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JULY 2018. Vol. XI, Issue VII

# INDIAN LEGAL IMPETUS®

## LIQUIDATED DAMAGES

# EDITORIAL

Manoj K. Singh
Founding Partner

Dear Friends,

The overwhelming response to our earlier editions of Indian Legal Impetus has encouraged us to bring out the July edition. The present edition of Indian Legal Impetus witnesses articles on varied aspects of Law. The Scope of this edition has been enlarged to make it more comprehensive and give our readers an encompassing experience.

This edition encompasses articles on different subject matters like Insolvency and Bankruptcy Code, Arbitration, Law of Contracts, Code of Civil Procedure, Commercial Courts and Criminal Procedure Code. It tries to analyse the organic and symbiotic growth of the laws in sync with the demands of current socio-politico-economic milieu. It further revisits few of the landmark judgments delivered by the Courts; throws light on the proposed amendments to make the legal spectrum more ambient and discusses the intricate details of the various principles and law relating to Indian Contract Act, 1872 which is often enumerated in agreements and contracts as entered into between the parties. Further issues pertaining to the impact of recent amendments in law and procedure to the Code of Civil Procedure and Criminal Procedure Code have been discussed.

This edition begins with the article **"Overview of the important amendments made to the Insolvency and Bankruptcy Code 2016"** where the author discusses the positive changes that have been brought about to boost the framework of insolvency regulations. The next article **"Case Analysis revisiting the Balco Judgment and application of Doctrine of Comity of Courts"** the author draws light from the wisdom precipitated through the judgments of the Hon'ble High Court of Delhi and explains the doctrine of Comity of Courts and its applicability. The next article **"Interpretation of Arbitration Clause under Insurance Policies"** discusses the judgment passed by the Hon'ble Supreme Court wherein it has been strictly held that arbitration clause in an insurance agreement must be strictly construed. The next article takes a leap forward and the author has attempted to discuss **"Salient Features of the Proposed Amendments in the Arbitration and Conciliation Act"** where he discusses the proposed amendments to be introduced in the Arbitration Act and how these amendments intend to facilitate an effective Arbitration process. **"Changes brought about by the Commercial Courts Act to the Code of Civil Procedure, 1908"** explains the innovative approach adopted by the legislature to ensure effective and quick disposal of the commercial disputes. **"Dispensing Attendance in Person of Accused – Differences between Section 205 And 317 Of Code of Criminal Procedure, 1973"** discusses the intricate differences of both provisions of criminal procedure code by referring to judgments, as laid down by courts.

Going further the next article **"No Injunction will be granted on Bank Guarantee merely because the Claim is not determined under section 9 of the Arbitration and Conciliation Act, 1996"** in light of a Supreme Court judgments discusses the settled principles of law governing the Bank Guarantees. **"To Prove or not To: Enforcing a Claim for Liquidated Damages"** where the author discusses that for claiming liquidated damages, loss has to be proved or not. Lastly, **"Bail - Considerations and Imposition of Conditions"** deals with the considerations which the Hon'ble Courts have while granting Bail and the conditions which accompany them.

Thus a sincere attempt has been made to enable our esteemed readers to cut across a diverse legal spectrum which not only apprises them with the recent judicial developments but also refreshes the established principles of law.

With pleasure of having the opportunity to stimulate intellectual discourses, we look forward to comments or suggestions from our readers.

Thank you.

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INDIAN LEGAL IMPETUS®
Volume XI, Issue VII

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# Contents

# OVERVIEW OF THE IMPORTANT AMENDMENTS MADE TO THE INSOLVENCY AND BANKRUPTCY CODE 2016

*Satwik Singh & Vineet Arora*

The Insolvency and Bankruptcy Code, 2016 (hereinafter to be referred as the "**Code**") nearly after two years of its operation has undergone some significant amendments by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance 2018 (hereinafter to be referred as the "**Ordinance**"). The ordinance was aimed at strengthening the Corporate Insolvency Resolution Process (hereinafter referred to as the "**CIRP**"). The objective of the Ordinance is *"to balance the interests of various stakeholders in the Code, especially the interests of home buyers and micro, small and medium enterprises, promoting resolution over liquidation of corporate debtor by lowering the voting threshold of committee of creditors and streamlining provisions relating to eligibility of resolution applicants".* The President of India promulgated the Insolvency Ordinance on 6 June 2018 which has made substantial changes to the Code including but not limited to the categorization of the homebuyers as financial creditors and it also clarifies that whether the proceedings against the guarantors fall within or outside the CIRP.

## OVERVIEW OF AMENDMENTS

### 1. CATEGORIZATION OF HOME BUYERS AS FINANCIAL CREDITORS

Arguably the most important and significant change brought about by the Ordinance is the categorization of the home buyers as Financial Creditors, this is important since it was being seen that the home buyers were being left high and dry when it came to playing a part in the decision making process of the CIRP. The same has been done by expanding the definition of "financial debt" which has been expanded to include any amount raised from an allottee under a real estate project which shall be deemed to be an amount having the commercial effect of a borrowing for the purposes of Section 5(8) (f) of the Code. The implication of the same is that homebuyers will now be treated as 'financial creditors' and form a part of the *committee of creditors* of a corporate debtor (the "**CoC**") and play a part in the decision-making process, which includes determining the CIRP of a corporate debtor, including whether to accept or reject a resolution plan. The classification as a 'financial creditor' also enables homebuyers to initiate the CIRP against large real estate houses.

### 2. INITIATION OF INSOLVENCY RESOLUTION PROCESS BY OPERATIONAL CREDITORS

There exists a distinction in the process of initiating the CIRP by the financial creditors and the operational creditors. The financial creditors can initiate the CIRP by directly filing the application with the National Company Law Tribunal (hereinafter to be referred as the "**NCLT**"), on the occurrence of a *default*, unlike the 'operational creditors' who were first required to deliver a demand notice (and invoices) to the corporate debtor, under Section 8 of the Code, who had 10 days to either pay off the debt *or* notify the creditor of the existence of a dispute *and* provide a record of the pendency of the suit or arbitration proceedings filed *before* the receipt of the notice. The operational creditor also had to file a certificate from their banker to certify that no amount had been received from the corporate debtor to satisfy the operational debt, now this requirement has been made optional by this Ordinance, the certificate is to be filed only if the same is available. Also the Ordinance has also reduced the requirement of the corporate debtor to provide evidence of any pending suit or arbitration proceedings and it has been clarified that an operational creditor will be barred from filing an application for initiating the insolvency resolution process if a dispute exists but is yet to be filed before the courts or an arbitration tribunal.

### 3. VOTING THRESHOLDS FOR DECISION MAKING BY THE COC

Before the Ordinance came into force, all the decisions of the Committee of Creditors (CoC) had to be approved by a majority vote of 75% of the voting shares. Important decisions such as the extension of the time period for the completion of the CIRP, replacement of the Insolvency Resolution Professional (hereinafter to be referred as the "**IRP**"), and more pertinently the voting

percentage for the approval of the resolution plan were subject to this high threshold, the same has been now lowered to 66% by this amendment .The objective behind this amendment is to avoid those unfortunate situations of liquidation where even though the proposed resolution plan was approved by a majority of the CoC members, the corporate debtor still went into liquidation as the voting percentage fell slightly short of the 75% figure and also to ensure that the object of the ordinance that is to promote resolution over liquidation is kept intact.

### 4. APPLICABILITY OF MORATORIUM TO GUARANTORS

There were various conflicting judgments of the NCLT and the NCLAT on the issue that whether the moratorium as envisaged under Section 14 of the Code applies to the assets of the guarantors of the corporate debtor as well or not. This amendment has laid this controversy to the rest, it has been categorically laid down by this amendment that the assets of the guarantor are outside the purview of the Section 14 and thereby no moratorium would be applicable.

### 5. SECTION 29A OF THE CODE

Prior to the amendment it was commonly observed that since Section 5(25) initially allowed, '*any person*' to submit the resolution, the promoters of the corporate debtors themselves submitted a resolution plan in the CIRP for their own distressed company and be the resolution applicant themselves. This was hazardous and defeating the purpose of the Code because, it envisaged a situation that the defaulting promoters could buy the assets of the distressed corporate debtor at very steep discounts. To prevent this malpractice, Section 29A was inserted. In a nutshell, Section 29A sets out the disqualification criteria for the resolution applicant. Amendments to section 29A have been introduced to bring more clarity to the eligibility criteria for submission of resolution plan. By inserting the meaning of "financial entity", who would not fall afoul of the eligibility criteria on account of it being a "related party" (proviso of Explanation I and newly inserted Explanation II after clause (j) in section 29A), further the ordinance also provides for exemptions to the promoters of the Micro, Small and Medium Enterprises (MSMEs) from being barred from bidding during the CIRP , it is hoped that this will result in more participation by prospective resolution applicants in the resolution process;

### 6. LIMITATION ACT TO APPLY TO THE CODE

The amendment has also settled the position on the issue of applicability of the Limitation Act, 1963 (hereinafter to be referred as the "**Limitation Act**") to proceedings under the Code, the Ordinance provides that the Limitation Act shall be applicable on proceedings and appeals filed under the Code.

## CONCLUSION

The amendment has brought in a slew of positive changes to the Code, which will significantly boost the framework of insolvency resolution as had been envisaged under the Code. The notable changes as discussed above, including but not limited to the recognition of the home buyers as financial creditors, amending Section 29A, reducing the threshold in the CoC, the automatic continuation of the resolution professional, once a resolution plan is submitted under Section 30(6) will surely help in fulfilling the aim and objectives of the Code.

***

# CASE ANALYSIS REVISITING BALCO JUDGMENT AND APPLICATION OF DOCTRINE OF COMITY OF COURTS

*Rupesh Gupta*

## CASE TITLE

ANTRIX CORPORATION LTD. (*'Antrix'*) Vs. DEVAS MULTIMEDIA PVT. LTD. ('Devas')[1]

## FACTS

An agreement was entered into between Antrix (a Union Government of India undertaking having its registered office at Bangalore) and Devas (an incorporated company having registered office at Bangalore) at Bangalore on January 28, 2005, for the Lease of Space Segment Capacity on ISRO/Antrix S-Band Spacecraft.

On February 17, 2011, the Union Cabinet Committee on Security ("CCS") resolved to decline orbital slot in S-band to Antrix for any commercial activity and to direct annulment of the agreement. Antrix consequently terminated the agreement on February 25, 2011. Subsequently, Devas approached the International Chamber of Commerce, Paris (hereafter "ICC"), by invoking arbitration clause under the agreement and requested for arbitration. ICC responded to Antrix on July 05, 2011, stating that a portion of the arbitration clause in the agreement substantially departed from the ICC Rules, and that should the parties wish the ICC Court to administer the case, then the arbitration will be conducted in accordance with Article 31 of ICC Rules and unless the parties objected within 5 days of this communication, it would be deemed that they have accepted to conduct the proceedings in accordance with the ICC Rules.

Antrix however, did not accept the above and wrote to ICC on July 11, 2011, objecting to ICC proceeding with the arbitration. On July 30, 2011, Antrix nominated a former Judge of the Supreme Court of India as its Arbitrator under the terms of Article 21(a) of the agreement. It also filed a petition (AA No. 20/2011) under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter "1996 Act"), before the Hon'ble Chief Justice of India, seeking a direction to constitute an arbitral tribunal.

ICC informed Antrix, through a letter dated October 13, 2011, that it had appointed a former Chief Justice of India as Co-Arbitrator on its behalf (i.e. Antrix) under Article 9(6) of the ICC Rules and also confirmed the appointment of the co-Arbitrator nominated by Devas under Rule 9 (1) of the ICC Rules. The two nominee Arbitrators were given 20 days to finalize the name of the third Arbitrator. The arbitrators, however, sought more time in view of the pendency of AA No. 20/2011 before the Hon'ble Chief Justice of India. Subsequently, on November 10, 2011, the ICC itself appointed the Chairman of the arbitral tribunal.

On December 05, 2011, Antrix filed a Petition under Section 9 of the 1996 Act, being AA No. 483/2011, before the Bangalore City Civil Court (hereafter "Bangalore Court") seeking reliefs including restraint order against Devas from proceeding with the ICC arbitration contrary to the agreement between the parties, restraining Devas from getting the agreement between the parties modified or substituted by the ICC and restraining the arbitral tribunal constituted by the ICC from proceeding with the arbitration. On May 10, 2013, the Chief Justice of India dismissed AA No. 20/2011, by which time the arbitral tribunal under the ICC Rules had already been constituted. While dismissing Antrix's application under Section 11, it was clarified that Antrix would nonetheless have the right to raise its objections in appropriate proceedings.

On September 14, 2015, ICC rendered its Award in favour of Devas with a sum of USD 562.5 million with interest quotient. On September 28, 2015, Devas filed a petition under Section 9 of the Arbitration Act, before the Hon'ble High Court of Delhi, being OMP (I) No. 558/2015 for interim reliefs. On November 19, 2015, Antrix applied to the Bangalore City Civil Court under

1 *Judgment dated 30.05.2018 passed in FAO(OS)(COMM) 67/2017 by High Court of Delhi at New Delhi*

Section 34 of the Act challenging the Award dated September 14, 2015.

On February 28,2017, the Single Bench of Delhi High Court, by the judgment in challenge, ruled that Antrix's petition under Section 9 before the Bangalore court (AA No. 483/2011) was not maintainable and Devas› petition under Section 9, being OMP (I) 558/2015, before Delhi High Court was maintainable and the bar under Section 42 of the 1996 Act was inapplicable to the present case to exclude the jurisdiction of this court. It was also held that consequently, Antrix's petition under Section 34 before the Bangalore City Civil Court would not be maintainable, because Devas› petition under Section 9 before the Delhi High Court was filed earlier. The Single Bench further directed Antrix to file an affidavit of an authorized officer, enclosing therewith its audited balance sheets and profit and loss accounts for the past three years and listed the matter for decision on merits.

Consequently, Antrix filed appeal in March 2017 under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereafter *"Commercial Courts Act"*) before the Division Bench of the Hon'ble Delhi High Court wherein following issues were adjudicated:

## ISSUES INVOLVED

a) Whether appeal under Section 13 is maintainable under the provisions of the Commercial Courts Act?

b) If appeal is maintainable, does Delhi High Court have exclusive jurisdiction to adjudicate any applications arising out of the Agreement between Antrix and Devas?

c) If the answer to question (b) is in the negative, will Section 42 of the 1996 Act preclude Devas' Section 9 petition before Delhi High Court on account of Antrix's previous Section 9 petition before the Bangalore City Civil Court?

## DECISION ON

**a) Issue (a)-** Whether appeal under Section 13 is maintainable under the provisions of the Commercial Courts Act?

To maintain an appeal under Section 13 of the Commercial Court Act, the Appellant needed to satisfy that the order in challenge is an order passed under Section 9 of the 1996 Act, and hence, the same is challengeable under Section 37 of the 1996 Act. Even though the Single Bench of High Court did not decide the reliefs sought under Section 9, the Court concluded that the Appeal is maintainable since the order under challenge is in the nature of an Order under Section 9 of the 1996 Act. The Court held that the direction to Antrix to furnish an affidavit along with the particulars sought, is to aid its order with respect to a possible distraint, attachment or further such consequential order towards interim relief. The Court further recorded that the Single Bench's observations that the Bangalore Court cannot proceed with the matter under Section 34 of the 1996 Act, is giving finality to an order and further the declaration by a Court about the lack of jurisdiction of another court, based on the appreciation of the matter before the latter court is undeniably an adverse order.

**b) Issue (b)-** If appeal is maintainable, does Delhi High Court has exclusive jurisdiction to adjudicate any applications arising out of the Agreement between Antrix and Devas?

The Court relied on the infamous BALCO Judgment (Bharat Aluminium Co Ltd v Kaiser Aluminium Technical Service Inc)[2] rendered by the Hon'ble Supreme Court, wherein it was held that for the purpose of Section 2(1)(e) of the 1996 Act, the courts at the seat of the arbitration do not have exclusive jurisdiction. Rather, two courts have concurrent jurisdiction – (1) the court which is amenable to the seat of the arbitration and (2) the court within whose jurisdiction the cause of action arises.

While the agreement between the parties is pre-BALCO judgment and BALCO judgment was ruled to apply prospectively to all the arbitration agreements executed post BALCO judgment rendered on September 06, 2012, this Judgment further clarified that the rule regarding prospective effect was applicable only to the finding that Part I of the Arbitration Act, 1996, is applicable only to all the

2 *(2012) 9 SCC 649*

arbitrations which take place within the territory of India, and not to other ratio laid down in BALCO.

In this case, since the parties chose the seat as New Delhi but did not specify an exclusive forum selection clause, it was held herein that the Delhi Court cannot be said to have exclusive competence to entertain applications under the 1996 Act. Since both the parties are from Bangalore, the agreement was signed in Bangalore, the cause of action has arisen in Bangalore and therefore, the Bangalore City Civil Court, cannot be said to have been excluded from jurisdiction to entertain applications under the 1996 Act.

c) **Issue (c) -** If the answer to question (b) is in the negative, will Section 42 of the 1996 Act preclude Devas' Section 9 petition before Delhi High Court on account of Antrix's previous Section 9 petition before the Bangalore City Civil Court?

The Court ruled that the principle of comity of courts would require that the Court which is seized of the dispute first shall decide on the application as to whether it is vexatious or an abuse of the process of law. Since the Bangalore City Civil Court was approached by Antrix first, the said Court should first decide on Section 9 petition filed by Antrix and whether it is maintainable, vexatious or mala-fide. In case the Petition is found to be maintainable and bona-fide, Section 42 would come into play and all subsequent applications would have to be made by the parties before that Court only.

Any other view to give jurisdiction to Delhi Court on a subsequent application under the 1996 Act would defeat the parliamentary mandate under Section 42 of the 1996 Act and would run afoul of the principle of comity of courts. If Bangalore Court upholds Devas' objections and finds Antrix's petition to be barred in law or vexatious, and declares it non-est, then the first application under the 1996 Act would be Devas' Section 9 application before the Delhi High Court, which would then not be hit by Section 42.

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# INTERPRETATION OF ARBITRATION CLAUSES UNDER INSURANCE POLICIES

*Ruchika Darira*

## INTRODUCTION

Recently, the Hon'ble Supreme Court of India, in the case titled **Oriental Insurance Company Vs M/S Narbheram Power & Steel Ltd**. bearing Civil appeal no.2268 of 2018(arising out of S.L.P.(c) No.33621 of 2017), adjudicated upon the interpretation of arbitration clauses under Insurance agreements/ contracts.

## RELEVANT FACTS

In the present case the Respondent - M/S Narbheram Power & Steel Pvt. Ltd (herein after referred as "***NPSL***") entered into an Insurance Policy pertaining to "Fire Industrial All Risk Policy" (herein after referred as the "***said policy***") with the Appellant - Oriental Insurance Company ("Appellant") in respect of the factory situated in Odisha.

In October 2013, a cyclone affected large parts of the state including NPSL's factory. NPSL suffered damages estimated at INR 39,336,224. Accordingly, the appellant being the Insurer was informed and a surveyor was appointed. Based on the report of the surveyor, NPSL requested the Insurer to settle its claim.

A series of correspondences were exchanged between NSPL & the Insurer (i.e. the appellant) but the claim of NSPL was not settled & consequently NSPL invoked the arbitration agreement and requested the Appellant to concur with the name of the arbitrator whom it wished to appoint. The Appellant on the other hand, objected to arbitration proceedings and declined to refer the dispute to arbitration between the parties in view of clause 13 of the said policy which stated that once the claim was repudiated & the insurer had disputed or not accepted the liability under or in respect of the policy, no difference or dispute could have been referred to arbitration.

## INTERPRETATION OF CLAUSE 13 OF THE POLICY

Clause 13 of the said policy provides that:

*"13. If any dispute or difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all questions be referred to the decision of a sole arbitrator to be appointed in writing by the parties to or if they cannot agree upon a single arbitrator within 30 days of any party invoking arbitration, the same shall be referred to a panel of three arbitrator, comprising of two arbitrators, one to be appointed by each of the parties to the dispute/difference and the third arbitrator to be appointed by such two arbitrators and arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Part I for ease of reference).*

*It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this policy (hereinafter referred to as Part II).*

*It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator/ arbitrators of the amount of the loss or damage shall be first obtained (hereinafter referred to as Part III)"*

The perusal of the arbitration clause would reveal an incongruity and conflict. It states that the insured (i.e. NSPL) has the right to initiate arbitration proceedings only pertaining to a dispute on quantum and not on denial of liability. On the other hand, the insured cannot initiate any action or suit on denial of liability without obtaining an award on quantum. Hence, the interpretation of the above clause stipulates that an insured is remediless if the claim is completely denied by the Insurer.

## HON'BLE HIGH COURT OF CALCUTTA

The insured - NPSL, filed an application under Section 11 of the Arbitration and Conciliation Act 1996, before

the Kolkata High Court requesting the Court to appoint an arbitrator to adjudicate the dispute between the parties. The High Court held that the dispute could be referred to arbitration by holding that the said arbitration clause was ambiguous in nature.

## HON'BLE SUPREME COURT'S INTERPRETATION OF THE ARBITRATION CLAUSE

The Hon'ble Supreme Court dismissed the Hon'ble Calcutta High Court's order by relying on the case of *Vulcan Insurance Co. Ltd. vs. Maharaj Singh & Anr*[1] and held that insurance contracts are to be interpreted exactly in the words in which the contract is expressed. It held that High Court had proceeded under the assumption that Part II and Part III of the arbitration clause do not have harmony, and in fact, sound a discordant note. The Hon'ble Supreme Court held that its judgment in *Vulcan Industries Case* (Supra) was clear on this point and dispels any ambiguity in construing Part II and Part III of the arbitration clause.

Relying upon various cases and reasons cited by the Appellant while repudiating liability, the Hon'ble Supreme Court opined that the present case was a case of denial of liability by the Appellant and not a dispute pertaining to quantum. While doing so, the Hon'ble Supreme Court made no comment on the distinction made by the Hon'ble High Court with respect to coverage or otherwise of a liability under the policy. It ruled that the arbitration clause clearly provided that no difference or dispute could be referred to arbitration if the Appellant had disputed or not accepted liability under the policy. The remedy available to NSPL was to institute a civil suit for its grievances.

## CONCLUSION

The present judgement passed by the Hon'ble Supreme Court provides that an arbitration clause inserted in an insurance policy must be strictly construed & must unequivocally express the intent of arbitration. It further recognized the fact that strict interpretation of such clauses could deprive the insured the benefits of arbitration. Such clauses, also open the doors for the insurers to avoid arbitration proceedings by repudiating the claims in entirety. Parties will therefore, have to be aware of such arbitration clauses and ensure that the arbitration clause encompasses all disputes in relation to their insurance policies in case they would like to pursue arbitration both for questions of liability and quantum.

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1 *(1976) 1 SCC 943*

# SALIENT FEATURES OF THE PROPOSED AMENDMENTS IN THE ARBITRATION AND CONCILIATION ACT, 1996

*Manish Gopal Singh Lakhawat*

To remove certain practical difficulties in the application of the Arbitration and Conciliation (Amendment) Act, 2015, and to give a boost to institutional arbitration vis-à-vis ad hoc arbitration, a High-Level Committee under the Chairmanship of Justice B.H. Srikrishna, Retired Judge, Supreme Court of India, was appointed by the Central Government. The High-Level Committee submitted its report on July 30, 2017, and the same was approved by the Union Cabinet in March 2018, to be tabled before the Parliament.

The salient features of the proposed amendments which are as per the report of the High-Level Committee are as follows:

- Speedy appointment of arbitrators is to be facilitated through designated arbitral institutions by the Supreme Court or the High Court, without any requirement to approach the court in this regard. It is envisaged that the parties may directly approach the institutions designated by the Supreme Court for International Commercial arbitrations and in other cases the concerned High Courts.

- The amendment provides for creation of an independent body namely the Arbitration Council of India (ACI), which will grade arbitral institutions and accredit arbitrators by laying down norms and take all necessary steps to promote and encourage arbitration, conciliation, mediation and other ADR Mechanisms and for that purpose formulate policies and guidelines for the establishment, operation and maintenance of uniform professional standards in respect of all matters relating to arbitration and ADR mechanisms. The Council shall also maintain an electronic depository of all arbitral awards.

- The ACI shall be a body corporate. The Chairman of ACI shall be a person who has been a judge of the Supreme Court of India or Chief Justice or Judge of any High Court or any eminent person. Further, the other Members would include an eminent academician etc. besides other Government nominees.

- Section 29A provides that an award must be made within 12 months from the Tribunal entering upon reference, extendable to a period of 18 months by party consent, failing which the mandate would terminate. Any extension over 18 months can only be obtained with the Court's permission. However, an important proposal is made to amend sub section (1) of section 29A by excluding International Arbitration from the binding of timeline due to criticism received from International institutions. Further, it is also proposed sensibly that the time limit of 12 months for domestic arbitrations shall start from the completion of the pleadings of the parties and not from the date of entering the reference.

- A new section 42A, is proposed to be inserted to provide that the arbitrator and the arbitral institutions shall keep confidentiality of all arbitral proceedings except award. Further, a new section 42B is proposed to protect an Arbitrator from suit or other legal proceedings for any action or omission done in good faith in the course of arbitration proceedings.

- A new section 87, is proposed to be inserted to clarify that unless parties agree otherwise, the Amendment Act, 2015, shall not apply to (a) Arbitral proceedings which have commenced before the commencement of the Amendment Act, 2015 (b) Court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings commenced prior to or after the commencement of the Amendment Act of 2015, and shall apply only to arbitral proceedings commenced on or after the commencement of the Amendment Act of 2015, and to court proceedings arising out of or in relation to such arbitral proceedings.

The above-mentioned amendments are intended to facilitate achieving the goal of improving institutional arbitration by establishing an independent body to lay down standards, make arbitration process more party friendly, cost effective and ensure timely disposal of arbitration cases. It is hoped that the proposed amendments will see the light of the day soon.

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# CHANGES BROUGHT ABOUT BY THE COMMERCIAL COURTS ACT TO THE CODE OF CIVIL PROCEDURE, 1908

*Mahip Singh Sikarwar*

## INTRODUCTION

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act (hereinafter 'Act') was enacted in the year 2015. Its purpose was to adjudicate on matters of commercial disputes of specified value and matters which are related or connected to that issue.

S. 16 of the Act clearly states that this Act will have overriding effect on the provisions of Code of Civil Procedure, 1908 (hereinafter 'Code'), and its amendments. It clearly mentions that in case of conflict between any rules of the Code, rules of jurisdictional High Courts or any state amendments made to the Code, the provisions of the Act, as it amends the Code, will prevail.

## CHANGES BROUGHT ABOUT

Below are some of the important changes which the Act makes on the Code.

- ***With regards to Costs*** – S. 35 of the Code deals with the costs which are ordered by the Court in a suit and it confers discretionary powers on the Court to determine the quantum of costs.

  The Act[1] instead provides for a general rule for payment of costs by the judgment debtor. The Courts are allowed to deviate from the general rule provided they lay down the reasons for the same in writing.

- ***Verification of pleadings*** – The Act[2] now provides for verification of pleadings before it can be relied upon as evidence, something which was not in place previously. All pleadings have to be verified by evincing affidavits which have to be signed by the party, or one of the parties to the proceedings or any person who is acquainted with the facts of the case and authorized by such parties. The same is applied while amending of pleadings.

- ***Procedure for discovery, disclosure and inspection of documents*** – The Code[3] laid down that and inspection of facts of the suits are to be done through interrogatories and discovery applications. The Act has added extra criteria for disclosure of the facts relevant to the case. Now, under the Act, the parties are mandatorily required to file a list of all the documents along with their photocopies at the stage of filing the plaint/written document. Moreover, the parties are prohibited from relying on any documents which have not been mentioned in the list along with their photocopies without the leave of Court. The Courts have been granted discretionary power to award exemplary costs against a party who willfully, unreasonably, wrongfully, or even negligently failed to disclose all documents pertaining to the suit in their possession.

- ***Written arguments*** – The Act has introduced a new provision toOrder XVIII to the Code, where it has been made mandatory that parties submit short and to the point written arguments under clear and distinct headings, within four weeks from the commencement of oral arguments. It also allows for filing of revised written arguments within one week of the conclusion of arguments. Such a provision was not there previously.

- ***Time period within which judgment has to be given*** – The Code[4] stipulates that judgments have to be pronounced within sixty days of conclusion of hearings. The Act extends it to ninety days from the date of conclusion of arguments.

- ***Case management hearing*** – This is an international practice which has been introduced for the first time in India by the Act.[5] It allows

1 *Schedule 2.*
2 *Rule 15A under SCHEDULE.*
3 *Order XI.*
4 *Rule 1, Order XX.*
5 *Order XV-A, new order under the Code.*

the Court to make a timeline, and fix dates for the proceedings of the matter, which helps achieve the objective of quick disposal of cases. Under this new practice, no adjournments will be granted for the sole reason of the absence of the counsel, which has long been used as a delaying tactic.

The Court is given authority to penalize parties if there are non-compliances with its orders. They can impose costs, forfeit parties' right to conduct suit and in extreme cases dismiss the plaint.

- ***Disposal of suit at first hearing*** – The Act omits Order XV of the Code which allowed for disposing a suit in the first hearing. This adds to the process of fair hearing and natural justice.

## CONCLUSION

The intent of the Act is to deal with commercial disputes where huge monetary costs are at stake. To better deal with such disputes and for its quick disposal, this Act has been enacted to override certain provisions of the Code. Since the Code forms the basis of all procedures in civil litigation and covers all civil disputes, an amendment to the Code may not have been a correct approach.

Instead, the approach taken by this Act to allow for some changes in the Code, without actually amending the Code to better suit certain types of civil disputes, namely commercial disputes, is not only innovative but also an effective and purposeful approach to that end.

As the Act restricts itself to quick disposition of commercial disputes coupled with the fact that it allows for arbitration, this can indeed go a long way in attracting foreign investments in India. Although the Act provides for adherence to strict timelines and imposing penalty in case of non-compliance to deal with the issue of pendency and delay in litigation, the success of the same in the long run is still contingent upon how effectively and efficiently the provisions are enforced.

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# DISPENSING ATTENDANCE IN PERSON OF ACCUSED – DIFFERENCES BETWEEN SECTION 205 AND 317 OF CODE OF CRIMINAL PROCEDURE, 1973

***Bornali Roy***

*This article discusses the difference between Section 205 and Section 317 of the Code of Criminal Procedure, 1973, for filing of the application to dispense with personal attendance. In addition, the article also discusses the contours of applicability of the aforesaid sections.*

For proper appreciation of the legal provisions, the aforementioned sections are reproduced herein:
**"Chapter XVI, Commencement of Proceedings Before Magistrates – Section 205. Magistrate may dispense with personal attendance of accused. –** 1. Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

2. But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided."

**"Chapter XXIV, General Provisions as to Enquiries and Trials - 317. Provision for inquiries and trial being held in the absence of accused in certain cases.** – 1. At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

2. If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately."

## DIFFERENCES BETWEEN THE SECTIONS

1. Though there may be some overlapping areas between these sections, **there also lies clear distinction between the same**. Section 205 of the Code of Criminal Procedure would be applicable when the **proceedings have begun before the Magistrate and charges are yet to be framed**. An order issued under Section 205 Cr.P.C., exempting personal attendance of an accused would continue to be operational even after charges have been framed and till the conclusion of the trial.

Reference here is drawn to the Supreme Court judgment in ***TGN Kumar v. State of Kerala and Ors.***[1], an excerpt of which is produced below:

*"Para 7.* ***The Section confers a discretion on the court to exempt an accused from personal appearance till such time his appearance is considered by the court to be not necessary during the trial.*** *It is manifest from a plain reading of the provision that while considering an application under Section 205* of the Code, the Magistrate has to bear in mind the nature of the case as also the conduct of the person summoned. ***He shall examine whether any useful purpose would be served by requiring the personal attendance of the accused or whether the progress of the trial is likely to be hampered on account of his absence.****"*

Section 317 of Code of Criminal Procedure would generally be applicable **during the trial stage**, **i.e., after the charges have been framed**.

S. 205 application can be filed at the time of first appearance of the accused claiming the exemption from appearance. In appropriate cases, the Magistrate can allow an accused to even **make the first**

1 MANU/SC/1646/2011

**appearance through a counsel**.[2] On the other hand, S. 317 empowers the Court to dispense with the Personal attendance of the accused for proceeding with further steps in the case at stage of inquiries and trials.

2. Another major difference between the sections is that power under Section 205 could be exercised only by a Magistrate, whereas power under Section 317 could be used both by a Session Judge or a Magistrate.

## CONTOURS OF APPLICABILITY OF THE SECTIONS

Both these sections are related to dispensing of the personal attendance of the **"Accused"** only. These sections do not apply to **"Complainant"**. However, in so far as the Complainant is concerned, the personal attendance may not always be insisted upon if the Complainant is represented by an advocate, except in "**private complaint**" cases. In case of private complaint cases, presence of complainant is considered to be necessary if the complainant is not represented by an advocate. It is so because in such a situation, the complainant himself would be the "prosecutor", in absence of whom the case cannot proceed further. In Private complaint cases if the complainant has appointed an advocate, the court would generally not insist on personal attendance of the complainant, except when it would be necessary. In this regard, please refer to **Kishor Bhai S/o Sognumal Matai v. State of Gujarat**[3] wherein the Gujarat High Court had discussed about Section 256 of Code of Criminal Procedure. It had been held in the judgment that, *"Thus, Section 256 makes it clear that if the Complainant fails to appear, the Magistrate shall acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day."*

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2 Bhaskar Industries Limited v. Bhiwani Denim and Apparels Ltd. and Ors., MANU/SC/0489/2001

3 Criminal Miscellaneous Application No. 10625/2016

# NO INJUNCTION WILL BE GRANTED ON BANK GUARANTEE MERELY BECAUSE THE CLAIM IS NOT DETERMINED UNDER SECTION 9 OF THE ARBITRATION & CONCILIATION ACT, 1996

*Kritika Angirish*

## FACTS

The appeal titled, **Classic KSM Bashir JV vs. Rites Ltd. and Ors. 2018 SCC OnLine Del 9056,** challenges the order of the learned Single Judge which had declined the grant of interim relief under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act').

A tender was floated, whereby the appellant was granted the Letter of Acceptance on December 03, 2012, for a project to be completed within a period of 15 months. An agreement dated January 18, 2013 was also executed by the parties in this regard. The date of completion of the work was extended several times until the appellant was aggrieved by the termination of the contract on September 20, , 2017. The grievance of the appellant was threefold - i) the invocation of performance guarantee, ii) mobilization of advance bank guarantee and iii) the alleged unlawful termination of the contract by Rail India Technical and Economic Service (hereafter 'RITES'). The Court vide order dated October 13, 2017, restrained the HDFC Bank, who has been impleaded, from taking any steps in relation to the encashment of the bank guarantee. However, RITES had already invoked the bank guarantees submitted by the appellant vide its invocation letter dated October 05, 2017.

The learned Single Judge stated that invocation of the performance guarantee could not be prohibited in view of the settled principles of law. However, he granted limited relief to the appellant with respect to the invocation of the mobilisation advance, holding that the invocation was not in terms of the bank guarantee.

**Legal propositions** upheld by the division bench in the said appeal:

1. The division bench stated that it could not be accepted that the performance guarantee cannot be invoked at all in a case of undetermined or inchoate sums claimed on the principal on account of damages.
2. The Division Bench upheld that the bank cannot adjudicate as to whether the claim by the beneficiary was in fact determined by it in accordance with the underlying contract between it and a third party in order to invoke the bank guarantee.
3. Furthermore, emphasis was laid on the fact that the guarantee is an independent contract and that a contract of guarantee is divorced from the obligations of the parties towards each other, in their bilateral enforcement.

The bank guarantees in question are unconditional in nature and thereof the bank had undertaken to pay the amount due and payable under the guarantee(s) without any demure and merely on a demand from RITES.

## CONCLUSION

In view of the above, RITES and HDFC Bank are restrained from giving effect to the invocation letter dated October 05, 2017, in so far as the Mobilization Advance Guarantee was concerned. However, it was clarified that this would not preclude RITES to issue fresh letter of invocation in accordance with the terms of the Mobilization Advance Bank Guarantee.

No stay was granted on invocation and encashment of the Performance Bank Guarantee(s) in view of settled principles of law thereby, upholding the High Court judgment that no stay can be granted under Section 9 of the Arbitration & Conciliation Act, 1996, without establishing the set principles of law.

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# TO PROVE OR NOT TO: ENFORCING A CLAIM FOR LIQUIDATED DAMAGES

*Aishani Das*

*Contractual Purpose and Statutory Basis for Liquidated Damages*

Liquidated damages are priorly estimated sums of compensation which are decided by parties at the time of formation of a contract, to be enforced if a breach is caused. Caution presupposed to have been observed by the parties when such formula for estimation of damages are affixed in contractual clauses.

This is in furtherance of the understanding that losses suffered that may be intangible or otherwise hard to establish are tentatively reflected by liquidated damages – the purpose for such inclusion itself being to dispense with the requirement to show proof.[1] This understanding may also be gathered from reading of Section 74 of the Indian Contract Act, 1872, which uses the phrase *"whether or not actual damage or loss is proved to have been caused"*[2] to enforce a claim for liquidated damages. A 'genuine pre-estimate of losses'[3] is understood to be indicated in such clauses, unless they are unreasonable, excessive[4], illegal[5] or in the nature of a penalty.

## A STRINGENT ONUS OF PROOF

Courts have been skeptical in enforcing liquidated damages clauses *as it is*, unless the Claimant establishes at least some *semblance of loss*[6] – such a demand still being within the boundaries of possible tenderable proof. However, in most instances, they have demanded a strict threshold of proof to establish the exact nature and degree of loss or damage that has been caused on account of the repudiation of the contract.[7] This demand defeats the very purpose for which liquidated damages clauses are inserted in contracts. For instance, expenses of standing nature such as deploying supervisory staff, manning of construction sites, etc. which may be incurred due to delays in delivering as per key deadlines in complex infrastructure contracts, especially when other interfacing contracts are dependent on the meeting of such deadlines or causing delivery of defective/faulty tools/supplies which are pre-requisites in the performance of allied construction contracts further necessitate the automatic trigger-based enforceability for liquidated damages clauses in comprehensive contracts.[8]

## A REAL LOSS BASED ON HYPOTHETICAL ESTIMATION

Merely by reason of the fact that liquidated damages are pre-estimates and reflect tentatively of losses that may be incurred on the happening or non-happening of certain events in contractual performance, it cannot be said that such clauses are hypothetical and therefore must be rendered infructuous. As long as such estimates are determined in a genuine manner *(by applying appropriate formulae, in consonance with fluctuating factors such as exchange rates, long-term price inflation, etc.)* and stemming from a genuine cause *(such as, loss to an organization on account of no-show by a hired professional expert leading to withdrawal from specific project[9], etc.)*, they must be enforced as a 'genuine pre-estimate of loss' *sans* actual proof.

As long as this fundamental test of genuineness is met, Courts must loosely and willingly enforce liquidated damages provisions in contract without demanding proof of actual loss caused. This approach must be further lax when it is evident from the communications

1 M.S. Mohd Danuri, M.E. Che Munaaim and L.C. Yen, 'Liquidated Damages in the Malaysian Standard Forms of Construction Contract: The Law and Practice', Construction Law Journal (2009), p. 2

2 § 74, The Indian Contract Act, 1872

3 *X.L. Energy Ltd. v. Mahanagar Telephone Nigam Ltd.*, MANU/DE/1892/2018

4 *Ledella Ravichander v. Satyam Computer Services Limited*, 2011 SCC AP 76

5 *Shiva Jute Baling Ltd. v. Hindley and Co. Ltd.*, AIR1959SC 1357

6 Leviable liquidated damages in the form of a price reduction clause as was in the case of *Engineers India Ltd. v. Tema India Ltd.*, MANU/SCOR/07762/2018

7 *Fateh Chand v. Balkishan Dass*, AIR 1963 SC 1405; *Maula Baux v. Union of India*, AIR 1970 SC 1995; *ONGC v. Saw Pipes*, 2003 (5) SCC 705

8 *Philips Hong Kong Ltd. v. The Attorney General of Hong Kong*, (Privy Council) 1993 WL 963001

9 *Tullett Prebon Group v. Ghaleb El-Hajjali*, [208] EWHC 1924 (Queen's Bench)

between the parties that extensions for performance were being denied and therefore, time was of essence in such contracts.[10]

## CONCLUSION

The question surrounding the nature of a liquidated damages clause in a contract must be objectively assessed to establish whether it functions *'in terrorem'* (as a penalty and therefore having deterrent effect) or simply represents a genuine pre-estimate of loss suffered on account of the breach.[11] As long as it serves a compensatory function, liquidated damages should be allowed without the requirement to quantify exact losses. Many a times, Courts refuse to entertain claims that involve mutual faults of both parties and therefore require apportionment of delay liability, in order to assess whether liquidated damages must be awarded or not.[12] Such kind of a cryptic 'all-or-nothing' approach is untenable; such an approach must only be adhered to in situations where the claimant of damages expressly acts against contractual provisions (*for e.g., allowing extension of time when such was expressly barred by the contract*).

Courts must be open and willing to enforce claims for liquidated damages, relying more on equitable doctrines. This would necessarily require a judicial approach that is premised on a more elastic standard of rendering proof of loss and awarding liquidated damages *as it is*, as long as the pre-requisite of genuinity is met.

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10 *Sudhir Gensets Limited v. Indian Oil Corporation*, 2011 (177) DLT 438

11 *Dunlop Pneumatic Tyre Co. Ltd v. New Garage & Motor Co Ltd*, [1914] UKHL 1

12 *Gogo v. Los Angeles County Flood Control Dist.*, (1941) 45 CA2d 334

# BAIL: CONSIDERATIONS AND IMPOSITION OF CONDITIONS

*Prateek Dhir & Abhishek Chauhan*

## INTRODUCTION

Every citizen of India has a fundamental right to freedom guaranteed under Article 21 of the Indian Constitution, which specifically states, "No person shall be deprived of his life or personal liberty except according to procedure established by law." Any individual, who violates the law of the land, is bound to face consequences as per the law and in such a case, his freedom may be restricted depending upon the gravity of offence as such committed. Every accused who has been frivolously charged with the allegations of a non-bailable offence is not only entitled to a good defense but also to be released on bail, by the Court upon taking into various factors such as nature or seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or the state and similar other factors. It is the solemn duty of the Court to decide the bail applications at the earliest by a reasoned order, based on the bona fides of the applicant in light of prevailing facts and circumstances.

## CONSIDERATIONS AT THE TIME OF GRANTING BAIL

At the time of deciding the application seeking bail, the Court should look at the prima facie material available and should not go into the merits of the case by appreciation of evidence. At the time of grant or denial of bail in respect of a non-bailable offence, the primary consideration is the nature and gravity of the offence. While adjudicating bail applications, the Courts should only go into the question of prima facie case established for granting bail. The Court cannot go into the question of credibility and reliability of the witnesses put up by the prosecution. The question of credibility and reliability of prosecution witnesses can only be tested during the trial. The Hon'ble Supreme Court in the matter of *State of Maharashtra vs. Sitaram Popat Vital*[1] has stated few factors to be taken into consideration, before granting bail, namely:

i) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence; ii) Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant; iii) Prima facie satisfaction of the Court in support of the charge.

At times certain matters require investigation for the Court to effectively decide upon the bail application, like: (i) whether there is or is not a reasonable ground for believing that the applicant has committed the offence alleged against him; (ii) the nature and gravity of the charge; (iii) the severity of the punishment which might fall in the particular circumstances in case of a conviction; (iv) the likelihood of the applicant absconding, if released on bail; (v) the character, means, standing and status of the applicant; (vi) the likelihood of the offence being continued or repeated on the assumption that the accused is guilty of having committed that offence in the past; (vii) the likelihood of the witnesses being tampered with; (viii) opportunity of the applicant to prepare his defense on merits. The Hon'ble Supreme Court in the matter of *Ram Govind Upadhyay vs. Sudarshan Singh and Ors*[2] while considering various factors for grant of bail has analyzed the scenario where the applicant has already been in custody and the trial is not likely to conclude for some time, which can be characterized as unreasonable, but it is not necessary that bail shall be granted. The factors such as, previous conduct and behavior of the accused in the Court, the period of detention of the accused and health, age and sex of the accused also may be considered at the time of grant of bail. The Hon'ble Supreme Court in the matter of *Prahlad Singh Bhati vs. N.C.T. Delhi and Ors*[3], has held that, *"the condition of not releasing the person on bail charged with an offence punishable with death or imprisonment for life shall not be applicable if such person is under the age of 16 years or is a woman or is sick or infirm, subject to such conditions as may be imposed."* Other relevant grounds which play a vital role in deciding the bail application are - the possibility for repetition of crime, the time lag between the date of

1 AIR 2004 SC 4258

2 AIR 2002 SC1475

3 AIR 2001 SC 1444

occurrence and the conclusion of the trial, illegal detention, and undue delay in the trial of the case.

It is essential that the Courts should provide investigating authorities with reasonable time to carry out their investigations. It is equally necessary that the Courts strike a correct balance between this requirement and the equally compelling consideration that a citizen's liberty cannot be curtailed unless the facts and circumstances completely justify it. Upon the literal interpretation of the Section 437 of Code of Criminal Procedure, it is observed that the legislature has used the words "reasonable grounds for believing" instead of "evidence". Thus, the Court has merely to satisfy as to whether the case against the accused is genuine and whether there is prima facie evidence to support the charge.

It is true that Article 21 is of great importance because it enshrines the fundamental right to individual liberty, but at the same time a balance has to be struck between the right to individual liberty and the interest of society. No right can be absolute and reasonable restrictions can be placed on them. The Court, at the time of adjudicating bail applications, after taking such factors into account, is at liberty to impose reasonable conditions to be abided by the applicant.

## IMPOSITION OF CONDITIONS

Section 437 of the Code of Criminal Procedure empowers the Court to impose conditions at the time of granting bail. The Court may, while granting bail to a person, ask him to surrender his passport as stated in *Hazarilal vs. Rameshwar Prasad*[4]. The accused cannot be subjected to any condition which is not pragmatic and is unfair. It is the duty of the Court to ensure that the condition imposed on the accused is in consonance with the intendment and provisions of the sections and not onerous. Under Section 437(3) the Court has got the discretion to impose certain conditions, on the person accused or suspected of the commission of an offence punishable with imprisonment, such as - (a) that such person shall attend in accordance with the conditions of the bond executed,(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence. The Court may also impose, in the interests of justice, such other conditions as it considers necessary. In order to make the provision stringent and to see that the person on bail does not interfere with the investigations or intimidate witnesses, sub-section (3) has been amended to specify certain conditions[5], which carry mandatory effect. The conditions as such imposed at the time for granting bail have to be reasonable. The Hon'ble Supreme Court in the matter *of Sumit Mehta vs. State of NCT of Delhi*[6] *held, "The words 'any condition' used in the provision should not be regarded as conferring absolute power on a Court of law to impose any condition that it chooses to impose. Any condition has to be interpreted as a reasonable condition acceptable in the facts permissible in the circumstance and effective in the pragmatic sense and should not defeat the order of grant of bail."* In the said case, the Apex Court set aside the decision of High Court of Delhi wherein the Bail Applicant was directed to deposit an amount of Rs. 1,00,00,000/- (One Crore) in fixed deposit in the name of the complainant in the nationalized bank and to keep the FDR with the Investigating Officer. The Hon'ble Supreme Court in the matter of *Sheikh Ayub vs. State of M.P*[7], while adjudicating upon the reasonability of the imposed bail conditions held, *"By the impugned order, the Appellant was granted bail and directed to deposit Rs.2,50,000/- which is alleged to be the amount appropriated by the Appellant. There was also condition for furnishing surety bond for Rs. 50,000/-. In the circumstances of the case, direction to deposit Rs. 2,50,000/- was not warranted, as part of the conditions for granting bail."* The onus is upon the Court to consider the entire facts and circumstances of the case before imposing the conditions for granting the bail. The Apex Court in the matter of *Ramathal and others vs. Inspector of Police and Another*[8], held that the High Court of Punjab and Haryana, had not taken into account the entire facts of the case in proper perspective while adjudicating, since the conditions imposed by the High Court asking the applicant to deposit a sum of Rs. 32,00,000/- (Thirty Two Lacs) was unreasonable and onerous, and beyond the means and power of the appellants, hence and the matter was remitted back to the High Court.

4 AIR1972SC484

5 Cr. PC (Amendment)Act, 2005 (25 of 2005)

6 (2013) 15 SCC570

7 (2004) 13 SCC 457

8 (2009) 12 SCC 721

## CONCLUSION

The primary objective of the provisions providing for the bail should not be to detain and arrest an accused person but to ensure his appearance at the time of trial and to make sure if the accused is held guilty, he is available to suffer the consequence of the offence as such committed, in terms of punishment in accordance with the law. It would be unjust and unfair to deprive the alleged accused of his liberty during the pendency of the criminal proceeding against him. The release on bail upon appropriate considerations and imposition of reasonable conditions is significant not only to the accused, and his family members who might be dependent upon him but also the society large, hence the Court is duty bound to contemplate the facts and circumstances prevailing in the matter and strike a balance between considerations and imposition of the reasonable conditions and then pass the appropriate order.

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