceedings without objecting to the same, or where such contravention has taken place with his consent or connivance.*" It is pertinent to note here that the term 'officer in default' now seeks to implicate every director (including nominee director) who is aware of the contravention. He need not even participate in any meetings of the board, but if the information as to a contravention is contained in any of the proceedings of the board received by him, he is deemed liable. Also, in view of the aforesaid provisions, a director needs to ensure that any objection raised by him at a board meeting is duly recorded in the minutes.

Liability of Directors under Companies Act 2013 and its applicability.

Contravention of provisions of Section 166 (relating to codified duties) is punishable with a fine which shall not be less than Rs.1 Lakh but which may extend to Rs.5 lakhs. Further, penal provisions throughout the 2013 Act have been made more stringent and provide for increased penalties as compared to the Companies Act, 1956. On an average, the minimum amount of fine that is imposed under certain Sections of the 2013 Act is Rs. 25,000/- which in certain cases extends to Rs.25 crores or even more. Set out below is the list of few contraventions, where the penalties are Rs.1 crore or more:

(a) Violation of provisions relating to not-for-profit companies (Section 8);

(b) Violation of provisions relating to subscription of securities on private placement (Section 42);

(c) Issue of duplicate share certificates with an intent to defraud (Section 46 (5));

(d) Failure to repay deposits within specified time (Section 74 (3));

(e) Contravention of provisions relating to

insider trading (Section 195 (2)).

Apart from monetary penalties, certain offences even attract imprisonment. Most of the offences leading to imprisonment under the 2013 Act are non-cognizable (that it would need warrant to arrest) but there are certain serious offences which are cognizable in nature and would not require a warrant to arrest. These offences are mainly connected to fraud or intent to defraud. Some of such offences are listed below:

(a) Section 7(6) - Furnishing of any false or incorrect particulars regarding any information or suppressing any material information, in any of the documents filed with the Registrar of Companies in relation to the registration of a company.

(b) Section 34 - Including in the prospectus, any statement which is untrue or misleading in form, or context in which it is included, or where any inclusion or omission of any matter is likely to mislead.

(c) Section 36 - Fraudulently inducing persons to invest any money.

(d) Section 56 - Default under Section 56 relating to transfer and transmission of shares with an intent to defraud;

(e) Section 66 - Offences relating to reduction of share capital.

(f) Section 53- Prohibition on issue of shares at discount

Fine on Company - Not less than Rs.1 lakh and may extend to Rs.5 lakhs.

Officer in default- Maximum imprisonment of 6 months or a fine not less than Rs.1 lakh which may extend to Rs.5 lakhs or both.

(g) Section 57 - Punishment for personation of shareholder

Such a person in default- Minimum 1 year to maximum 3 years imprisonment or a fine not less than Rs.1 lakh which may extend to Rs.5 lakhs.

(h) Section 58(6) - Refusal of registration to transfer after order of tribunal

Such person in default- Minimum 1 year to Maximum 3 years imprisonment or a fine not less than Rs.1 lakh which may extend to Rs.5 lakhs.

(i) Section 59(5) - Non-rectification of register of members as per the order of tribunal

Fine on Company - Not less than Rs.1 lakh which may extend to Rs.5 lakhs

Officer in default– Maximum imprisonment of 1 year or a fine not less than Rs. 1 lakh which extend to Rs.3 lakhs or both.

(j) Section 68(11) - Power of Company to purchase its own securities

A fine on Company not less than Rs.1 lakh which may extend to Rs.3 lakhs.

Officer in default- Maximum imprisonment of 3 years or a fine not less than Rs.1 lakh which may extend to Rs.3 lakhs or both.

(k) Section 71(11) - Debentures

Officer in default- Maximum imprisonment of 3 years or a fine not less than Rs.2 lakh which may extend to Rs.5 lakhs or both.

(l) Section 86 - Failure to Register Charge

A fine on Company not less than Rs.1 lakh which may extend to Rs.10 lakhs.

Officer in default- Maximum imprisonment of six months or a fine not less than Rs. 25,000 which may extend to Rs.1 lakh or both.

(m) Section 92(5) - Failure to file Annual return

A fine on Company not less than Rs. 50,000/- which may extend to Rs.5 lakhs.

Officer in default - Maximum imprisonment of six months or a fine not less than Rs. 50,000/- which may extend to Rs.5 lakhs or both.

(n) Section 118(12) - Tampering with the minutes of proceedings of general meeting, meeting of Board of Directors and any other meetings and resolutions passed by postal ballot.

Any person found guilty of tampering with the minutes - Maximum imprisonment for 2 years and a fine not less than Rs. 25,000/- but which may extend to Rs.1 lakh.

(o) Section 128(6) - Failure to keep Books of accounts.

Officer in default- Maximum imprisonment of 1 year or a fine not less than Rs. 50,000 which may extend to Rs.5 lakhs or both.

(p) Section 185(2) - Loan to directors in contravention of section 185

A fine on Company not less than Rs.5 lakhs which may extend to Rs.25 lakhs.

Officer in default– Maximum imprisonment of 6 months or a fine not less than Rs.5 lakhs which may extend to Rs.25 lakhs or both.

(q) Section 186(13) - Loan and investment by Company.

A fine on Company not less than Rs. 25,000/- which may extend to Rs.5 lakhs.

Officer in default- Maximum imprisonment of 2 years or a fine not less than Rs. 25,000/- which may extend to Rs.1 lakh or both.

(r) Section 187(4) - Investments held in its own name.

A fine on Company not less than Rs. 25,000/- which may extend to Rs.25 lakhs.

Officer in default- Maximum imprisonment of 6 months or a fine not less than Rs. 25,000/- which may extend to Rs.1 lakh or both.

The company has the right to initiate legal action against directors, in case of breach of their duties. Apart from this, the 2013 Act has also introduced the novel concept of 'class action suits' under Section 245. Under this concept, a group of shareholders (constituting a minimum of 100 shareholders or such minimum percentage of total shareholders as may be prescribed) can bring an action on behalf of all affected parties, against the company and/or its directors, for any fraudulent or wrongful act or omission of conduct on its/their part.

Comparison between some common provisions of Companies Act 1956 and 2013.

LIABILITY TOWARDS COMPANY

Liability arising from	**Provisions in Companies Act 1956 and 2013**
Breach of Fiduciary Duty	The Acts recognize that most of the powers of the Directors are 'powers of trust' and acting dishonestly towards the interest of the company or acting in furtherance of their own interest shall entail liability.
Ultra Vires Acts	The powers and duties of the Directors are restricted within the Articles and Memorandum of Association (MOA) of the Company and stepping outside these prescribed limits would be considered as *ultra vires* act and personal liability would be incurred.
Negligent Acts	When the Directors fail to exercise reasonable care, skill and diligence, they shall be deemed to have acted negligently in the discharge of their duties and consequently shall be liable for any loss or damage resulting therefrom.
Acts caused by *mala fide* intentions	Directors are the trustees of the assets of the company including money and property, and also exercise power over them. If they exercise such power dishonestly or perform their duties in a *mala fide* manner, they will be held liable for the breach of trust and would be asked to reimburse the company, for whatever the loss company suffers due to such an act.

LIABILITY TOWARDS THE THIRD PARTY

Liability arising from	Companies Act 1956	Companies Act 2013
Misstatement in Prospectus	In case of any omission to state any particulars as per the requirement of section 56 and Schedule II of the Act, or misstatement of facts in the prospectus, renders a director personally liable for damages to the third party.	Sec 35- Civil Liability: Where any person has subscribed to securities acting on misleading statements in the prospectus, the director is liable without any limitation, and for all losses and damages incurred by that person.
	Sec 62 - Civil Liability Sec 63 - Criminal Liability: Imprisonment extended to 2 years or fine upto Rs.50 thousand or both.	Sec 34 - Criminal Liability: Where any prospectus issued, circulated or distributed includes any untrue or misleading statements, every person shall be made liable under Sec 447. Penalty Provision: Imprisonment not less than 6 months which may extend to 10 years. Fine not less than the amount involved in the fraud and can extend to 3 times that amount.
Allotment of Shares Failure to repay application monies when application for listing of securities are not made or is refused	Under section 73(2)-Where the permission for listing of the shares of the company has not been applied or such permission having been applied for, has not been granted, the company shall forthwith repay, without interest, all monies received from the applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay, the company and every director of the company who is an officer in default shall from the expiry of the eighth day, be jointly and severally liable to repay that money with interest rate of not less than four per cent but not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.	Sec 40 – Every Company shall, before making a public offer, make an application to a stock exchange and obtain permission for the securities to be dealt with. Monies received on application from the public shall be kept in a separate bank account etc. Default in compliance to such provision would make the Company liable. The director shall be punished by imprisonment that may extend to one year or a fine not less than fifty thousand rupees which may extend to three lakh rupees or both.

Fraudulent Trading	If the directors have been found guilty of fraudulent trading during the course of business, they may also be made personally liable by an order of the court under section 542. Sec 542(3) provides that every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to fifty thousand rupees, or with both.	Sec 339 – For any fraudulent conduct in business, every person who was knowingly a party to the aforementioned manner, shall be liable under sec 447.

VICARIOUS LIABILITY OF DIRECTORS

The basic test for determining this has been provided for by the courts in various judgments. The Hon'ble Supreme Court of India laid down in the case of *Maksud Saiyed* vs. *State of Gujarat and Ors.* that the vicarious liability of the Managing Director and Director would arise provided any provision exists in that regard in the statute. This was re-iterated by the Supreme Court once again in *S.K. Alagh's* case where it held that in absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. The decision of *Tesco* has been referred to by the earlier division bench decisions of the Supreme Court in *J.K Industries Limited and Others v. Chief Inspector of Factories and Boilers and Others* and *P.C Agarwala v. Payment of Wages Inspector, M.P and Others* wherein it has been held that in the context of vicarious liability under strict liability statutes, a person in charge would be deemed to be responsible for the acts of the company. Thus, the decision of the three-judge bench of the Supreme Court has clearly brought some clarity on the principles of attribution and vicarious liability in the context of corporate criminal liability *vis-à-vis* strict liability under a statute.

The provisions of Section 138 of the Negotiable Instruments Act, have been incorporated and the bouncing of a cheque has been made a criminal offence which was earlier a civil offence with the intent of making the cheque truly acceptable in the commercial world. Not only this, but the concept of vicarious liability has also been incorporated by Section 141 of the Negotiable Instruments Act, making the director, manager, secretary, and other officers of the Company liable if the offence is attributable to any neglect on their part, thereby, incorporating the concept of vicarious liability.

The fall out of the above is that it has opened a floodgate of criminal litigations under Section 138 and 141 of the Negotiable Instruments Act, in which the directors are also made parties. The issue has also been settled by the Hon'ble Supreme Court in line with judgments which state that Directors are liable under Sections 138 and 141 of the Negotiable Instruments Act. But since the offence is bailable, one can seek bail as a matter of right, which serves to considerably lessen the heat felt in the Corporate World.

The Hon'ble Delhi High Court, in case of *Kamal Goyal* Vs. *United Phosphorus Ltd,* has relied upon Form No.32 to establish cessation of a person as a Director of the Company. Taking in view that certified copy of Form 32 is a public document authenticity of which had not been disputed, it could be considered in proceedings under Section 482 of the Code of Criminal Procedure, this Court also relied upon the decision of the Hon'ble Supreme Court in *All Carogo Movers (I) Pvt. Ltd.* v. *Dhanesh Badarmal Jain and Anr.* (2007) 12 SCALE 39, *V.Y. Jose and Anr.* vs. *State of Gujarat and Anr.* (2009) I AD SC 567, and *Minakshi Bala* v. *Sudhir Kumar*. An analysis of

the above mentioned judgments establishes that if the certified copy of Form No.32 is brought on record of the case – it establishes that the person has resigned as a Director. In case the offence has been committed after the date of cessation as a Director, that person cannot be arrayed as accused person in the criminal complaint by the complainant by invoking the principle of vicarious liability.

LIABILITIES OF DIRECTORS UNDER OTHER ACTS

LIABILITY OF DIRECTORS UNDER SECTION-415 AND 409 AND OTHER PROVISIONS OF INDIAN PENAL CODE.

In the case of *GHCL Employees Stock Option Trust* vs. *Kranti Sinha reported* at MANU/SC/0271/2013: (2013)4 SCC 505, the Managing Director and Joint Managing Director, Company along with its Directors were prosecuted for the offences punishable under Sections 120-B,415 and 409 r/w Section 34 of the Indian Penal Code. A process was issued by the learned Metropolitan Magistrate against all the accused including the Managing Director. The Managing Director and Directors filed a petition before the High Court of Delhi challenging the issuance of summons against the Company, the Managing Director of the Company, Company Secretary and Directors of the Company. The High Court of Delhi quashed the process issued against the Managing Director, Company Secretary and Directors of the Company and upheld the order of process issued against the Company. The matter was carried to the Supreme Court by the complainant.

SOME CASE LAWS ON VICARIOUS LIABILITY OF DIRECTORS:

In the case of *K.K. Ahuja* vs. *V.K. Vohra*, (2009) 10 SCC 48, Hon'ble Supreme Court has held that:

"It is evident that a person who can be made vicariously liable… is a person who is responsible to the company for the conduct of the business of the company and in addition is also in charge of the business of the company. There may be many directors and secretaries who are not in charge of the business of the company at all ... a person may be a director and thus belongs to the group of persons making the policy followed by the company, but yet may not be in charge of the business of the company; that a person may be a Manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business.

In the case of *Ajay Mitra* vs. *State of M.P* 2003 Cri LJ 1249, the Hon'ble Supreme Court held that:
"Since the appellant were not in picture at all at the time when complainant alleged to have spent money in bottling plant, neither any guilty intention can be attributed to them nor there possibility of any intention on their part to deceive the complainant. No offence of cheating can, therefore, be said to have been committed by appellants.

In the case of *N.K. Wahi* vs. *Shekhar Singh & Others*, (2007) 9 SCC 481, the Hon'ble Supreme Court held that:

"To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in-charge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still, in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable.

In the case of *Sunil Bharti Mittal* vs. *Central Bureau of Investigation*, (2015) 4 SCC 609:

Principle of 'alter ego' - a company acts through persons in charge of its affairs and the intent of such person is the *mens rea* in an offence by the company.

ENFORCEMENT OF THE FOREIGN ARBITRAL AWARD WORTH MORE THAN 3500 CRORES – HIGH COURT OF DELHI (INDIA)

RUPESH GUPTA

CASE TITLE:

DAIICHI SANKYO COMPANY LIMITED (PETITIONER) VS. MALVINDER MOHAN SINGH AND ORS. (RESPONDENTS)

FACTS:

Daiichi Sankyo Company Ltd. **("Daiichi")** filed a petition before the Hon'ble High Court of Delhi seeking enforcement of foreign arbitral award passed in its favour on April 29, 2016. The arbitration arose out of a Share Purchase and Share Subscription Agreement dated June 11, 2008 **("SPSSA")** whereby Daiichi agreed to purchase from the Respondents their total stake in the Company named Ranbaxy Laboratories Limited. According to this agreement, the place of arbitration was to be Singapore while ICC rules were to be followed. The applicable procedural law for arbitration was International Arbitration Act of Singapore while the substantive law was the law of India.

Disputes arose between the parties when Daiichi claimed to have found out about the existence of an internal Self-Assessment Report **("SAR")** that had details about the data falsification and wrongful practices carried out at Ranbaxy by the respondents. Daiichi claimed that it was kept in the dark by the Respondents about the seriousness of the matters pending with the US FDA and Department of Justice. It further claimed that it was induced to buy out shares of Ranbaxy due to such false representations made by the Respondents. It claimed that it had to suffer substantial direct and indirect losses as a consequence of such fraud. Daiichi subsequently sold Ranbaxy to Sun Pharma in April 2014. The arbitration between the parties was invoked on November 14, 2008 by the petitioners claiming compensatory damages on account of such false and misleading representations made by the Respondents. Award was passed on April 29, 2016 and thereafter the Petitioner filed petition against the Respondents for execution and enforcement of the said Award before the Hon'ble High Court of Delhi. Vide elaborate Order dated 31.01.2018, the Hon'ble High Court dismissed the objections of the Respondents raised as per Section 48 of the Arbitration and Conciliation Act, 1996 against the enforcement and execution of the said Award dated April 29, 2016.

ISSUES INVOLVED:

The following issues came up for consideration before the Hon'ble High Court:

a) Whether the Award can be refused enforcement in terms of Section 48 of the Arbitration and Conciliation Act, 1996 ("Act")?

b) Whether the arbitral tribunal exceeded its jurisdiction in awarding consequential damages and hence the same would be unenforceable?

c) Whether the Award cannot be enforced as Award of Interest on awarded damages amounts to award of multiple damages?

d) Whether the award is unenforceable as the claim was barred by limitation?

e) Whether the award against minor respondents is unenforceable being against the public policy of India?

DECISION:

The Court upheld the enforcement of the award and observed that section 48 of the Act does not allow the Court to reassess the correctness of an award on merits or re-appreciation of the evidence. The ourt refused the claim of the respondents that since Daiichi sold Ranbaxy at a profit, the tribunal was wrong in awarding such consequential damages. The objection raised qua claim being barred by limitation was also rejected as the findings of the Arbitral Tribunal regarding the date of knowledge of fraud were based on the appreciation of evidence on record. The High Court held that it cannot go into the finding of fact recorded by the Arbitral Tribunal, and also the findings recorded by the Arbitral Tribunal cannot be said to be contrary to Fundamental

Policy of Indian Law. The Court held that the award does not pertain to grant of consequential damages and is enforceable as per the Indian Law. The grant of pre-award award was also upheld relying upon the relevant clause in the agreement between the parties as well as in view of the law laid down by the Hon'ble Supreme Court of India in ***Renusagar Power Company Limited vs. General Electric Company 1994 Supplementary 1 SCC 644*** wherein it has been clarified that there is no absolute bar on the award of interest by way of damages and it would be permissible to do so if there is usage or contract, express or implied, or any provision of law to justify the award of such interest.

The Court although held that the award will not be enforced against the few minor respondents as the same would be against the public policy of India. The Court observed that minors are incapable of carrying out fraud through an agent and hence, in the present case, they had no role to play in the fraud played upon the petitioner.

CONCLUSION:

The case at hand is an example where the Court has recognized the principle of minimum interference in a foreign award. The Court went into detailed analysis as to the claim of the respondent with respect to lack of inherent jurisdiction of the tribunal but once it was established that the tribunal was within its powers in awarding damages, it did not find any reason to interfere with the same. The only relief granted to the respondents is, with respect to the enforceability of the award against the respondents being minor. However, since substantial amount is involved in the matter and the points of law with respect to limitation, awarding of interest on damages are debatable aspects, the parties are expected to battle it out in further challenge to this Order passed by the Hon'ble High Court. We look forward to further updates on this and will share the same with our esteemed readers.

INSIDER TRADING LAWS IN INDIA VIS-À-VIS THE US & THE UK

BORNALI ROY

4.1 THE UNITED STATES OF AMERICA

According to the legal framework of the US, the fundamental provisions relating to insider trading are Security and Exchange Commission Rules (SEC) Rule 10 b-5 (anti-fraud rule)[1], Rule 14 e-3 (relating to tender offers) and Section 16 (b) (recovery of short-swing profits) of the Exchange Act.

4.1.1 RULE 10 B-5

Rule 10b-5 was etched in the light of Section 10(b)[2] of the Securities Exchange Act, 1934 which is also known as the anti-fraud rule and allows the Securities and Exchange Commission (SEC) to enforce the prohibition on insider trading. It is worth mentioning that neither Section 10(b) of the Securities Exchange Act, nor Rule 10b-5, expressly prevent insider trading. Rule 10b-5 prohibits the acts and business practices that amount to fraud or deceit on any person, in relation to the sale or purchase of securities. For the purpose of establishing fraud or deceit, the U.S. courts have laid their basis on the principle of fiduciary duty on the part of the person acting as an insider towards the company or the shareholders, i.e., only if the fiduciary duty existed for an insider and there was a breach of such fiduciary duty, such a person would be considered to be an insider liable for fraud under this Rule. The burden of proof that fiduciary duty existed was on the Regulator.

4.1.2 RULE 14 E-3[3]

Apart from Rule 10b-5, Rule 14e-3 of the Securities Exchange Act, specifies prohibition against insider trading during tender offer which prohibits any person who is in possession of material non-public information relating to the commencing of a tender offer, directly or indirectly, either of the bidder company or the target company, from trading in the securities of the target company. This provision provides a complete ban on insider trading and it differs from Rule 10b-5 as there is no need to prove existence of fiduciary duty. Nevertheless, the Rule has its exceptions. Sub-section (1) to Rule 14e-3 eliminates purchases by a broker or by an agent on behalf of an offering person. The Rule is so designed to allow bidders to utilize outside brokers to make open market purchases prior to the filing requirement.

4.1.3 SECTION 16(B)

Another important provision in relation to insider trading in the U.S. is Section 16(b) of the Securities Exchange Act, 1934, which permits the issuers of securities to recover short-swing profits from an insider. In the U.S., trading by corporate insiders is regulated by Section 16(b) of the Securities Exchange Act. As per this provision, the short swing profit (i.e. profits out of purchase and sale transactions within a period of six (6) months) made by insiders is restricted. It is immaterial as to whether the violator is in possession of non-public information. An issuer or a shareholder, under Section 16(b), has a right to recover any profits made by an officer, director, or controlling shareholder from purchases and sales that occur within six (6) months of each other. Liability is determined solely if the purchase-sale transactions have taken place within the statutory period of six (6) months.

4.2 UNITED KINGDOM

4.2.1. The vital provisions related to insider trading or insider dealing are found in Section 52[4] of the Criminal

1 SEC rule 10b-5, 17 C.F.R § 240.10B-5 (1976) provides: *"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or, (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."*

2 Section 10(B) of Securities Exchange Act, 1934: *"To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."*

3 17 C.F.R. § 240.14E-3 (1981)

4 Section 52 - The offence - *(1) An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in*

Justice Act, 1993 ('**CJA'**) and the Financial Securities and Markets Act, 2000 ('**FSMA'**). The approach adopted in the CJA, 1993, follows the European Community Insider Dealing Directive, as per which insider dealing is an abuse of the market rather than breach of the insider's fiduciary obligations with the company. Insider trading in the U.K is regulated under securities legislation rather than the company law. The definition of 'insider dealing' under Section 52 of the CJA, 1993, covers the following three offences: (a) dealing offence; (b) encouragement offence; and (c) disclosure offence. This is similar to the Rule 10b-5 of the U.S. Securities and Exchange Act, which regulates manipulation cases as well as insider trading, under the single anti-fraud rule. Section 119[5] of the FSMA requires the Financial Services Authority ('FSA') to issue a Code of Market Conduct (the 'Code') that provides guidance to determine what kind of behaviour amounts to market abuse. However, the Code is not exhaustive, and it has the effect of codifying the rules on market abuse.

4.3 INDIA

4.3.1. Section 12A (d) & (e)[6] of the SEBI Act, read with the Insider Regulations and Section 15G[7] of the SEBI Act regulates insider trading in India. However, none of these provisions give a specific definition of 'insider trading'. Section 15G is an enabling provision for SEBI to impose penalty in insider trading cases and the SEBI relies on the nature of the violation and description of the prohibited activities under this provision for imposing such penalties. The cases of violation are defined within the provision itself. On the other hand, Section 12A of the SEBI Act lists prohibited activities that primarily include manipulative trades, insider trading activities and substantial acquisition of securities.

4.3.2. Although the term 'insider trading' has not been defined specifically, Regulation 4 of the Insider Regulations provides that contravention of Regulation 3 of Insider Regulations amounts to the offence of insider trading. Under Regulation 3 of the Insider Regulations, an insider who deals with the securities of a listed company, while in possession of any unpublished price sensitive information (UPSI) is said to be guilty of insider trading. It also prohibits an insider from procuring, counseling and communicating UPSI to any other person.

4.3.3. Therefore, the offence of 'insider trading' as provided under Regulation 3, read with Section 12A of the SEBI Act, requires any of the following activities: a. Dealing in securities, while in possession of UPSI; b. By encouraging another person to deal; c. By disclosing the UPSI to another person.

subsection (3), he deals in securities that are price-affected securities in relation to the information.

(2) An individual who has information as an insider is also guilty of insider dealing if—

(a) he encourages another person to deal in securities that are (whether or not that other knows it) price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the circumstances mentioned in subsection (3); or

(b) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.

(3) The circumstances referred to above are that the acquisition or disposal in question occurs on a regulated market, or that the person dealing relies on a professional intermediary or is himself acting as a professional intermediary.

(4) This section has effect subject to section 53.

5 Section 119 - *(1) The Authority must prepare and issue a code containing such provisions as the Authority considers will give appropriate guidance to those determining whether or not behaviour amounts to market abuse. (2) The code may among other things specify— (a) descriptions of behaviour that, in the opinion of the Authority, amount to market abuse; (b) descriptions of behaviour that, in the opinion of the Authority, do not amount to market abuse; (c) factors that, in the opinion of the Authority, are to be taken into account in determining whether or not behaviour amounts to market abuse. (3) The code may make different provision in relation to persons, cases or circumstances of different descriptions. (4) The Authority may at any time alter or replace the code. (5) If the code is altered or replaced, the altered or replacement code must be issued by the Authority. (6) A code issued under this section must be published by the Authority in the way appearing to the Authority to be best calculated to bring it to the attention of the public. (7) The Authority must, without delay, give the Treasury a copy of any code published under this section. (8) The Authority may charge a reasonable fee for providing a person with a copy of the code.*

6 Section 12A – *"No person shall directly or indirectly –(d) engage in insider trading; (e) deal in securities while in possession of material or non-public information or communicate such material or non-public information to any other person, in a manner which is in contravention of the provisions of this Act or the rules or the regulations made thereunder;"*

7 Section 15G- "**Penalty for insider trading. -** *If any insider who,- (i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price sensitive information; or (ii) communicates any unpublished price- sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law; or (iii) counsels, or procures for any other person to deal in any securities of anybody corporate on the basis of unpublished price-sensitive information, shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher."*

4.3.4. An analysis of the provisions governing the prohibition on insider trading (Regulation 3 and 4 of the Insider Regulations and Section 12 (d) and (e) and Section 15G of the SEBI Act) is imperative to understand the legal framework for prohibition of insider trading in India and to demonstrate the efficacy as well as deficiency of the provisions.

ARBITRATION AS AN ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMER DISPUTES

VAIBHAV THAKURIA

The preamble of the consumer protection act, 1986 declares that the act had been enacted to protect the interest of the consumers from exploitation and to present the consumer complaints in appropriate consumer court so that the objective of the Act is achieved and justice is done to the consumers. "*The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of public bodies which are degenerating into storehouses of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked*"[8]. On the other hand, Arbitration as an alternative dispute resolution has been on boom between the large corporations as well as private individual parties. The reason for such a change in trend has been its fast mechanism of redressal of the disputes, which has been major concern for the judiciary as long pending cases in court has been of concern for the disputing the parties. According to section 7 of the arbitration and conciliation act, 1996, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

National consumer disputes redressal commission, in its judgment *Aftab singh v emaar mgf land limited & anr*[9], discussed in length the issue "Whether the Arbitration Act mandates Consumer Forums, constituted under the Consumer Protection Act, 1986 ("the Consumer Act"), to refer parties to arbitration in terms of a valid arbitration agreement, notwithstanding other provisions of the Arbitration Act and the Consumer Act?"

In A. Ayyasamy vs A. Paramasivam[10], Justice D.Y Chandrachud had held that certain category of disputes as a matter of public policy are assigned to the public fora and those are excluded from public fora and authoritively opined that forum will not be barred to entertain complaint under the consumer act, has observed as under:-

"*Hence, in addition to various classes of disputes which are generally considered by the courts as appropriate for decision by public fora, there are classes of disputes which fall within the exclusive domain of special fora under legislation which confers exclusive jurisdiction to the exclusion of an ordinary civil court. That such disputes are not arbitrable dovetails with the general principle that a dispute which is capable of adjudication by an ordinary civil court is also capable of being resolved by arbitration. However, if the jurisdiction of an ordinary civil court is excluded by the conferment of exclusive jurisdiction on a specified court or tribunal as a matter of public policy such a dispute would not then be capable of resolution by arbitration*".

Section 3 of the consumer protection act states that "*The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force*"[11], the act protects the right of the consumers and the remedy provided under the act is in addition to the provisions of any other law.

In many other leading cases it has been the object to understand the preamble of the act, as the act is social legislation to protect the rights of the consumer, it becomes necessary for the court to interpret the act in same sence. The arbitrary nature of the consumer dispute will nullify the main object of the act as consumer will have to fight for its right in arbitration which is pro corporate and it ends the meaning of the formation of the consumer redressal commissions. From the preamble of the Consumer protection act, 1986, it is apparent that the main objective of the act is to protect the rights and interest of the consumer by

8 *Lucknow development authority v. M.K*

9 *III(2017)CPJ270(NC)*

10 *(2016) 10 SCC 386*

11 *Section 3, Consumer Protection Act, 1986*

providing mechanism through which cheaper, expeditious, easier and effective redressal is made available to the consumers. Supreme court held and observed that "*The preamble of the Act declares that it is an Act to provide for better protection of the interest of consumers and for that purpose to make provision for the establishment of Consumer Councils and other authorities for the settlement of consumer disputes and matters connected therewith*"[12].

As per the amended section 8 (1) of the Arbitration and conciliation act, 1996, the forum should be "*Judicial Authority*" before which the parties applies for arbitration, should refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement agrees. The language of the amended section clearly states that the dispute should be referred to the arbitration if a party applies to a judicial authority unless the judicial authority finds that no valid agreement exists. The Supreme Court of India in Fair Air Engineers Pvt Ltd & Anr vs. N.K. Modi[13], while holding that the consumer forum were judicial authority, inter alia observed that "*It is seen that Section 3 envisages that the provisions of the Act are in addition to and are not in derogation of any other law in force. It is true, as rightly contended by Shri Suri, that the words 'in derogation of the provisions of any other law for the time being in force' would be given proper meaning and effect and if the complaint is not stayed and the parties are not relegated to the arbitration, the Act purports to operate in derogation of the provisions of the Arbitration Act. Prima facie, the contention appears to be plausible but on construction and conspectus of the provisions of the Act we think that the contention is not well founded. Parliament is aware of the provisions of the Arbitration Act and the Contract Act, 1872 and the consequential remedy available under Section 9 of the Code of Civil Procedure, i.e. to avail of right of civil action in a competent court of civil jurisdiction. Nonetheless, the Act provides the additional remedy".*

Any dispute between the private parties can be adjudicated by arbitration as per the choice of the parties as long as disputes are not barred by legislation. The Supreme Court of India in the case of Booz Allen and Hamilton Inc. v SBI Home Finance Limited[14] explained the conceptual framework of what kinds of disputes are arbitrable and non arbitrable. "*Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes*." The courts are required to draw a line between what is arbitrable and what is not arbitrable by ensuring that sensitive matters of public interest falls within the principle jurisdiction of the Courts and disputes between private parties can be freely choose to do arbitration rather than litigating their differences. Supreme court in its various decisions has interpreted section 3 of the consumer protection act and held that the act is enacted with the object to provide for better interest of the consumers and for this purpose consumer councils has been established so that the interest of the consumer can be protected by providing for better redressal, mechanism through which cheaper, easier, expeditious and effective redressal is made available to consumers. The court in Aftab Singh (Supra), further held that consumer act was envisaged as a special social legislation to protect consumer rights. Unlike other legislations that create dispute resolution mechanism between level players, this legislation established a level-playing field between unequal players i.e consumers and large Corporations.

The Larger Bench of NCDRC while deciding the issue held that, if Arbitration is allowed, it would prove to be against the entire purpose and object of the act i.e to protect the interest of the consumers by ensuring speedy, just and expeditious resolution and disposal of the consumer disputes. Exposure of consumer disputes to the arbitration will invite application of the arbitration act which is enforceable through civil court, which would be against the purpose of the consumer act. The court further concluded that the statutory enactments which are established with a specific purpose to adjudicate and govern specific disputes, are not arbitrable as there are vast domains of the legal universe that are non-arbitrable and kept distance at a distance from private dispute resolution.

Presently, the case has been taken up by the Hon'ble Supreme Court of India to examine the correctness of the decision of the Larger bench of NCDRC in *Aftab*

12 *The Secretary, Thirumurugan Co-operative Agricultural Credit Society Vs. M. Lalitha (Dead) through Lrs. and Ors., AIR2004SC448*

13 *AIR 1997 SC 533*

14 *(2011) 5 SCC 532*

singh v emaar mgf land limited & anr, which has held that the consumer disputes cannot be settled by Arbitration. The Hon'ble Supreme Court should find a balance towards the applicability of both the acts so that the legislature philosophy and social objective of consumer protection act, 1986 and Arbitration and Conciliation act, 1996 could be achieved while protecting the interest and rights of the parties.

APPEAL AGAINST ENFORCEMENT OF FOREIGN AWARD: INTERPRETING ARBITRATION ACT AND COMMERCIAL COURTS ACT IN THE LIGHT OF KANDLA EXPORT CORPORATION VS. OCI CORPORATION & ANR

ANMOL JASSAL

INTRODUCTION

In the matter of *Kandla Export Corporation & Anr* v. *M/s OCI Corporation & Anr* [Civil Appeal No. 1661-1663 of 2018], the question to be determined was - whether an appeal, not maintainable under Section 50 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act'), is nonetheless maintainable under Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to as 'the Commercial Courts Act').

BACKGROUND OF THE CASE

On August 08, 2017, the High Court of Gujarat allowed the execution petition filed by the Respondents. Being aggrieved by this judgment, the Appellants filed an appeal under the Commercial Courts Act, which was dismissed by the impugned judgment dated September 28, 2017, stating that the Commercial Courts Act did not provide any additional right of appeal which is not otherwise available to the Appellants under the provisions of the Arbitration Act. Considering the fact that Section 50 of the Arbitration Act only provided for an appeal in case a petition to enforce a foreign award was rejected, the High Court held that keeping in view the legislative policy of the Arbitration Act, (which was to speedily determine matters relating to enforcement of foreign awards), since an appeal did not lie from a judgment enforcing a foreign award under the said section, no such appeal would be maintainable under the Commercial Courts Act.

SUBMISSIONS OF THE COUNSEL ON BEHALF OF APPELLANT

According to the learned counsel on behalf of Appellants, Section 13 provided an appeal to any person aggrieved by the decision of a Commercial Division of a High Court, and as Section 50 of the Arbitration Act found no place in the proviso to Section 13(1) of the Commercial Courts Act, it was clear that the wide language of Section 13(1) would confer a right of appeal, notwithstanding anything contained in Section 50 of the Arbitration Act. The things, according the counsel, became even clearer when read with Section 21, which provides that the provisions of the Commercial Courts Act shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force. He argued that Section 37 of the Arbitration Act, which is expressly mentioned in the proviso to Section 13(1) of the Commercial Courts Act, specifically speaks of the enumerated appeals in the said provision, together with the expression "and no others", which expression is conspicuous by its absence in Section 50 of the Arbitration Act. He also argued that the language of Section 13(1) of the Commercial Courts Act is extremely wide – it embraces "decisions", "judgments" and/or "orders" by the Commercial Division of a High Court, and that being so, the impugned judgment of August 08, 2017, allowing the execution petition filed by the Respondents, would certainly be a "decision" and/or "judgment" which would expressly be covered by the wide terms contained in Section 13(1) of the Commercial Courts Act. He also relied upon Section 13(2) to state that, after the coming into force of the Commercial Courts Act, appeals lie only in the manner indicated in the aforesaid Act and not otherwise than in accordance with the provisions of the Act. According to the learned counsel, the scheme of the Act would show that, in all matters over Rs.1 crore, the legislative intent is to provide an appeal, given the stakes involved, which will, under Section 14, be expeditiously disposed of within a period of 6 months from the date of filing of such appeal. Learned counsel also referred us to Section 5 of the Arbitration Act, which contains a non-obstante clause insofar as Part I of the Arbitration Act is concerned and stated that the absence of a similar non-obstante clause, so far as Part II of the Arbitration Act is concerned, is significant.

Therefore, this is not even a case where there are competing non-obstante clauses and, therefore, Section 21 of the Commercial Courts Act must be given full play. According to him, Section 49 of the Arbitration Act also makes it clear that the award shall be deemed to be a decree of the Court that enforces it. This being the case, an appeal from such decree is provided by Section 13(1) of the Commercial Courts Act, which, as has been argued by him, speaks of "decisions", "judgments" and "orders".

SUBMISSIONS OF THE COUNSEL ON BEHALF OF RESPONDENTS

Learned counsel appearing on behalf of the Respondents, on the other hand, relied strongly upon Sections 10 and 11 of the Commercial Courts Act. According to the learned counsel, the explanation to Section 47 of the Arbitration Act, when read with Section 11 of the Commercial Courts Act, would make it clear that the non-obstante clause contained in Section 21 of the Commercial Courts Act has to give way to Section 11, and that since Section 50 of the Arbitration Act impliedly bars appeals against an application allowing execution of a foreign award, Section 13 would be out of harm's way, insofar as his client is concerned. He relied strongly on the judgment of this Court in *Fuerst Day Lawson Limited* v. *Jindal Exports Limited*, (2011) 8 SCC 333, and stated that the Arbitration Act is a self-contained Code on all matters pertaining to arbitration, which would exclude the applicability of the general law contained in Section 13 of the Commercial Courts Act. Also, according to him, the object of both the Acts is to speedily determine matters pertaining to arbitration and/or commercial disputes and, the providing of an extra appeal by the Commercial Courts Act, which is impliedly excluded by the Arbitration Act, would militate against the object of both Acts. The learned counsel further argued that in cases of enforcement of foreign awards of an amount below Rs.1 crore, admittedly, no appeal would lie. However, merely because the amount contained in the foreign award in question was above Rs.1 crore, it does not stand to reason that an extra appeal would be provided.

THE DECISION

The proviso to Section 13 goes on to state that an appeal shall lie from such orders passed by the Commercial Division of the High Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure Code, 1908, and Section 37 of the Arbitration Act. It will at once be noticed that orders that are not specifically enumerated under Order XLIII of the CPC would, therefore, not be appealable, and appeals that are mentioned in Section 37 of the Arbitration Act alone are appeals that can be made to the Commercial Appellate Division of a High Court.

However, to answer the main argument by the counsel on behalf of Appellants- that Section 50 of the Arbitration Act does not find any mention in the proviso to Section 13(1) of the Commercial Courts Act and, therefore, notwithstanding that an appeal would not lie under Section 50 of the Arbitration Act, it would lie under Section 13(1) of the Commercial Courts Act, it was found necessary to advert to the judgment in *Fuerst Day Lawson (supra)*, the relevant portion of which is stated thus,

"(*vii) The exception to the aforementioned rule is where the special Act sets out a self-contained code and in that event the applicability of the general law procedure would be impliedly excluded. The express provision need not refer to or use the words "letters patent" but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred.*"

It, therefore, becomes clear that Section 50 is a provision contained in a self-contained code on matters pertaining to arbitration, and is exhaustive in nature. It was found clear that Section 13(1) of the Commercial Courts Act, being a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration Act. For this reason, it was felt that Section 13(1) of the Commercial Courts Act must be construed in accordance with the object sought to be achieved by the Act. Any construction of Section 13 of the Commercial Courts Act, which would lead to further delay, instead of an expeditious enforcement of a foreign award must, therefore, be eschewed. Even on applying the doctrine of harmonious construction of both statutes, it is clear that they are best harmonized by giving effect to the special statute i.e. the Arbitration Act, vis-à-vis the more general statute, namely the Commercial Courts Act, being left to operate in spheres other than arbitration. Therefore, if an appeal is barred against the enforcement of a foreign award, a corresponding appeal under the Commercial Courts Act would not apply.

LAWS FOR RECOVERY OF DAMAGES

AVNEET JHA

Often the misgivings of an executed contract show up at the time of disputes; especially when promises are made under a contract; non-performance thereof, have farther reaching effects than what the parties give credit at the time of negotiating a contract. This is evident more so in contracts with multiple parties and higher stakes. However, if the parties are mindful of the provisions under the law, the pre-contract discussions can play a vital role in a suit for recovery of damages due to non-performance of a contract.

Under the Indian Contract Act, the word 'damages' is understood as compensation under a contract paid by the defaulting party to the non-defaulting party, which are awarded to the non-defaulting party to compensate for actionable wrongs of the former.

Over the years, courts have categorised damages in several ways, for instance, general, special, nominal, exemplary, aggravated damages etc.

However, under a contract the compensation awarded are liquidated or unliquidated damages awarded as per the terms governing the contract. Under a contract, the parties may agree to payment of a certain sum on breach of the terms of the contract. When the agreement between the parties stipulates the sums payable for non-performance, damages are known as liquidated damages. Unliquidated damages are awarded by the courts or arbitral tribunals on assessment of the loss or injury caused to the party suffering from breach of contract.

Under the Indian Contract Act 1872, unliquidated damages and liquidated damages are governed by Sections 73 and 74 respectively. Damages that a non-defaulting party may suffer on account of a defaulting party can be broadly categorised as direct, or indirect/ consequential damages. It is pertinent to know that any of such types of damages may be contemplated by the parties, be in knowledge of the parties or foreseeable at the time of making the contract.

The underlying principle under Section 73 of the Indian Contract Act is to assess the acts and/or omissions by a party under the contract to arrive at a compensation that is payable to the non-defaulting party due to non-performance by the other party in order to place such non-defaulting party in the financial position it would have occupied had the promise made under the contract been fulfilled. Thus, the compensation is, more often than not, commensurate with the expectation that results from fulfillment of the promise made under the contract.

However, the Indian Contract Act 1872, qualifies the general principle as aforesaid by providing that for an award of damages, the loss or damage must have arisen in the usual course of things from such breach; or parties should have known that such a loss or damage could subsequently arise at the time of entering into the contract.

In the landmark case of *Hadley v. Baxendale* it was held that a party injured by a breach of contract can recover only those damages that either should reasonably be considered as arising naturally, i.e., according to the usual course of things from the breach, or might reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it, thereby, covering both aspects of direct and consequential damages.

Section 73 of the Act provides that compensation is not to be granted for any remote or indirect loss or damage sustained by reason of breach of contract. However, it does not take away from the provision that the non-defaulting party is entitled to receive from the defaulting party, compensation for any loss or damage caused thereby which the parties knew when they made the contract.

If a party can establish that under any special circumstances (which are outside the ordinary course of things) resulting in such losses the other party to the contract was aware of the losses suffered due to the actions or inactions of such party, the latter shall be liable for such losses, even if such losses do not occur in the normal course of events. And if such losses were not contemplated under the special circumstances under the terms of the contract or that a reasonable

man could not have foreseen such risk arising out of a breach, then the mere knowledge of the special circumstances would not make such party liable for such alleged loss or injury. Therefore, at the time of drafting a contract it is essential for the parties to be aware of such special circumstances and the risks reasonably arising out of breach under such special circumstances in order to protect their interests from losses that are indirect or consequential.

The principles of remoteness and foreseeability have been enunciated in various other cases including *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd.* wherein it was held that "in cases of breach of contract, the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. What was at that time reasonably so foreseeable, depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach. For this purpose, it was held that the knowledge 'possessed' is of two kinds: one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently, what loss is liable to result from a breach of contract in that ordinary course"... "But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added, in a particular case, knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things,' of such a kind that a breach in those special circumstances would be liable to cause more loss.'

Even though the concept of consequential damage arises within the four corners of the aforesaid principle and that on breach of a contract (in addition to the compensation payable due to the loss or damage caused as may have been agreed between the parties), the defaulting party may also be liable to compensate for the losses and damage consequent to such loss or damage. However, the same would only be awarded when the circumstances or the nature of loss or damage were in the knowledge of the party, reasonably foreseeable at the time of entering into the contract.

As regards the quantum of liquidated damages, it has been held by the Supreme Court of India that if the court is unable to assess the compensation, the sum named by the parties, if it be regarded as a genuine pre-estimate, may be taken into consideration as the measure of reasonable compensation (albeit not if the sum named is in the nature of a penalty). However, since the contracts do not provide quantification of indirect, consequential damages - for quantification of the same, the said principle laid down by the Supreme Court could be said to apply to such damages too. Further, it is a settled position in law that where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him. In addition, the principles of causation and the attempt made by parties to mitigate such losses also play a vital role to determine liability for damages.

From the aforesaid, it can be concluded that the general principle with respect to claiming the consequential damages by a non-defaulting party is that, the non-defaulting party is only entitled to recover /claim such part of the damage or loss resulting from breach by the defaulting party as was reasonably foreseeable (as liable to result from breach at the time of execution of the contract). The damage or loss reasonably foreseeable would *inter alia* depend on the knowledge possessed and shared between the parties.

ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA – THEIR SCOPE, POWERS AND DIFFERENCES

PUSHKRAJ S. DESHPANDE

Articles 226 and 227 are the parts of the constitution which define the powers of the High Court.

Article 226, empowers the high courts to issue, to any person or authority, including the government **(in appropriate cases),** directions, orders or writs, including writs in the nature of **habeas corpus, mandamus, prohibition, quo warranto, certiorari or any of them.**

What are these Writs?

Habeas Corpus - A simple dictionary meaning of the writ of Habeas Corpus is "a writ requiring a person under arrest of illegal detention to be brought before a judge or into court, especially to secure the person's release unless lawful grounds are shown for their detention".

Mandamus - A writ issued as a command to an inferior court or ordering a person to perform a public or statutory duty.

Prohibition - A writ of prohibition is issued primarily to prevent an inferior court or tribunal from exceeding its jurisdiction in cases pending before it or acting contrary to the rules of natural justice.

Quo warranto - This simply means "by what warrant?"**.** This writ is issued to enquire into the legality of the claim of a person or public office. It restrains the person or authority to act in an office which he / she is not entitled to; and thus, stops usurpation of public office by anyone. This writ is applicable to the public offices only and not to private offices.

Certiorari- Literally, Certiorari means "**to be certified".** The writ of certiorari can be issued by the Supreme Court or any High Court for quashing the order already passed by an inferior court, tribunal or quasi-judicial authority.

The High Court is conferred with this power under Article 226 of the Constitution of India for enforcement of any of the fundamental rights conferred by part III of the Constitution or for any other purpose.

Article 227 determines that every High Court shall have **superintendence over all courts and tribunals throughout the territories in relation** to which it exercises jurisdiction (except a court formed under a law related to armed forces).

The High Court, can, under Article 227 -

- Call for returns from such courts,
- Make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts.
- Prescribe forms in which books, entries and accounts be kept by the officers of any such courts.
- Settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts.

SCOPE, POWERS AND DIFFERENCE BETWEEN ARTICLE 226 AND ARTICLE 227

The Hon'ble Supreme Court, in the case of ***Surya Devi Rai vs. Ram Chander Rai,*** relied on several constitutions Judgments of the Hon'ble Apex court, one of which was ***Umaji Keshao Meshram and Ors. vs. Smt. Radhikabai and Anr,*** which laid down scope, power and differences between Article 226 and Article 227.

The first and foremost difference between the two articles is that Proceedings under **Article 226** are in exercise of the **original jurisdiction** of the High Court while proceedings under **Article 227** of the Constitution are not original but only **supervisory**. Article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915, excepting that the power of superintendence has been extended by this Article to tribunals as well. Though the power is akin to that of an ordinary court of appeal, yet the

power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and not for correcting mere errors.

The court further observed that power under Article 227 shall be exercised only in cases occasioning grave injustice or failure of justice such as when:

(i) The court or tribunal has assumed a jurisdiction which it does not have,

(ii) The court or tribunal has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and

(iii) The jurisdiction though available is being exercised in a manner which tantamount

to overstepping the limits of jurisdiction.

The Hon'ble Court in case of ***Surya Devi rai vs. Ram Chander Rai***, further observed that there is lack of knowledge of the distinction between the understanding of ***Article 226 and 227*** and hence it is a common custom with the lawyers labeling their petitions as one common under Articles 226 and 227 of the Constitution, though such practice has been deprecated in some judicial pronouncements.

After reeling on the catena of decisions of the apex court, the Hon'ble Supreme Court in ***Surya Devi Rai vs. Ram Chander Rai*** laid down the following differences:

i. **F**irstly, the writ of certiorari is an exercise of its original jurisdiction (Article 226) by the High Court; exercise of supervisory jurisdiction (Article 227) is not an original jurisdiction and in this regard, it is akin to appellate revisional or corrective jurisdiction.

ii. Secondly, in a writ of certiorari, the record of the proceedings having been certified and sent up by the inferior court or tribunal to the High Court, the High Court if inclined to exercise its jurisdiction, may simply annul or quash the proceedings and then do no more (Art 226). In exercise of supervisory jurisdiction (Art 227) the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute the impugned decision with a decision of its own, as the inferior court or tribunal should have made.

iii. The jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved but the power conferred under Article 227 viz the supervisory jurisdiction is capable of being exercised suo moto as well.

The court concluded that under Article 226 of the Constitution, writ is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted:

(i) without jurisdiction, by assuming jurisdiction where there exists none, or

(ii) in excess of its jurisdiction – by overstepping or crossing the limits of jurisdiction, or

(iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate court has assumed a jurisdiction which it does not have, or has failed to exercise a jurisdiction which it does have, or the jurisdiction though available is being exercised by the court in a manner not permitted by law, and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

The Hon'ble Supreme Court, through this judgment, brought all the subordinate Judicial bodies under the ambit of Article 226 of the Constitution of India, curtailing the alternate remedy of Appeal available to the aggrieved, which directly or indirectly made no difference in the powers of Article 226 and 227 of the Constitution of India.

RADHEY SHYAM & ANR VS CHHABI NATH & ORS

In 2015, the Constitution Bench of the Hon'ble Supreme Court comprising of H.L Dattu. CJI, Sikri.J, and A.K. Goel. J, was placed with the matter in order to consider the correctness of the law laid down in *Surya Devi Rai vs. Ram Chander Rai*.

The Hon'ble Court observed that:

"This Court unfortunately discerns (with ***Surya Devi Rai vs. Ram Chander Rai***) that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also, in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases, the High Courts, in a routine manner, entertain petitions under Article 227 over such disputes and such petitions are treated as writ petitions. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals, writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.

We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in *Surya Dev* and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed, it has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226."

Hence, by this judgment, the Hon'ble Supreme Court upheld the difference laid down between Article 226 and 227 but at the same time it curtailed few powers in the hands of the Hon'ble High Courts regarding exercising the powers under Article 226 by entertaining the petitions not affecting the Fundamental rights of the individual. And hence, overruled the judgment of ***Surya Devi Rai vs. Ram Chander Rai.***

The jurisdiction of 226 and 227 is vast and has to be exercised sparingly. It can be exercised to correct errors of jurisdiction, but not to upset pure findings of the fact, which is within the domain of an appellate court only. This is where the power of revision comes into picture. The purpose of revision is to enable the revision court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of the inferior criminal court. The jurisdiction of Article 226 cannot be used as a Revision or Appeal court as the rejection of the order by the subordinate court does not arise the question of violation of fundamental right when the alternate remedy of appeal is available to the aggrieved.

CRIMINAL INVESTIGATION FOR TRIAL

PUSHKRAJ S. DESHPANDE

INTRODUCTION

This article is a brief outline of how and what happens once a crime takes place and how the investigation machinery leads the investigation under Cr.P.C and ultimately rests its case before the Judiciary in order to give the accused a chance of fair trial and to prove his innocence for the crime taken place.

INVESTIGATION

For investigation to kick start, there should be some crime, any act which is punishable under the Indian Penal Code or any other legal statute as passed by the Indian Parliament shall be termed as Crime.

CRIME/OFFENCE

For any investigation to begin crime has to be committed. Crime/offence can be a cognizable crime i.e Bailable or Non- Cognizable crime i.e. Non-bailable in nature. Indian Penal Code (herein after to be referred as IPC) has divided the types of Crimes/offences in several chapters. The classification of an offence so as to whether it is a cognizable offence, non-cognizable offence, bailable or non- bailable and compoundable or non-compoundable - is listed in the First Schedule.

COGNIZABLE OFFENCE

Most of such offences are non-bailable and are of a much more serious nature than that of the Non-cognizable offence. Cognizable offence is a case in which a police officer may, in accordance with the First Schedule or under any other law, arrest without warrant. As soon as it is intimated to the local police that any kind of cognizable offence has been committed in its local jurisdiction, the police are duty bound to register (First Information Report) U/s 154 of Cr.P.C; this FIR can be lodged at the instance of anyone who has the knowledge that the cognizable/Non-bailable offence has taken place. The police are at liberty to get their preliminary investigation done prior to registration of an FIR in few cases.

NON-COGNIZABLE OFFENCE

Any offence which is not a cognizable offence is a Non-Cognizable offence. Non-cognizable offence is a case in which a police officer has no authority to arrest without a Warrant form the Magistrate; the police needs to take order u/s 155(2) of Cr.P.C from the Magistrate. Once such order is received form the Magistrate the police may treat the said case the same way as it is an Cognizable offence.

Section 156(3) Cr.P.C – If the police refuse on any point to register an offence, the aggrieved person can approach the Ld. Magistrate by making an application u/s 156(3) Cr.P.C in order to present its case before the Magistrate so that a direction can be given by the Magistrate to the police authorities to take cognizance of the case. Before approaching the Magistrate, the aggrieved person will have to comply with 154(3) i.e. to inform the S.P/DCP about the complaint and request him to take cognizance of the offence as the Police officials subordinate to him are refusing to do so.

STAGE OF EVIDENCE

Once FIR has been registered by the police authorities, the evidence is mainly into 3 parts:

- Recording of Statements u/s 161 of Cr.P.C
- Collecting of Evidence in form of Documents and others
- Recording of confessions or statements u/s 164 Cr.P.C before the Magistrate.

RECORDING OF 164 STATEMENT

Is it mandatory for the police/Magistrate to record Statements u/s 164? It is not mandatory for the investigating agency to record 164 Statements in all the cases but as per the amendment to Sub-clause 5 i.e. 164(5A), in any case where offence is committed u/s 354, 376 or 509 of the IPC, the Magistrate has to record

the statement, u/s 164, of the person against whom the offence has been committed.

STAGE OF SECTION 173 (FINAL REPORT)

After all the three states of evidence are over, the Police has to file, u/s 173, their Final Report before the Magistrate, which is in turn the conclusion of the investigation and the evidence collected by the Investigation Agency. If the Police Authorities, after investigation find that there is deficient evidence against the accused, it may file a report u/s 169 of Cr.P.C and release the accused on executing a Bond and undertaking for appearing as and when required before the Magistrate empowered to take cognizance.

The final Report will be of two kinds-

- Closer Report
- Charge Sheet /Final report

CLOSER REPORT

It simply means that there is no evidence to prove that the alleged offence has been committed by an accused under question. Once the closer report is filed by the Police, the Magistrate may:

a. Accept the report and close the case.

b. Direct the investigation agency to further investigate the matter, if they have left any lacunae in the investigation

c. Or issue notice to the First Informant as he is the only person who can challenge the closer report as per the guidelines issued by the Hon'ble SC in the case of Bhagwan Singh vs. Commissioner of Police.

d. In some cases, the Magistrate may directly reject the closer report and take cognizance of the case u/s 190 of Cr.P.C and issue summons u/s 204 of Cr.P.C to the accused and direct his appearance before the magistrate.

CHARGE SHEET

It contains elements of the offence in a prescribed form, and it also contains the complete investigation of the Police authorities and the charges slapped against the accused. It includes the facts in brief, the copy of the FIR, all the statements recorded u/s 161, 164 Panchnamas, list of witnesses, list of seizure and other documental evidence collected by the investigation agency during the investigation. On filing of the Charge sheet, the magistrate may issue summons/warrant to the accused named in the charge sheet and direct him to appear before him, on the date he so directs.

In cases where the offence is punishable with imprisonment of less than 10 years, the final report u/s 173 shall be filed by the investigation agency within 60 day,s and in cases where the offence recorded to have been committed is punishable with imprisonment for more than 10 years, life imprisonment or death penalty, the investigation agency, in such matters, have to file their report within 90 days from the date of the FIR being registered.

This part ends the Course of Investigation and the part of Trial starts. The police Aathorities have to hand over the case to the Prosecutor/Special Prosecutor, if so appointed, and act has per his instructions during the course of Trial.

COMMITMENT OF THE CASE U/S 209

Once the Charge Sheet is filed by the investigation agency before the Magistrate, irrespective of whether it is sessions triable case or not, the Magistrate will take cognizance of the case u/s 190 (1)(b) and issue warrant u/s 204 to the accused to secure his presence before him and further can direct the investigation agency to hand over the chargesheet to the accused u/s 207of Cr.P.C. If the offences are sessions trial then the Magistrate will commit the case and send all the papers and proceedings of the case to the District and Session court for the trial to begin.

SESSIONS TRIAL

Chapter XVII deals with the procedure of Sessions Trial. Section 225 to 233 deal, pointwise, how the trial has to be conducted by the Public Prosecutor.

OPENING OF THE CASE

The Prosecutor appointed will have to open the case by explaining to the Court about the charges slapped on the accused in the Charge Sheet.

Discharge u/s 227 and Framing of Charges u/s 228

The accused, at any time before framing of charges against him, can file an Application u/s 227 for discharging him from the charges leveled against him in the charge sheet. The accused has to put, before the court, that all the charges leveled against him are false and are not strong or sufficient enough to proceed against him in the trial.

If the said application u/s 227 is rejected by the Court, then the court may go ahead and frame charges against the accused u/s 228, the hon'ble Court at this stage can even add or delete any charge if the material available on record does not support the said charge. The Hon'ble Court shall read out the charges to the accused and ask if he agrees with the said charges and pleads guilty for the same.

CONVICTION OF PLEA OF GUILTY U/S 229

If at this stage of trial, the accused pleads guilty of comitting the offence and agrees to the charges framed, he may be directly convicted for those charges u/s 229 of Cr.P.C. If the accused pleads not guilty, then the judge will direct to proceed with the Trial and the accused will have to face the Trial.

STAGE OF EVIDENCE OF PROSECUTION - SECTIONS 230 AND 231 OF CR.P.C

The stage of evidence comprises of examination of witnesses of the both sides, this includes Examination of Chief, Cross Examination and Re-Examination. Under the Indian Evidence Act, the Examination of Witnesses are covered Under Chapter X.

STATEMENT U/S 313 OF THE ACCUSED

After the evidence of the Prosecution, if completed, the Judge will direct the appearance of the accused in the witness box and record his statement u/s 313 of Cr.P.C. At this time, it is the first time the court hears the accused and puts to him in question and answer form, all the testimony of the witnesses who have testified against him. Oath is not administered during the recording of the statement nor can anything recorded against the accused, be used against him in at the later stage.

DEFENSE WITNESS

At this stage after recording of the Statement u/s 313 of Cr.P.C, the Judge may allow the accused, through his Advocate, to produce Defense Witness, if any, in order to get the said witness examined.

FINAL ARGUMENTS/ VERDICT/ QUANTUM OF PUNISHMENT / JUDGMENT

This is the final stage of the Trail where both the parties, after proper evaluation of Statements and Evidence and testimony of the witnesses, put their case before the Court, through arguments. On the basis of the said arguments and the material evidence on record, the Hon'ble Judge will pronounce if the accused is Convicted or Acquitted from the charges put against him. In case the Judge convicts the accused, then he will have to hear the accused on quantum of Judgement u/s 360 as to what shall be the period of him serving the term for the offence committed by him and on hearing the accused, the Judge will pass a detailed Judgment, recording all the reasons as to why according to him, the accused shall be punished for the offence.

THE NEW DELHI INTERNATIONAL ARBITRATION CENTRE BILL, 2018: CREATING AN ECOSYSTEM FOR INTERNATIONAL ARBITRATION CENTRE IN INDIA

PALASH TAING & PRATEEK KHANNA

INTRODUCTION

The Central Government for speedy resolution of commercial disputes and to make India an international hub of Arbitration and a Centre of robust ADR mechanism catering to international and domestic arbitration, constituted a ten Member, High Level Committee under the Chairmanship of Justice B.N.Srikrishna, Retired Judge, Supreme Court of India. The Committee was given the mandate to review the institutionalization of arbitration mechanism and suggest reforms thereto. Subsequently, after several deliberations and sittings, the Committee submitted its report on August 03, 2017, to Shri Ravi Shankar Prasad, Hon'ble Minister of Law & Justice and Electronics and Information Technology.[15]

Based upon the recommendations submitted by the Justice Saikrishna Committee, the New Delhi International Arbitration Centre Bill, 2018[16], was introduced in Lok Sabha by the Minister of State for Law and Justice, Mr. P.P. Chaudhary, on January 5, 2018, to establish an autonomous and independent institution for better management of arbitration in India.

Objective: To provide for the establishment and incorporation of the New Delhi International Arbitration Centre (NDIAC), for the purpose of creating an independent and autonomous regime for institutionalized arbitration and for acquisition and transfer of undertakings of the International Centre for Alternative Dispute Resolution, and to vest such undertakings in the NDIAC for the better management of arbitration so as to make it a hub for institutional arbitration, and to declare the NDIAC to be an institution of national importance and for matters connected therewith or incidental thereto.

15 *PIB Press Release dated 03.08.2017*

16 *http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/2_2018_LS_Eng.pdf*

FEATURES OF THE BILL

ESTABLISHMENT

The Bill seeks to provide for the establishment of the NDIAC to conduct arbitration, mediation, and conciliation proceedings. The Bill declares the NDIAC as an institution of national importance (Clause 4 of the Bill). It specifies that the NDIAC will establish a Chamber of Arbitration which will maintain a permanent panel of arbitrators. Further, the NDIAC may also establish an Arbitration Academy for training arbitrators and conducting research in the area of alternative dispute resolution (Clause 29 of the Bill). Apart from this, the NDIAC may also constitute other committees to administer its functions.

STATUS OF NDIAC

As per Clause 3 of the Bill, the NDIAC is proposed to be a body corporate [as defined under Section 2(11) of Companies Act, 2013] with perpetual succession, common, seal, power to hold and dispose property and to enter into contracts and initiate legal proceedings by itself or defend against itself.

COMPOSITION

(Clause 5 of the Bill) Under the Bill, the NDIAC will consist of seven members including:

(i) a Chairperson who may be a Judge of the Supreme Court or a High Court, or an eminent person with special knowledge and experience in the conduct or administration of arbitration;

a) The said chairperson will be appointed by the Centre in consultation with the Chief Justice of India.

b) The members of NDIAC will hold office for three years and will be eligible for re-appointment. The retirement age for the Chairperson is 70 years and other members is 67 years.

(ii) two eminent persons having substantial knowledge and experience in institutional arbitration;

(iii) three ex-officio members, including a nominee from the Ministry of Finance and a Chief Executive Officer (responsible for the day-to-day administration of the NDIAC); and

(iv) a representative from a recognized body of commerce and industry, appointed as a part-time member, on a rotational basis.

OBJECTIVES OF THE NDIAC

(i) Promoting research, providing training and organizing conferences and seminars in alternative dispute resolution matters;

(ii) Providing facilities and administrative assistance for the conduct of arbitration, mediation and conciliation proceedings;

(iii) Maintaining a panel of accredited professionals to conduct arbitration, mediation and conciliation proceedings.

The key functions of the NDIAC will include facilitating conduct of arbitration and conciliation in a professional, timely and cost-effective manner; and (ii) promoting studies in the field of alternative dispute resolution.

INSTITUTIONAL SUPPORT

The Bill specifies that the NDIAC will establish a Chamber of Arbitration which will maintain a permanent panel of arbitrators. Further, the NDIAC may establish an Arbitration Academy for training arbitrators and conduct research in the area of ADR. It may also constitute other committees to administer its functions.

THOUGHTS

The said bill aims to overcome the roadblocks in the development of institutional arbitration in India and create a robust ecosystem which if not better, but is at par with the International Arbitration institutions such as Singapore International Arbitrational Centre (SIAC), London Court of International Arbitration (LCIA) and others. The creation of NDIAC promises a future of strong institutional arbitration in India.

CRIMINALIZATION OF ADULTERY IN INDIA - GENDER BIAS APPROACH

RAHUL PANDEY & AISHWARYA MISHRA

Section 497, Indian Penal Code, 1860 [hereinafter referred as "the Act"] adumbrates that if an accused has sexual intercourse (not amounting to the offence of rape) with a person who is and whom he knows or has reason to believe to be the wife of another man shall be punishable for the offence of adultery if there isn't any consent or connivance of the husband. Further, it states that the *wife (with whom the accused had the intercourse) shall not be punishable as an abettor*. The following conclusions can be drawn from the bare perusal of the aforementioned section:

1. That the accused (whether married or not) is punishable for imprisonment for 5 years or fine or both if he has sexual intercourse with a married woman [hereinafter referred as "**the alleged act**"].
2. That if there is consent or connivance of the husband, then the said act will be outside the purview of Section 497.
3. That for the alleged act to fall within the ambit of the aforementioned section, the same has to be *consensual* otherwise it will tantamount to rape. Thus, the section prescribes punishment for a consensual sexual activity.
4. That in such case of "alleged act" only "man" is held as the accused and not the married woman with whom he had consensual sexual intercourse. *Even though there is intentional aid (for the application of this section, consent has to be presumed on the part of wife), the wife has been statutorily exempted from any penal consequences and we cannot presume the common intent on the part of wife because she can't be prosecuted as an abettor.*
5. That the section makes the alleged act punishable only if the same is with the married woman. Thus, if an accused being a married man has sexual intercourse with an unmarried woman, although adultery, the same will be outside the purview of aforementioned section.
6. That aforementioned offence being a non-cognizable one, the prosecution for the same cannot be initiated unless *there is a complaint by the husband* as he is the one who is deemed to be aggrieved and no one else. Further, in case the husband is not there then the *person who had guardianship of the woman on his behalf, at the time when such an alleged act was committed*, with the leave of the court, may make complaint on his behalf.[17] Thus, in case a married man has sexual intercourse with a married woman then only the husband of married woman is deemed to be aggrieved and not the wife of married man (or the accused in this scenario,).

FOR THE SAKE OF REFERENCE, SECTION 497 OF THE INDIAN PENAL CODE IS HEREIN UNDER:

497. Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

That in terms of the said section and the various judicial precedents, it is clear that as per Section 497 of the Indian Penal Code "wife" cannot be held responsible for the said criminal act. Furthermore, as per the well-established principles of law, wife is not even punished or held criminally liable for 'abetting' the offence which is in total contradiction to the concept of 'equality' which forms the fundamental cornerstone of the Indian Constitution.

Adultery is also a civil wrong and the same has been prescribed as the ground of divorce in matrimonial

17 *See, Section 198(2), Code of Criminal Procedure, 1973.*

laws.[18] Further, the scope and meaning of adultery in matrimonial laws is wider than the aforementioned Section.[19]

CONSTITUTIONAL VICES IN THE SECTION

There is no iota of doubt that abovementioned section is suffering from constitutional vices on the ground of gender discrimination and is tilted in favour of woman, as they have been granted complete immunity from prosecution. The constitutionality of the aforementioned section has been challenged before the Hon'ble Supreme Court of India[20] and each time although noting certain flaws, the Hon'ble Court was pleased to adjudge the same as constitutional. Law Commission[21] has also noticed the institutionalized discrimination imbibed in the section and suggested for its removal or alternatively making it gender neutral. That the Hon'ble Supreme Court, in various judgments[22], has held the same as constitutional on the ground that it is a special provision for women[23] and is also necessary to preserve the matrimony.[24]

It is submitted that the aforementioned section suffers from constitutional vices on the following grounds:

1. That the object of the section is to punish for adultery as the same, is against the prevalent societal values. Yet only adultery with married woman is a punishable offence but not with the unmarried woman. Thus, *ex facie*, the classification into married and unmarried woman doesn't have any reasonable nexus with the object sought to achieve.

2. That the section loses its enforceability if there is consent or connivance of husband. This results in degradation of the status of woman being a 'property' of man, as for having consensual sexual relations she needs consent of her husband which results in a conclusion that the man is owner of his wife and this 'absurd' conclusion which has direct implication of the bare wordings of the section is against the equality or gender justice principles enshrined in the Constitution.

3. That the section 198(2), Code of Criminal Procedure, 1973, doesn't treat the wife of a married man committing the alleged act as a person aggrieved by that said act. It is submitted that there doesn't exist any intelligible differentia for such classification. It is a grave inconsistency that at one instance Section 497 is said to be constitutional on the ground that it is a special provision for woman under Article 15, while the right to prosecute one's own husband for adultery has not been recognised[25].

4. That consensual sex falls within the ambit of sexual privacy of an individual, hence, should not be penalised. The civil consequence of the section is already given in the form of divorce under personal laws. Such an interference by the state in extremely personal matter is wholly unwarranted and against the one's personal liberty.

At present, the constitutionality of the aforementioned sections has been challenged again before the Hon'ble Supreme Court vide a Public Interest Litigation.[26] The Hon'ble Court in the aforementioned case directed the matter to be heard by a Constitutional Bench, *inter alia*, noting that:

"…we had noted that the provision seems **quite archaic and especially, when there is a societal progress**. Thus analyzed, we think it appropriate that the earlier judgments required to be reconsidered regard being had to the **social progression, perceptual shift, gender equality and gender sensitivity.** That apart, there has to be a different kind of focus on the affirmative right conferred on women under Article 15 of the Constitution."
(Emphasis supplied)

CONCLUSION

As noted earlier, that, *ex facie*, the section 497 of the Act suffers from constitutional vices and gender inequality. The basic structure of our legal system is also based on the fundamental concept of 'equality' and in such a scenario, it is of utmost importance to achieve gender equality by addressing the challenges of both men and

18 *See, Section 13 (1), Hindu Marriage Act, 1955; Section 27(a), Special Marriage Act, 1954; Section 10(1)(i), Indian Divorce Act, 1869; Section 32(d), Parsi Marriage and Divorce Act, 1936.*

19 *Sowmithri Vishnu vs. Union of India and Another, (1985) Suppl.SCC 137.*

20 *Yusuf Abdul Aziz v. State of Bombay,1954 SCR 930; Sowmithri Vishnu v. Union of India and Another, (1985) Suppl. SCC 137 and V. Revathi v. Union of India and Others, (1988) 2 SCC 72; W. Kalyani v. State through Inspector of Police and Another,(2012) 1 SCC 358.*

21 *42nd Law commission reports in 1971 and Justice Malimath Committee on Reforms of Criminal Justice System, 2003.*

22 *Supra note 4.*

23 *Yusuf Abdul Aziz v. State of Bombay,1954 SCR 930*

24 *Sowmithri Vishnu v. Union of India and Another, (1985) Suppl. SCC 137*

25 *V. Revathi v. Union of India and Others, (1988) 2 SCC 72.*

26 *Joseph shine v. Union of India Writ Petition (Criminal) 194/2017.*

women. It is high time that offences under the Act be revisited and brought into consonance with the present day societal values. It is pertinent to state that in a country like India, wherein right to equality forms one of the basic tenets of the Indian Constitution, men and women should be treated at par and as such crime is supposed to be gender neutral and the protection for women envisaged in Article 15 does not and cannot reasonably be presumed to provide protection against the crime committed by her. The neighboring countries sharing common societal background and history have also considered 'adultery' as a gender-neutral crime.[27] The wife is punishable as an abettor in Section 497 of Ranbir Penal Code, 1932(*the act applicable in Jammu & Kashmir)*.

With the recognition of 'Right to privacy' as a fundamental right in particular, the acceptance of 'sexual privacy' of an individual, state control in consensual sex matters is highly undesirable and unwarranted. The argument for not punishing women so as to save the marriage loses its force, as the action of divorce is still maintainable against the wife under matrimonial laws. Thus, the whole scheme of the section is not in coherence with the object for which it was enacted and hence, stands on a very loose pedestal.

As rightly said by Hon'ble Justice SN Dhingra:

"We are living in an era of equality of sexes. The Constitution provides equal treatment to be given irrespective of sex, caste and creed. Does this concept of equality not apply in case of adultery also? Is a woman a child, baby, an insane or suffers from some other infirmity that anyone can easily take her for a ride? Even if she is highly educated then also she is granted blank cheque of having free sex and not be held liable and face punishment for the same. This is most despicable, to say the least. A crime is a crime. If women can be punished for murder, theft and other offences then why not for adultery also? Time has come when this gross injustice perpetrated on men alone is rectified suitably and necessary amendments be made to Sec. 497 IPC, so as to do away with the irregularities, and in the interest of doctrine of equality."

Hence, the legislators need to decriminalize the section as adultery is no threat to the society. Further, steps need to be taken to amend the law to the extent that both men and women are treated at par with respect to the crime committed under Section 497 of the Indian Penal Code. Furthermore, there should be equal rights for men and women as laid in the Constitution of India which envisages equality before the law and equal protection of the law for all its citizens.

27 *K.D.Gaur, Indian Penal Code, 1860 845 (6th Ed.,2015).*

LAW ON MARITAL RAPE – A MUCH NEEDED REFORM IN OUR LEGAL SYSTEM

AISHWARYA MISHRA

Even as we celebrate 70 years of Independence, the women in our country are still not truly free and independent and continue to live under the realm of darkness and fear. It is indeed a somber reality of India.

It is a matter of concern, that while on one hand the country is celebrating some glorious decisions in the legal arena from the Hon'ble Supreme Court of India like landmark judgments in the matter of 'Adhaar Card Case' and '"Triple Talaq' creating new cornerstones for the judiciary; on the other hand, to the general disappointment, the Central Government has given its view against criminalizing marital rape, saying doing so would 'destabilize the institution of marriage'.

As observed by Justice Arjit Pasayat:

"While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female."

However, despite the increasing number of cases of marital rapes in our country, marital rape is not defined in any statue/ laws. It is to be noted that while 'Rape'" is defined under section 375 of the Indian Penal Code, there is no definition of 'Marital Rape' till now and there is no reorganization of marital rape under the ambit of Indian Law. It is disheartening that such a sensitive issue like marital rape is being dismissed by the highest courts of India by giving the view that *"You are espousing a personal cause and not a public cause…This is an individual case."*

In India, marital rape exists *de facto* but not *de jure*. While in other countries either the legislature has criminalized marital rape, or the judiciary has played an active role in recognizing it as an offence, in India however, the judiciary seems to be operating at cross-purposes.

Though marital rape is the most common and repugnant form of masochism in Indian society, it is hidden behind the iron curtain of marriage. The Hon'ble Supreme Court of India, the last hope for reforms in outdated approach towards marital rape after Parliament had hung up its boots, said that country isn't ready to accept marital rape as a crime. It can be seen that the law makers have a different view and believe marital rape cannot be applied in the Indian context because of factors like "level of education and illiteracy, poverty, social customs and religious beliefs".

Section 375, the provision of rape in the Indian Penal Code (IPC), echoes very archaic sentiments, mentioned as its exception clause- "Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape."

Section 376 of IPC provides punishment for rape. According to the section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both.

SECTION 375 OF THE INDIAN PENAL CODE DEFINES "RAPE",

Operative part of the said section is reproduced herein below:

375. Rape.—A man is said to commit "rape" if he-—

(a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman

so as to cause penetration into the vagina, urethra, anus or any of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:

Firstly,— Against her will.

Secondly, — Without her consent.

Thirdly, — With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly, — With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly, — With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly, — with or without her consent, when she is under eighteen years of age

Seventhly, — When she is unable to communicate consent.

Explanation I—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception I—A medical procedure or intervention shall not constitute rape.

Exception 2—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

The primary aim of the 2013 amendment was to make much needed changes to the definition of rape and to improve women's access to the legal system. The amendments to the Criminal Penal Code and the Evidence Act were aimed at ensuring that women are not re-victimized when they approach the legal system after an act of rape against them. The amendments sought to remove irrelevant medical examinations and unnecessary questions that women were asked during cross-examination, and to facilitate better investigation and trial in rape cases. However, despite the changes in law, the law makers and the governments have taken no step regarding framing of law for Marital Rape.

Even the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), of which India is a signatory, has viewed that this sort of discrimination against women violates the principles of equality of rights and respect for human dignity. Further, the Commission on Human Rights, at its fifty-first session, in its Resolution No. 1995/85 of 8-3-1995 titled "The elimination of violence against women", recommended that marital rape should be criminalized.

That Article 21ofthe Indian Constitution, incorporates the right to live with human dignity and is a standout amongst the most fundamental components of the right to life which perceives the independence of a person. The Supreme Court has held in a catena of cases that the offense of rape abuses the right to life and the right to live with human dignity of the victim of the crime of rape

In *Bodhisattwa Gautam v. SubhraChakraborty*[28] the court held that rape is a crime against the basic human right and violation of the right to life enshrined in Article 21 of the Constitution and provided certain guidelines for awarding compensation to the rape victim.

28 *AIR 1996 SC 922*

In the landmark case of *The Chairman, Railway Board v. Chandrima Das*[29], *the Hon'ble Court* held that rape is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved. Rape is a crime not only against the person of a woman, it is a crime against the entire society. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.

That a reading of the aforesaid cases as well various other catena of the judgments and cases,it is ample clear that such an exception as "marital rape: us violative of the basic fundamental concepts on which our entire legal system is bases and such an except damages the entitlement of women to live with dignity and encourages the society to commit crime against the women, which in itself is unacceptable and against the principle and corner stones of the Constitution of India..

That the case of *State of Maharashtra v. Madhkar Narayan*[30] the Supreme Court has held that every woman is entitled to her sexual privacy and it is not open to for any and every person to violate her privacy as and whenever he wished.

In the landmark case of *Vishakha v. State of Rajasthan* [31]the Supreme Court extended this right of privacy in working environments also. Further, along a similar line we can translate that there exists a right of privacy to get into a sexual relationship even inside a marriage.

In *Sree Kumar vs. Pearly Karun*[32], the Kerala High Court watched that the offense under Section 376A, IPC won't be pulled in as the spouse is not living independently from her husband under a declaration of partition or under any custom or use, regardless of the possibility that she is liable to sex by her better half without wanting to and without her assent. For this situation, the spouse was subjected to sex without her will by her husband when she went to live with her husband for 2 days as a result of settlement of separation procedures which was going on between the two parties. Subsequently the spouse was held not liable of raping his wife even though he had done so.

29 MANU/SC/0046/2000

30 AIR 1991 SC 207

31 AIR 1997 SC 3011.

32 1999 (2) ALT Cri 77

The judiciary appears to have totally consigned to the fact that rape inside marriage is impractical or that the disgrace of assault of a lady can be erased by getting her married to the attacker.

In 2005, the Protection of Women from Domestic Violence Act, 2005 was passed which although did not consider marital rape as a crime, did consider it as a form of domestic violence.[33]Under this Act, if a woman has undergone marital rape, she can go to the court and obtain judicial separation from her husband. However, the same doesn't entirely protect the women from the crime has undergone.

The whole legal system relating to rape is in a mess, replete with paradoxes. The major legal lacunae that come in the way of empowering women against marital rape are:

- The judicial interpretation has expanded the scope of Article 21 of the Constitution of India by leaps and bounds and "*right to live with human dignity*" is within the ambit of this article. Marital rape clearly violates the *right to live with dignity* of a woman and to that effect, it is submitted, that the exception provided under Section 375 of the Indian Penal Code, 1860 is violative of Article 21 of the Constitution.

- Article 14 of the Constitution guarantees the *fundamental right* that "*the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*". Article 14 therefore protects a person from State discrimination. But the exception under Section 375 of the Indian Penal Code, 1860, discriminates with a wife when it comes to protection from rape. Thus, it is submitted, that to this effect, exception provided under Section 375 of the Indian Penal Code, 1860, is not a *reasonable classification*, and thus, violates the protection guaranteed under Article 14 of the Constitution.

That it is pertinent to state that in the absence of a law, there is no data on the number of cases of marital rapes being reported. It is pertinent to note that the criminal law is in the Concurrent List and is implemented by the States. There is a vast diversity in the cultures of the

33 The Protection of Women from Domestic Violence Act, 2005

states. And hence, in view of the same it is necessary for the State Government to take stringent steps in this regard. That in the era of legal reforms and revolutions, it is of utmost importance to take steps towards criminalizing marital rape so that we can move a step forward towards the road of progress in real sense. In a country like India, such a reform is far from the reality as neither the lawmakers of this country nor the Indian judicial systems are prepared to bridge the gap between marital rape and rape as they are both heinous crimes which could scar the victim for life.

ISSUE OF JURISDICTION AND EXECUTION OF ARBITRAL AWARDS

TANYA TIWARI AND ADHIP KUMAR RAY

Arbitration friendliness of a jurisdiction is primarily dependent on the enforcement regime of Arbitral Awards by the Courts of the jurisdiction.

This article will be dealing with the question of whether an Award under the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act), is required to be first filed in the Court having jurisdiction over the arbitration proceedings, for execution and then to obtain precept for transfer of the decree or whether the Award can directly be filed for execution in the Court where the assets of the Judgment Debtor are located. There have been conflicting opinions of various High Courts and the law in this regard is being explored herein.

EXECUTION UNDER THE CODE OF CIVIL PROCEDURE, 1908

An overview of the provisions for execution and requirement for transfer of a Decree from a Court to another for execution under the Code of Civil Procedure, 1908 (hereinafter referred to as 'Code'), is being dealt summarily here.

Order XXI of the Code of Civil Procedure, 1908, provides detailed provisions for making an application for execution of a Decree and the manner by which such applications will be entertained, dealt with and decided. Section 38 of the Code contemplates that a Decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Section 37 defines the expression 'Court which passed a decree' and Section 39 provides for the transfer of a Decree for execution by the Court which passed it to another Court of competent jurisdiction and the conditions for such transfer. Sections 40 to 45 provide the conditions of transfer to another State, the powers of executing Court and for execution of Decrees passed in reciprocating territories. Section 46 provides for issuance of precepts by the Court which passed a decree to another Court for execution. However, in most cases, the Court which passed the Decree or Order is the executing Court.

EXECUTION UNDER ARBITRATION ACT, 1940

Per Section 17 of the Arbitration Act 1940, the person in whose favor an Award was passed, had to approach the competent Civil Court to get judgment being passed in terms of the award before he could execute the decree drawn as per the judgment. The original award had to be filed in Court under Section 14(2) of the 1940 Act and the Court was obliged to issue notice to the parties about the same. Thereafter, the Court was empowered to modify or correct the award, in terms of the provisions of Section 15. The Court also had the power to remit the Award under Section 16 of the 1940 Act. If the Court saw no reason to remit the award or to set aside the award for any of the reasons provided in the Act of 1940, the Court would pronounce a judgment under Section 17. A decree would follow pronouncement of such judgment under Section 17. Thus, only the decree passed in terms judgment pronounced under Section 17 and it was executable. This decree would be executed in terms of the provisions of the Code.

EXECUTION UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

Section 2(1)(e) of the Act defines 'Court' and Section 42 which provides for jurisdiction determines the Court to which all applications under Part I of the Act are made before, during or after arbitral proceedings. The Hon'ble Supreme Court[34] while interpreting these provisions held that the expression 'with respect to an arbitration agreement' widens the scope of Section 42 to include all matters which directly or indirectly pertain to an arbitration agreement.

Section 36 of the Act likens an Arbitral Award to a Decree of the Civil Court and therefore provides for it to straightaway be executed to realize the decretal amount. However, there is no provision in the Act which likens the Arbitral Tribunal to a Court which passed the Decree. There is also no provision for an Arbitral Tribunal to execute its own Award. Inevitably, the Decree has to

34 *State of West Bengal v. Associated Contractors, MANU/SC/0793/2014 : AIR 2015 SC 260*

be brought for execution before an executing Court. As per the Code, a decree can be executed by the Court which passes the decree or where the Judgment Debtor is residing or carrying on business or having immovable property. However, the Act of 1996 is special law which prevails over the general provisions of the Code[35].

In view of this, a doubt is raised as to whether an Award can be executed under Section 36 of the Act in any jurisdiction different to the place where the Award has been passed, without requiring such award to be transferred to the executing Court by the competent Court as per Section 42.

VARYING VIEWS OF VARIOUS HIGH COURTS

The High Court of Karnataka, in the case of *I.C.D.S. Ltd. v. Mangala Builders Pvt. Ltd*.[36], held that the Court which could exercise jurisdiction under Section 34 of the 1996 Act would be the only Court which could enforce an award. Reliance was placed on the wordings of Section 36 of the Act. A right to enforce the award arises only after the period for setting aside the arbitral award under Section 34 has expired or such an application having been made, is rejected. In light of the same, it was stated that the Court which can exercise power under Section 34 of the Act can alone enforce the arbitral award.

The High Court of Bombay, in the case of *SK Engineers v. BSNL*[37], held relying on Section 42 of the Act that the expression Court for the purpose of Section 36 cannot be read at variance with the meaning of the expression under Section 34 and that the provisions of Section 36 refer to Section 34.

The High Court of Calcutta, in the case of *Srei Equipment and Finance Pvt. Ltd. v. Khyoda Apik and Ors*.[38], held relying on this judgment of the Bombay High Court[39] that when an application under Part I has been made in a Court with respect to an arbitration agreement, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and arbitral proceedings including execution proceedings.

The High Court of Madras taking a contrary view in the case titled *Kotak Mahindra Bank Ltd. v. Sivakama Sundari*[40], held that while the award passed by an arbitral tribunal is deemed to be a decree of a civil court under Section 36 of the Act, there is no deeming fiction anywhere to hold that the court within whose jurisdiction the arbitral award was passed, should be deemed to be the court which passed the decree. Therefore, the procedure of filing an execution petition before the court within whose jurisdiction the arbitral award was passed is misconceived. In light of this, the Court further stated that it is not open for any executing Court (i) either to demand transmission from any other Court; (ii) or to order transmission to any other Court. Another bench of the Madras High Court later concurred with this judgment[41].

The High Court at Hyderabad for the State of Telangana and State of Andhra Pradesh in the case titled as *Shriram Transport Finance Co. Ltd. vs. S. Salauddin and Ors*.[42], concurring with the view of the High Court of Madras held that "…no Court, to which an application for execution is made, can insist on the filing of the execution petition first before some other Court and to have it transmitted to it later". This view had been previously taken by the High Court of Hyderabad in the case *Transmission Corporation of Andhra Pradesh Limited (A.P. TRANSCO) vs. Equipment Conductors and Cables Limited*[43], relying on the view taken by the High Court of Delhi in the case *M/s Religare Finvest Limited vs. Ranjit Singh Chouhan*[44].

The High Court of Delhi in the case of *Religare Finvest* relied on the view of the Madras High Court as also on its previous case titled as *Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd*.[45] and held that territorial jurisdiction for execution is determined by the locus of the Judgment Debtor or the property of the Judgment Debtor since the Award itself is executable as a decree, the Court of the place where the property/money against which the decree is sought to be enforced is situated would have inherent jurisdiction to entertain

35 *Consolidated Engineering Enterprises v. Principal Sec. Irrigation Dept., MANU/SC/7460/2008 : (2008) 7 SCC 169 : (AIR 2009 SC (Supp) 396) and Union of India v. Popular Construction Co., MANU/SC/0613/2001 : (2001) 8 SCC 470 : (AIR 2001 SC 4010).*

36 *MANU/KA/0627/2001: AIR 2001 Karnataka 364*

37 *S.K. Engineers v. Bharat Sanchar Nigam Ltd., 2009 (4) Arbitration Law Reporter 369 (Bom): MANU/MH/0771/2009: (2010 (4) AIR Bom R. (NOC) 386*

38 *MANU/WB/1040/2016: AIR 2016 CAL 293*

39 *Supra 3*

40 *MANU/TN/3588/2011: 2011 (6) CTC 11*

41 *Veerapathiran vs. Rajavel Decided on 18.12.2017: MANU/TN/4199/2017*

42 *Decided on 07.08.2017: MANU/AP/0493/2017*

43 *Decided on 07.12.2016: MANU/AP/0993/2016*

44 *Decided on 28.02.2012: MANU/DE/2330/2012*

45 *(2009) 3 Arb LR 524 (Del)*

the execution. This view has been consistently maintained by the High Court of Delhi[46].

The High Court of Punjab and Haryana has also subscribed to this view of the High Court of Delhi in various cases[47] holding that even in cases where no application had been moved regarding arbitral proceedings even then Court with the requisite territorial jurisdiction would be the competent Court to execute the award. It was held that there is no requirement of transmission for its enforcement.

JUDGMENT OF THE SUPREME COURT

This issue has now been put to rest by the Hon'ble Supreme Court in the case *Sundaram Finance Limited vs. Abdul Samad and Ors.*[48], numbered as Civil Appeal No. 1650 of 2018 vide judgment dated 15.02.2018.

The Hon'ble Supreme Court referred to the views of various High Courts such as Madhya Pradesh[49] and the Himachal Pradesh[50] which subscribed to the view that transfer of decree should first be obtained before filing the execution petition before the Court where the assets are located. The Hon'ble Supreme Court also referred to the contra view taken by various High Courts such as Delhi, Kerala[51], Madras, Rajasthan[52], Allahabad[53] and Karnataka[54] which opined that an arbitral award can be filed for execution before the court where the assets of the judgment debtor are located and there is no requirement of transfer and transmission.

After exploring the relevant provisions in detail, the Hon'ble Supreme Court held that reliance on Section 42 of the Act is misconceived since it only provides for jurisdiction over arbitral proceedings. These proceedings terminate with the final Arbitral Award as provided for under Section 32. Therefore, it is the Code which applies to execution proceedings. Further, the Hon'ble Supreme Court referred Section 46 of the Code which provides for issuance of precepts by the Court which passed the decree upon application of the decree holder to any other Court competent to execute the said decree, and noted that the expression "the Court which passed the decree" is as per Section 37 of the said Code. It was pointed out that in the case of an award there is no decree passed by any Court but the award itself is executed as a decree by fiction and therefore there is no deeming fiction anywhere to hold that the Court within whose jurisdiction the arbitral award was passed should be accepted as the Court, which passed the decree.

CONCLUSION

In light of this judgment the law has been settled that while enforcing an award, execution proceedings can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the Court which would have jurisdiction over the arbitral proceedings.

EXECUTION OF FOREIGN DECREES

A full bench of the Bombay High Court has, in the judgment[55] immediately succeeding the judgment of the Supreme Court on this issue, has stated regarding enforcement of foreign awards under Chapter-I in Part-II of the Act that Section 49 stipulates that when a foreign award becomes enforceable, it is deemed to be a decree of that Court. The expression "that Court" would mean the Court as defined by Section 2(1)(e)(ii). It would, thus, refer to the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming the subject-matter of the arbitration if it had been the subject-matter of a suit and in other cases, a High Court having jurisdiction to hear appeals from decrees of Courts subordinate to the High Court. In any case, Order XLIX, Rule 3 of the Code does not exclude the application of the provisions of Order XXI of the Code in the matter of execution of decrees.

46 *The State Trading Corporation of India Ltd. vs. Global Steel Holdings Limited and Ors. Decided on 09.03.2015: MANU/DE/0711/2015*

47 *Indusind Bank Ltd. vs. M/s. Bhullar Transport Company and Another Decided on 15.11.2012: MANU/PH/2896/2012 and Mahindra & Mahindra Financial Services Limited vs. Manjeet Singh Decided on 12.11.2013: MANU/PH/4218/2013*

48 *MANU/SC/0122/2018*

49 *Computer Sciences Corporation India Pvt. Ltd. v. Harishchandra Lodwal and Anr. MANU/MP/0422/2005: AIR 2006 MP 34*

50 *Jasvinder Kaur and Anr. v. Tata Motor Finance Limited, Decided on 17.9.2013 in CMPMO No. 56/2013*

51 *Maharashtra Apex Corporation Ltd. v. V. Balaji G. and Anr., MANU/KE/1629/2011: 2011 (4) KLJ 408*

52 *Kotak Mahindra Bank Ltd. v. Ram Sharan Gurjar and Anr., MANU/RH/1205/2011: (2012) 1 RLW 960*

53 *GE Money Financial Services Ltd. v. Mohd. Azaz and Anr. MANU/UP/1182/2013: (2013) 100 ALR 766*

54 *Sri Chandrasekhar v. Tata Motor Finance Ltd. & Ors. MANU/KA/2982/2014: (2015) 1 AIR Kant R 261*

55 *Gemini Bay Transcription Private Ltd. and Ors. vs. Integrated Sales Service Ltd. and Ors. Decided on 16.02.2018 : MANU/MH/0265/2018*

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