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INDIAN LEGAL IMPETUS®

EDITORIAL

Manoj K. Singh
Founding Partner

Dear Friends,

We are pleased to present the **April 2019 Edition** of our monthly newsletter "**Indian Legal Impetus**". In this edition, we have covered recent developments, case laws and issues relating to various disciplines of law in India.

The first article highlights the issue regarding the pre-deposit clause for initiating arbitration which is contrary to the object of de-clogging the court system and would render the arbitral process ineffective and expensive. The article takes into consideration various judicial authorities while dealing with the subject.

The second article throws light on the arrival of bitcoin in India. The bitcoin currency has come forth with a great amount of opportunity for the investors. However, on the other hand, it has raised a number of regulatory concerns as far as the question of its misuse is concerned. The article highlights the legality of Bitcoin in India and other countries, also deals with the complex issue regarding taxability of Bitcoin and other opportunities in various sectors.

The next article focuses on the Damages provided under Section 73 of the Contract Act. When a contract is broken, the party suffering from the breach of contract is entitled to receive compensation from the party who has broken the contract. However, if in a contract the parties have specifically restricted or excluded liability for damages, then no compensation can be awarded to the party claiming the same.

The next article highlights the issue regarding the Motor Vehicles Act, which is a beneficial and welfare legislation. The article focused on the compensation awarded by the MACT Court or High Court, can be challenged, if the compensation is not reasonably awarded on the basis of the evidence on record. The article also explains that there is no need for a new cause of action to claim an enhanced amount.

Thereafter, there is a legal bite regarding the procedure to be followed while filling evidence by way of affidavit before Arbitral Tribunal.

The next article focuses on the aspect of Damages awarded by the Arbitral Tribunal under Section 73 and Section 74 of Indian Contract Act, 1872, for unliquidated and liquidated damages. The article covers recent developments by the Apex court in order to deal with the complex issue of awarding damages for pre-estimated loss occurred on breach of contract and in form of penalty and deterrent in nature.

The seventh article covers the recent judgment by the Hon'ble Supreme Court wherein the Hon'ble Supreme Court has recently reversed its own judgment dated 07.01.2019 in which teachers were denied the benefit of gratuity for not being covered under the definition of "employee" under Section 2 (e) of the Payment of Gratuity Act, 1972 ("the Act"). The article covers the recent judgment wherein The Division Bench suo moto took up the appeal and clarified that pursuant to the Amending Act No. 47 of 2009 which has retrospective effect from 03.04.1997, teachers are "employees" as per the amended definition and are entitled to the benefit of gratuity under the Act.

The eight article is related to Section 2(24) (iv) of the Income-tax Act, which is a special piece of enactment covering benefits, both of, capital and revenue nature. This provision is intended to take care of passing of benefits by a company to its directors, who occupy the position of fiduciary relationship and hold an office of trust.

Finally, the last article provides an insight into the ongoing developments in the Real Estate (Development and Regulation) Act, 2016. The article highlights the dilution of RERA by the State Legislatures. The article goes on to deal with the issue of compensation and refund u/s 71 & 37 of the Real Estate (Development and Regulation) Act, 2016 respectively.

We sincerely hope, that our distinguished readers find this information useful and equip them in understanding and interpreting the recent legal developments. We welcome all kinds of suggestions, opinion, queries or comments from all our readers. You can also send in your valuable insights and thoughts at newsletter@singhassociates.in.

Thank you.

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SINGH & ASSOCIATES
ADVOCATES & SOLICITORS

NEW DELHI
E-337, East of Kailash
New Delhi - 110065 INDIA

GURUGRAM
7th Floor, ABW Tower, MG Service Road
Sector 25, IFFCO Chowk, Gurugram
Haryana -122001 INDIA

MUMBAI
Unit No. 101, 10th Floor
Sakhar Bhavan, Plot No. 230
Ramnath Goenka Marg
Nariman Point, Mumbai - 400021, INDIA

BENGALURU
N-304, North Block, Manipal Centre,
47, Dickenson Road
Bengaluru - 560042, INDIA

Ph: +91-11- 46667000
Fax: +91-11- 46667001

Email: india@singhassociates.in
Website: www.singhassociates.in

SINGH & ASSOCIATES
FOUNDER MANOJ K SINGH
ADVOCATES & SOLICITORS

Managing Editor
Manoj K. Singh

Editor
Amit Kumar Dadhich

Published by
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Advocates and Solicitors

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Amit Kumar Dadhich

INTRODUCTION

In the recent judgment passed by Hon'ble Supreme Court in case titled "M/s Icomm Tele Ltd. Vs Punjab State Water Supply & Sewerage Board & Anr.", it is stated that the pre-deposit clause for initiating arbitration is contrary to the object of de-clogging the court system and would render the arbitral process ineffective and expensive.

FACTS OF THE CASE

In 2008, the Punjab State Water Supply & Sewerage Board, Bhatinda, issued a notice inviting tender for extension and augmentation of water supply, sewerage scheme, pumping station and sewerage treatment plant for various towns mentioned therein on a turnkey basis.

M/s Icomm Tele Ltd., which is involved in civil/electrical works in India, was awarded the tender by the Board. A contract was entered into between both the parties. The concerned arbitration clause 25(viii) which is set out, stated as follows:-

"viii. It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall furnish a "deposit-at-call" for ten percent of the amount claimed, on a schedule bank in the name of the Arbitrator by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded w.r.t the amount claimed and the balance, if any, shall be forfeited and paid to the other party."

The company addressed letters to the board with regard to the appointment of arbitrator regarding the disputes which arose between the parties and sought for waiving the 10% deposit fee. After receiving no response from the board, the company filed a writ petition challenging the validity of clause 25(viii) of the arbitration clause before the High Court of Punjab and Haryana. The writ petition was dismissed by the High Court of Punjab and Haryana stating that such tender condition can in no way said to be arbitrary or unreasonable.

The company challenged the order passed by the High Court of Punjab and Haryana before the Hon'ble Supreme Court. The company argued that the arbitration clause contained in the tender condition amounts to a contract of adhesion, and since there is unfair bargaining strength between Board and the Company, this clause ought to be struck down following the judgment in ***Central Inland Water Transport Corpn. v. Brojo Nath Ganguly, (1986) 3 SCC 156***. The company also argued that arbitration being an alternative dispute resolution process, a 10% deposit would amount to a clog on entering the aforesaid process. Further, claims may ultimately be found to be untenable but need not be frivolous. Also, frivolous claims can be compensated by heavy costs. Further, even in the event that the award is in favour of the claimant, what can be refunded to him is only in proportion to the amount awarded and the rest is to be forfeited. This would also be a further arbitrary and highhanded action on the part of the Board.

The Board argued that there is no infraction of Article 14 in the present case. It is clear that clause 25(viii) would apply to both the parties equally, and as this is so, the said sub-clause cannot be struck down as being discriminatory. Further, the principle contained in ***Central Inland Water Transport Corpn. (supra)*** cannot possibly be applied to commercial contracts. Also, in similar cases, this Court has not entertained this kind of a challenge.

The Hon'ble Supreme Court observed that the 10% "deposit-at call" of the amount claimed is in order to

avoid frivolous claims by the party invoking arbitration is against the well settled law that a frivolous claim can be dismissed with exemplary costs. It is, therefore, always open to the party who has succeeded before the arbitrator to invoke this principle and it is open to the arbitrator to dismiss a claim as frivolous on imposition of exemplary costs.

The important principle established by the judgments passed by Hon'ble Supreme Court in the case titled as ***General Motors (I) (P) Ltd. v. Ashok Ramnik Lal Tolat, (2015) 1 SCC 429*** is that unless it is first found that the litigation that has been embarked upon is frivolous, exemplary costs or punitive damages do not follow. Clearly, therefore, a "deposit-at-call" of 10% of the amount claimed, which can amount to large sums of money, is obviously without any direct nexus to the filing of frivolous claims, as it applies to all claims (frivolous or otherwise) made at the very threshold.

The 10% deposit has to be made before any determination that a claim made by the party invoking arbitration is frivolous. This is also one important aspect of the matter to be kept in mind in deciding that such a clause would be arbitrary in the sense of being unfair and unjust and which no reasonable man would agree to. Indeed, a claim may be dismissed but need not be frivolous, as is obvious from the fact that where three arbitrators are appointed, there have been known to be majority and minority awards, making it clear that there may be two or more possible or even plausible views which would indicate that the claim is dismissed or allowed on merits and not because it is frivolous. Further, even where a claim is found to be justified and correct, the amount that is deposited need not be refunded to the successful claimant.

Take for example a claim based on a termination of a contract being illegal and consequent damages thereto, if the claim succeeds and the termination is set aside as being illegal and a damages claim of one crore is finally granted by the learned arbitrator at only ten lakhs, only one tenth of the deposit made will be liable to be returned to the successful party. The party who has lost in the arbitration proceedings will be entitled to forfeit nine tenths of the deposit made despite the fact that the aforesaid party has an award against it. This would render the entire clause wholly arbitrary, being not only excessive or disproportionate but leading to the wholly unjust result of a party who has lost an arbitration being entitled to forfeit such part of the deposit as falls proportionately short of the amount awarded as compared to what is claimed.

Further, Hon'ble Supreme Court also emphasized the settled law that arbitration is an important alternative dispute resolution process which is to be encouraged because of high pendency of cases in courts and cost of litigation. Any requirement as to deposit would certainly amount to a clog on this process. Also, it is easy to visualize that often a deposit of 10% of a huge claim would be even greater than court fees that may be charged for filing a suit in a civil court.

CONCLUSION

The Hon'ble Supreme Court set aside the judgments passed by the Hon'ble High Court of Punjab and Haryana and allowed the appeal of the company stating that deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10% would discourage arbitration, contrary to the object of de-clogging the court system, and would render the arbitral process ineffective and expensive.

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BITCOIN: AN OPPORTUNITY OR A CHALLENGE?

Rishab Khare

INTRODUCTION

Arrival of bitcoin in India has led to various issues that are required to be addressed. The bitcoin currency has come forth with a great amount of opportunity for the investors. However on the other hand, it has raised a number of regulatory concerns as far as the question of its misuse is concerned. The absence of any regulation governing bitcoin currency has left many questions unanswered. With the growth of usage in internet and digital transactions, growth of bitcoin and other crypto currencies is inevitable.

The imperative question that needs to be answered is - what will the consequences be if bitcoins are awarded a legal status in India? The status as of now is that various governmental communications indicate that the central Bank i.e. Reserve Bank of India has constantly been advising the citizens is keeping a vigil while venturing out in the transactions pertaining to bitcoin in India. It is also pertinent to mention that bitcoins have been awarded legal recognition in several developed states such as United States.

LEGALITY OF BITCOINS IN INDIA

Reserve Bank of India via its' press release dated December 24, 2013 clarified that creation, trade and usage of virtual currencies is neither recommended nor authorised by the Reserve Bank of India. The relevance of this press release is that it brings forward two points regarding bitcoins and its' legal status in India. First, the status of bitcoins in India is that of an unauthorised currency as far as the central bank is concerned and secondly, the bitcoins have still not been accorded the status of being illegal in India.

The usage of bitcoins in India has led to the fears that it might lead to increase in money laundering in India especially after the demonetisation drive that occurred in India in 2016. For the same reason, the use of bitcoin currency has constantly been on the radar of law enforcement agencies.

TAXABILITY OF BITCOINS IN INDIA

There is also a question of taxability of bitcoins in India. Very recently a controversy surfaced when Income Tax department slapped notices on around five lakh citizens who traded in bitcoin. The reason for the same was that these customers were classified as High Net Worth Individuals (HNIs).

"Just after conducting a survey across Indian Bitcoin exchanges, the Income Tax (IT) department is said to have issued notices to 4-5 lacs high net worth individuals (HNIs) trading on the Bitcoin exchanges, according to PTI."[1]

LEGALITY OF BITCOINS IN OTHER JURISDICTIONS AND ITS' SUCCESS RATE

"Bitcoin can be transferred from one country to another without limitation. However, the exchange rate against other currencies can be very volatile. This is partly because the price is often driven by speculation, and also because it is a fairly small market compared with other currencies. Some countries explicitly permit the use of bitcoins, including Canada and Australia. It is prohibited in Iceland, which has had strict capital controls since the collapse of its banks during the 2008 financial crisis."[2]

As mentioned before, bitcoin have been awarded a valid and legal status in select jurisdictions such as the European Union, United States and Canada. In United States, bitcoin have been duly recognised and have been made taxable under the law.

In China, the use of bitcoin is restricted. China has specifically prohibited financial institutions and payment companies from entering into transactions involving bitcoin. "There are currently no laws, rulings, or announcements from regulatory bodies such as the

1 *Income tax department to issue notice to 5 lakh high net worth Bitcoin investors: reports (December 18, 2017) < https://yourstory.com/2017/12/now-income-tax-department-issue-notice-5-lakh-high-net-worth-bitcoin-investors-reports/ >*

2 *Is Bitcoin Legal in the US (December 15, 2015), < https://www.investopedia.com/ask/answers/121515/bitcoin-legal-us.asp >*

People's Bank of China (PBoC) or the Ministry of Industry and Information Technology (MIIT) on the legality of bitcoin and its trading."[3]

It is also important to mention in this regard that the European Union has not adopted any overall position in this regard. However, several restrictions were imposed on the use of bitcoin currency in the aftermath of the paris attacks.

Reference to foreign jurisdictions is to assess what India should do as far as the dealings pertaining to bitcoin is concerned. It is reported that due to the element of anonymity with the usage of bitcoin, it has been used very commonly for terrorism financing and drug financing. There have also been concerns regarding bitcoin being used for the purposes of money laundering. With these challenges in mind, India needs to take a call as whether bitcoin should be declared as illegal currency, per se or if it has to be considered to be legal, and under which regulations it can be allowed to be used. Reserve Bank of India has clarified via press release that it does not authenticate the use of bitcoin as a currency. The effect of the same has been that bitcoin is neither legal nor illegal and still it has still not been conferred the status of a valid currency under the Indian Legal System.

BITCOINS: WHAT ARE THE OPPORTUNITIES AHEAD?

A. REAL ESTATE AND GOVERNMENT SERVICES

In the field of real estate, processes consume a lot of time and are bound by red tapism. Due to the decentralized nature of the system of blockchain, there could be an absolute disruption of the existing structure of middlemen and other processes including verification and other aspects of compliance requirements such as regulatory compliance.[4] Governments in Sweden, USA and Georgia have already decided on exploring for options in this regard.[5]

B. LEGAL SERVICES

In the legal services sector, there is a varied applicability of this currency – it can be used for systemising specific obligations such as contractual duties of payment. These can be automated for self-execution on the fulfilment of contractual obligations. This by itself will result in reduction of monitoring resources and other compliance directives. Thus, decentralization in itself would result in the loss of requirement for execution of contracts based on trust. It can be utilised for automation of processes involved in various documentation and other aspects.[6]

C. INTELLECTUAL PROPERTY

In a similar mechanism to the one conceptualized in real estate, this form of technology can be used for the storage of records pertaining to intellectual property. Any transaction with regard to transfer and licensing can be established without hassle through the distributed ledger in a transparent manner, with the accompanying rights and other terms.[7]

It would provide solutions with regard to revenue sharing and rights management amongst various media enterprises. In fact, it is already used for trading amongst gaming companies with regard to gaming content.[8]

D. INSURANCE SECTOR

In the insurance sector, the applications of block chain are especially useful for providers of wholesale insurance wherein all aspects such KYC regulatory compliances and processing of claims can be streamlined and thereby, provide a lean and effective mechanism for the insurance industry.[9]

3 *Leonhard Weese, Bitcoin Regulation In China Still Unclear, But Chinese Exchanges Thrive Overseas (November 29, 2017), < https://www.forbes.com/sites/leonhardweese/2017/11/29/bitcoin-regulation-in-china-still-unclear-but-chinese-exchanges-thrive-overseas/#75403ec96487 >*

4 *Don Oparah, Blockchain Will Change Real Estate,(TechCrunch, 19 February2016) https://techcrunch.com/2016/02/06/3-ways-that-blockchainwill-change-the-real-estate-market*

5 *Anthony Couse, ' Disruptive Technology and its Use for Improvement in Real Estate'(Weforum, 16 August 2016)https://www.weforum.org/agenda/2016/08/how-disruptive-technology-could-solve-real-estate-s-transparency-problem*

6 *CFO Insights, ' Getting Smart about Smart Contracts' (Deloitte Journal,23 June 2016) http://deloitte.wsj.com/cfo/2016/06/23/getting-smart-aboutsmart-contracts/*

7 *https://monegraph.com/*

8 *http://ownage.io/*

9 *BI Intelligence, 'How Blockchain can help Wholesale Insurance Industry'(Business Insider, 3 August 2016) http://www.businessinsider.com/heres-how-blockchain-canhelp-the-wholesale-insurance-industry-2016-8?r=UK&IR=T; see also https://proofofphysicaladdress.com/*

Moreover, smart contracts, as projected by Deloitte, can be extremely effective in dealing with faulting error checking and smooth workflow.[10]

It can also enhance the reach for micro-insurance, as it would facilitate micro-payments based on availability of data from other connected mechanisms.

E. HEALTHCARE

Blockchain as a mechanism can help in streamlining healthcare processes for patients and therein, contain all electronic records of medical profiles and other health monitoring reports of the patient.[11]

This can be utilised for small payments and automatic disbursal of health related payments under health plans.

RECENT DEVELOPMENTS W.R.T USE OF CRYPTO CURRENCIES SUCH AS BITCOIN IN INDIA

In India, the RBI, SBI and NITI Aayog along with the Secretary of Department of Economic Affairs at the helm, formed an inter-disciplinary committee at the behest of the Government and submitted a report on the regulation of cryptocurrency.[12] The Government has encouraged utilisation of the technological benefits of the mechanism as well as cautioned against the likely legal complications due to a number potential grey areas. The Government has to foresee potential fallout occurring due to non-linear aspect of jurisdictional problems which may arise, as payments are international in nature and outside the purview of basic transactional terms. The representatives of the Reserve Bank of India have asserted that the Government is more inclined towards utilisation of fiat currency rather than bitcoins, reflecting the concern of the nodal authorities.[13]

10 John Ream, Yang Chu, David Schatsky, 'Upgrading Blockchains' (Deloitte Dupress, 08 June 2016)
http://dupress.deloitte.com/dup-us-en/focus/signals-for-strategists/using-blockchain-for-smart-contracts.html?top=4

11 Id.

12 Sukanya Mukherjee, ' RBI Looking for Cryptocurrency Policy' (Inc42,14 October 2017)
https://inc42.com/buzz/rbi-cryptocurrency-policy-bitcoin/(last visited November 26,2017)

13 Beena Parmar, 'RBI wary of Bitcoins' (Money Control, 13 September 2017)
http://www.moneycontrol.com/news/business/economy/rbi-looking-at-cryptocurrency-but-wary-of-bitcoins-reserve-bank-executive-director-2386489.html

CONCLUSION

Bitcoin, in itself, is a mechanism borne out of antipathy towards central authority and regulation. It became popular due to its anonymous nature of transaction and is immensely popular among elements at odds with the law. Thus, such a system, most synchronically, draws concern and caution from central financial regulators and the governing authorities.

Bitcoin and its underlying technology boasts of an immense amount of positives against legal or operational challenges, similar to any new form of technology. There are a number of legal grey areas for applicability of this technology. Most essentially, there should not be any regulation put forth in haste as it may only result in hampering innovation. It would be better to read into the various complexities and realise its implications.

However, if it is left unregulated, it might result in widespread confusion amongst the various elements of the system such as the government, courts, commercial entities, etc. It would be best to approach the issues in a measured sense along with representatives of all stakeholders in order to develop best standards and establish maximum benefit.

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CAN DAMAGES PROVIDED UNDER LAW BE PREVENTED BY AGREEMENT?

Sara Siddiqi

The general rule as provided under Section 73 of the Contract Act is that when a contract is broken, the party suffering from the breach of contract is entitled to receive compensation from the party who has broken the contract. While Section 74 provides that the parties to a contract may agree at the time of contracting, that in the event of a breach the party in default shall pay a 'stipulated sum of money' to the aggrieved party. Further, if that stipulated sum of money is a genuine pre-estimate of loss, then that amount is called Liquidated Damages, and if it is not a genuine pre-estimate of loss, but an amount intended to secure performance of contract, it may be a penalty. However, in the case of *Maharashtra State Electricity Board vs. Sterlite Industries (India)*[1], it has been held that it is open to the parties to contract to agree to a special provision for the computation of damages and the mode of computation under Section 73 will thus be excluded.

Similarly, there may be cases whereby damages provided under law may be prevented by agreement, whereby a contract may contain within itself, the element of its own discharge, in the form of provisions, whether express or implied, for its determination in certain circumstances.

EXCLUSION OF RIGHT TO CLAIM DAMAGES BY EXPRESS CONTRACT

There may be a situation where the parties may exclude or restrict liability for damages.[2] The question that arose for consideration under the case of *Bharathi Knitting Company vs. D.H.L. Worldwide Express Courier Division of Air Freight Ltd*, was whether the State Commission or the National Commission under the Act could give relief for damages in excess of the limits prescribed under the contract; wherein the apex court held that the Commission was right in limiting the liability undertaken in the contract entered by the parties and in awarding the amount of deficiency in service to the extent of the liability undertaken by the respondent.

Hence, when the parties have expressly made provisions in their contract regarding limitation of liability or exclusion of liability, the court will not award more than the extent of liability undertaken.[3] In some cases, parties may provide that in the event of breach, no compensation will be payable, except for the refund of amounts paid.[4]

Damages cannot be awarded when the contract provides that in case of delay in handing over possession of site to contractor or delay due to any other cause, the contractor was entitled to extension of time for completion of the contract but was not entitled to compensation of damages.[5]

In this case, [*Union of India vs. Chandalavada Gopalkrishna Murthy and Ors.*], clause 17(3) of the contract stated that, in the event of failure or delay by the Railway to hand over to the contractor, possession of land necessary for execution of works, the said failure shall not vitiate the contract or entitle the contractor to damages of compensation thereof, but the railway may grant reasonable extension of completion date. Hence it was held in this case that the contractor shall not be entitled to compensation.

Similar question was raised in the case *Ch. Ramalinga Reddy vs. Superintending Engg. And Anr*[6], whereby it was held that if the contract is extended

1 *AIR 2000 Bom 204 affirmed in Maharashtra State Electricity Board vs. Sterlite Industries (India) AIR 2001 SC 2933, (2001) 8 SCC 482*

2 *Bharathi Knitting Co. vs. DHL Worldwide Express Courier Division of Air Freight Ltd. (1996) 4 SCC 704, AIR 1996 SC 2508*

3 *Ibid.*

4 *Syed Israr Masood vs. State of Madhya Pradhesh (1981) 4 SCC 289, AIR 1981 SC 2010*

5 *Union of India vs. Chandalavada Gopalkrishna Murthy and Ors. (2010) 14 SC 633*

6 *1999 (9) SCC 610*

under the terms of the contract, compensation cannot be awarded by the arbitrator.

In the case of *General Manager Northern Railways and Ors. vs. Sarvesh Chopra*[7], the court stated that it was impermissible to award claim for compensation because the arbitrator was required to decide the claims referred to him with regard to the contract between the parties and, therefore, his jurisdiction was limited by the terms of the contract.

In the case of *Numaligarh Refinery Ltd. vs. Daelim Industrial Company Ltd*[8], it was held that a contractor was not entitled to duties levied for the first-time after the contract, because he had agreed to bear all duties. It was held that as per various clauses of the contract since it was the duty of the DIC to pay all taxes, customs duty and levies, they cannot escape their liability to bear the countervailing duty imposed by the Government.

However, in case of *Simplex Infrastructure Ltd. vs. Siemens Ltd*[9], it was stated that if the limitation of liability clause is limited in scope, amounts which are outside the scope of the clause can be awarded. It was held that it was a settled law that the bank guarantee is an independent contract and a challenge to the invocation/encashment of an irrevocable and unconditional bank guarantee has to be considered without any reference to the underlying or main contract or to the disputes/claims thereunder. Therefore, bank guarantee could not be restrained.

CONCLUSION

As discussed in the aforesaid judgments, it can be concluded that if in a contract the parties have specifically restricted or excluded liability for damages, then no compensation can be awarded to the party claiming the same.

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7 *Civil Appeal No. 1791 of 2002, decided on 01.03.2002, MANU/SC/0145/2002*

8 *2007 AIR SCW 5948, (2007) 8 SCC 466*

9 *(2015) 5 Mah LJ 135, (2015) 2 Bom CR 72*

CASE LAW ANALYSIS: RAMLA V. NATIONAL INSURANCE COMPANY LIMITED

Ruchika Darira

Case law analysis on the judgment passed by the Supreme Court in the case titled as "*Ramla v. National Insurance Company Limited*", Civil Appeal No. 11495 of 2018, Special Leave to Appeal (C) No.22334 of 2017

Through a bench comprising of Justice N.V. Ramana and Justice M.M. Shantanagoudar, the Hon'ble Supreme Court has held that there is no restriction in awarding compensation over and above/ exceeding the amount claimed under Section 168 of Motor Vehicles Act, 1988.

FACTS OF THE CASE

In the present case, claimants before the Hon'ble Supreme Court were seeking further enhancement of compensation from Rs. 21,53,000/- awarded by the High Court of Kerala at Ernakulam.

The claimants were the dependents i.e the wife, two children, and an aged father of the deceased who succumbed to death due to grievous injuries in an accident in the year 2008. Initially, the claimants moved a claim petition before the Motor Accidents Claim Tribunal seeking a total compensation of Rs. 25,00,000/- (Rupees Twentyfive Lakhs). After hearing the arguments, the Tribunal granted a compensation of Rs 11,83,000/- which was enhanced by the High Court of Kerala by an additional award of Rs. 9,70,000/-. Being aggrieved by the decision of the High Court of Kerala, the claimants preferred an appeal before the Hon'ble Supreme Court for further enhancing the amount of compensation.

DECISION OF THE HON'BLE SUPREME COURT

While deciding the present appeal filed by the claimants, the Hon'ble Supreme Court considered the salary certificate of the deceased, cost of living, and other relevant factors. The Hon'ble Supreme Court elaborated on the term of "**just compensation**" under Section 168 of the Motor Vehicles Act. Section 168 of the Motor Vehicles Act reads as under:

168. Award of the Claims Tribunal — On receipt of an application for compensation made under section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be; provided that where such application makes a claim for compensation under section 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of Chapter X.

(2) The Claims Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award.

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct.

The Supreme Court held that the High Court was not right in deducting 2/3rd of the deceased's total income towards his personal expenses and was of the view that a deduction of 40% would be appropriate for quantifying compensation. In the opinion of the Supreme Court, the claimants were entitled to a total compensation of Rs 28,00,000/- which was higher than the amount claimed by the claimants/ dependents of the deceased. The Hon'ble Supreme Court relied upon

the judgements of *Nagappa v. Gurudayal Singh*[1], *Magma General Insurance v. Nanu Ram*[2], and *Ibrahim v. Raju*[3]*;* the Court observed, "There is no restriction that the Court cannot award compensation exceeding the claimed amount, since the function of the Tribunal or Court under Section 168 of the Motor Vehicles Act, 1988 is to award 'just compensation'".

The court observed that the Motor Vehicles Act is a beneficial and welfare legislation. A 'just compensation' is one in which the compensation awarded is reasonable on the basis of evidence produced on record. It cannot be said to have become time-barred. The court further observed that there is no need for a new cause of action to claim an enhanced amount. The courts are duty bound to award just compensation."

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1 *(2003) 2 SCC 274*
2 *2018 SCC OnLine SC 1546*
3 *(2011) 10 SCC 634*

NOTE ON FILING OF EVIDENCE BY AFFIDAVIT BEFORE ARBITRAL TRIBUNAL

Pratyush Raj

Section 1 of the Evidence Act lays down that it shall neither apply to affidavits, nor to proceedings before an Arbitrator.

1. SHORT TITLE, EXTENT AND COMMENCEMENT -

This Act may be called the Indian Evidence Act, 1872.
*It extends to the whole of India [except the State of Jammu and Kashmir] and applies to all judicial proceedings in or before any Court, including Courts -martial, [other than Courts - martial convened under the Army Act (44 & 45 Vict., c. 58)] 4 [the Naval Discipline[29 & 30 Vict.,109] Act or ** the Indian Navy (Discipline) Act, 1934 (34 of 1934),[or the Air Force Act (7 Geo. 5, c. 51)] but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator;*

And it shall come into force on the first day of September 1872.

Similarly S.19 of the Arbitration and Conciliation Act, 1996, stipulates that the Arbitral Tribunal is not bound by the Code of Civil Procedure or the Indian Evidence Act. As such the provisions of the Evidence Act are not applicable to inquiries conducted by tribunals, however, it has been laid down in catena of judgments that the tribunal cannot ignore the principles of natural justice.

Furthermore, though the Evidence Act is not binding upon the proceedings before the arbitral tribunal and the tribunal has the autonomy to fix its own procedure, however, as a matter of practice the tribunal follows the principles regarding relevancy and admissibility of evidence as provided in the Evidence Act.

PROVISIONS OF CPC DEALING WITH SUBMISSIONS OF AFFIDAVIT

A civil suit proceeds through the following stages as mentioned – Plaint, Notice/Summons, Written Statement, Rejoinder/Replication, Issues, Evidence, Cross Examination and Final Arguments.

The stage of evidence is dealt with in the Order 18 of the CPC. The Rule 4 of the Order 18 lays down the procedure regarding recording of evidence. Order 18 Rule 4 is as under: -

Rule 4. **Recording of evidence**
(1) In each case, the examination– in- chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:
Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

Originally Order 18 Rule 4 simply stipulated recording of the oral evidence before the court. After the Amendment of CPC in the year 1999, 7 sub-rules were added, and there was a further amendment in the year 2002. The said amendments have been upheld in the Salem Bar Association v. Union of India Judgments cited in (2003) 1 SCC 49 and (2005) 6 SCC 344

Order 19 lays down the procedure required for admission of an affidavit before the court.

Though evidence can be adduced by way of affidavits, it cannot be relied upon until the deponent is available for cross-examination[1].

It has also been held by the Hon'ble Supreme Court that in case of a living person, evidence must be tendered by calling the witness to the stand and not by submission of affidavit unless the law permits the same.[2]

1 *Ayaaubkhan Noorkhan Pathan v. State of Maharashtra – (2013) 4 SCC 465*
2 *Munir Ahmed v. State of Rajasthan – 1989 Supp (1) SCC 387*

The rule regarding submission of affidavit instead of oral examination-in-chief has been made for the purpose of speeding up the disposal of a suit.

S. 30 of the CPC also stipulates proving of a certain fact by way of affidavit; however, the same is subject to the discretion of the court and the powers under the order 19.

Order 19 Rule 1 vests the court with the power to pass an order to allow any point to be proven by way of an affidavit. Still it does not mean that the affidavit submitted in furtherance thereof will be considered as an evidence. The contents of the said affidavit are subject to the cross-examination of the person deposing through the said affidavit.

Order 19 Rule 3 clearly outlines the matters to which the affidavit should be confined.

Rule 3. **Matters to which affidavits shall be confined.**
(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted; provided that the grounds thereof are stated.

Furthermore, the Rule 6 (as inserted by the Commercial Courts Act, 2015) of the Order 19 provides the guidelines for submission of any point on affidavit, which can be summarized as below:

(a) such affidavit should be confined to, and should follow the chronological sequence of the dates and events that are relevant for proving any fact or any other matter dealt with;

(b) where the court is of the view that an affidavit is a mere reproduction of the pleadings, or contains the legal grounds of any party's case, the court may, by order, strike out the affidavit or such parts of the affidavit, as it deems fit and proper;

(c) each paragraph of an affidavit should, as far as possible, be confined to a distinct portion of the subject;

(d) an affidavit shall state —
(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
(ii) the source for any matters of information or belief;

(e) an affidavit should—
(i) have the pages numbered consecutively as a separate document (or as one of several documents contained in a file);
(ii) be divided into numbered paragraphs;
(iii) have all numbers, including dates, expressed in figures; and
(iv) if any of the documents referred to in the body of the affidavit are annexed to the affidavit or any other pleadings, give the annexures and page numbers of such documents that are relied upon.

Furthermore, it has been held by the Hon'ble Allahabad High Court that affidavit of evidence must contain the evidence of the deponent as to such facts only, of which he is in a position to speak from his own knowledge[3].

Where evidence is adduced by affidavits, such affidavits may be properly verified either from knowledge or from source. But the basis of such knowledge or source of information must be strictly stated.

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3 *Brijlal v. State of UP – AIR 1954 All 393*

PROOF OF ACTUAL DAMAGE

Sara Siddiqi

Under the Indian Contract Act, 1872, Section 73 and Section 74 provide for unliquidated and liquidated damages respectively. Unliquidated Damages are the damages awarded by the courts on the basis and assessment of actual loss or injury caused to the party suffering breach of contract. Whereas, Liquidated Damages are the damages which the parties to the contract may agree to, as payment of a certain amount on the breach of contract.

The relevant parts of the sections are as follows:

Section 73: Compensation for loss or damage caused by breach of contract: *When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*

Section 74: Compensation for breach of contract where penalty is stipulated for: *When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.*

PROOF OF LOSS/INJURY IN CASE OF LIQUIDATED DAMAGE

Firstly, irrespective of the nature of damages, breach of contract is the pre-condition to claim the same. That is, there can be no claim for damages if there is no breach of contract between the parties. Secondly, to claim damages, the party making such claim has to establish the loss. It is understood that the reasonable compensation agreed upon as liquidated damages in case of breach of contract is in respect of some loss or injury and hence existence of such loss or injury is indispensable for such claim of liquidated damages.

In some cases, the courts have demanded the parties to prove the degree of loss or damage suffered as a result of breach of contract.[1]

In the case of ***Maula Bux***[2], the court has specifically held that the court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The court has, however, also specifically held that in case of breach of some contracts it may be impossible for the court to assess compensation arising from breach. In such a case, 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, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

In the case of ***Iron & Hardware (India) Co. v. Firm Shamlal & Bros***[3], it was stated that an automatic pecuniary liability does not arise in the event of a breach of a contract which contains a clause for liquidated damages. Till the time, it is determined by the court that the party complaining of the breach is entitled to damages, the plaintiff shall not be granted compensation by the mere presence of a liquidated damages clause.

It is however, apparent from the above that this demand to prove the loss suffered, defeats the very purpose for which liquidated damages clauses are inserted in contracts. Section 74 of the Act emphasizes on reasonable compensation. Only if the compensation in the contract is by way of penalty, consideration would be different and the party would only be entitled to compensation for the loss suffered. But if the compensation named in the contract is a genuine pre-estimate of loss, which the party knew at the time of

1 *Fateh Chand v. Balkishan Dass AIR 1963 SC 1405*
2 *(1969)2 SCC 554*
3 *AIR 1954 Bom 423*

entering into contract, there is no question of proving such loss. Burden is in fact on the other party to lead evidence to prove that no loss is likely to occur by such breach.[4]

In the case of ***Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd***, it was held that if the terms of the contract are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract, unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation. However, in some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

In the case of ***Indian Oil Corporation v. Lloyds Steel Industries Ltd[5],*** the court held that:

"…The guiding principle is 'reasonable compensation'. In order to see what would be the reasonable compensation in a given case, the Court can adjudge the said compensation in that case. For this purpose, as held in Fateh Chand (supra) it is the duty of the Court to award compensation according to settled principles. Settled principles warrant not to award a compensation where no loss is suffered, as one cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage."

In the case ***Construction & Design Services v. Delhi Development Authority***[6], the apex court reconfirmed that the court must determine the reasonable compensation and then grant it to the injured party. It held as follows:

"Applying the above Principle to the present case, it could certainly be presumed that delay in executing the work resulted in a loss for which the respondent was entitled to reasonable compensation. Evidence of precise amount of loss may not be possible but in the absence of any evidence by the party committing breach, the court has to proceed on guesswork as to the quantum of compensation to be allowed in the given circumstances. Since the respondent also could have lead evidence to show the extent of higher amount paid for the work got done or produce any other specific material but it did not do so, we are of the view that it will be fair to award half of the amount claimed as reasonable compensation."

In the case of ***M/s. Herbicides (India) Ltd. v. M/s. Shashank Pesticides P. Ltd[7],*** the court held in case of liquidated damages that *"… even if it does not prove the actual loss/damage suffered by it, is entitled to reasonable damages unless it is proved that no loss or damage was caused on account of breach of the contract"*

The provisions relating to liquidated damages are required to be drafted with clarity and one has to prove that the amount is a genuine pre-estimate of loss or injury suffered.[8]

CONCLUSION

Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section. However, as long as it serves a compensatory function, liquidated damages should be allowed without the requirement to prove exact losses.

Thus, where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in

4 *Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd (2003) 5 SCC 705*
5 *MANU/DE/8665/2007*
6 *MANU/SC/0313/2015*
7 *180 (2011) DLT 243*
8 *ONGC v. Saw Pipes (2003) 5 SCC 705*

cases where damage or loss is difficult or impossible to prove, that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded. Thus, it is the nature of the Liquidated Damages clause that needs to be considered, that is, whether it's a genuine pre-estimate of loss occurred on breach of contract or whether it is in form of penalty and deterrent in nature.[9]

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

TEACHERS ARE EMPLOYEES AND ENTITLED TO CLAIM GRATUITY W.E.F. 03.04.1997: SC

Divya Harchandani

The Hon'ble Supreme Court recently reversed its own judgment dated 07.01.2019 in the matter of *Birla Institute Technology vs. the State of Jharkhand & Ors.* as per which teachers were denied the benefit of gratuity for not being covered under the definition of "employee" under Section 2 (e) of the Payment of Gratuity Act, 1972 ("the Act"). The Division Bench consisting of Hon'ble Justice Abhay Manohar Sapre and Hon'ble Justice Indu Malhotra suo moto took up the appeal and clarified that pursuant to the Amending Act No. 47 of 2009 which has retrospective effect from 03.04.1997, teachers are "employees" as per the amended definition and are entitled to the benefit of gratuity under the Act.

The appellant was a premier technical educational institute known as Birla Institute of Technology (BIT). The Respondent No. 4 was an assistant professor who had joined the Institute in 1971. In 2001 the professor attained the age of superannuation and made a representation to the institute praying for payment of gratuity. The Institute however declined the request, pursuant to which the respondent professor filed an application before the controlling authority. The controlling authority allowed the application and directed the appellant institute to pay a sum of Rs. 3, 38, 796/- with 10% interest as gratuity to the Respondent No. 4.

Aggrieved by the said direction, BIT filed an appeal before the appellant authority which was dismissed. Consequently, BIT filed a writ before the High Court of Jharkhand which was dismissed yet again by the Single Judge who upheld the order of the authorities. The appellant then filed a Letters Patent Appeal before the Division Bench of the High Court which was again dismissed, which led the Institute to file the present appeal by way of special leave before the Apex Court.
The short question for consideration was whether the Respondent no. 4/Assistant Professor was entitled to claim gratuity amount from BIT under the Act. The Hon'ble Court placed reliance on the case of *Ahmadabad Pvt. Primary Teachers Association vs. Administrative Officer and Others (2004) 1 SCC 755* as per which teachers did not find place in the definition of "employee" under the 1997 Act which read as follows-

> "2 (e) employee means any person (other than an apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, *to do any skilled, semiskilled, or unskilled, manual, supervisory, technical or clerical work*, whether the terms of such employment are express or implied, *and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any…*"

The Apex Court had observed that trained or untrained teachers are not "skilled", "semi-skilled", "unskilled", "manual", "supervisory", "technical" or "clerical" employees. The court while interpreting the said definition held that if the Act intended to cover in the definition of employee all kind of employees, it would have used a wide language as contained in the Employees Provident Fund Act, 1952. The court then concluded that although teachers are engaged in a noble profession of educating our young generation, they should not be given any gratuity benefit.

In the present case, the Apex Court pronounced its judgment dated 07.01.2019 denying the benefit of gratuity to teachers based on the judgment in the case of Ahmadabad Pvt. Primary Teachers. However, the apparent error that was not brought to the notice of the court was that pursuant to the decision of the Apex Court in Ahmadabad Pvt. Primary Teachers Association in 2004, the Parliament had amended the definition of "employee" as defined in Section 2 (e) of the Act by Amending Act No. 47 of 2009 with retrospective effect from 03.04.1997. The amended definition read as follows-

> *"2(e) 'employee' means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise,*

in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity."

While BIT urged that the constitutional validity of the Amending Act No. 47 of 2009 is under challenge in a writ petition which is pending before this court, but the Bench held that pendency of such a writ petition does not affect the constitutionality of the Amending Act till the court declares the said statute to be ultra vires.

The Hon'ble Court also took note of the Statement of Objects and Reasons of the Payment of Gratuity (Amendment) Bill, 2009 to understand the intent behind amending the definition of "employee" under the Act and held that the benefit of the Payment of Gratuity Act was extended to teachers from 03.04.1997.

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AN ANALYSIS OF SECTION 2 (24) (IV) OF THE INCOME TAX ACT, 1961

Divya Kashyap & Prashant Daga

INTRODUCTION

Section 2(24) of the Income Tax Act, 1961, defines the term "Income" which is chargeable under the Income Tax Act. Under sub-clause (iv) of the section, it includes amongst others, the value of any benefit or perquisite, whether convertible into money or not, obtained from a company either by a director or by a person who has a substantial interest in the company, or by a relative of the director or such person, and any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director or other person aforesaid.

By virtue of this clause of Section 2(24) of the Act, any kind of benefit/perquisite given by the company which enriches the pocket of the director/person having substantial interest in the company is included in his taxable income.

SCOPE AND APPLICABILITY OF SECTION 2(24)

(IV)Section 2(24) (iv) adumbrates the following two situations:

Case 1: The value of any benefit or perquisite, whether convertible into money or not, obtained from a company either by a director or by a person who has a substantial interest in the company, or by a relative of the director or such person

Case 2: Any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director or other person aforesaid.[1]

Case 1 is applicable on the situations when the benefit or perquisite is directly enjoyed by the individuals referred in the said clause; however, Case 2 refers to those situations when sum is paid by the company to a third person.[2]

The Bombay High Court in the case of *CIT v. Shri Ramnath A. Porlar*[3], analyzing Section 2(24) (iv) of the Income Tax Act, 1961, speaking through Tulzapurkar J. (as he then was), made the following pertinent observations: *"Section 2(24) (iv) of the Income-tax Act, 1961, merely defines the expression 'income'. The value of any benefit or perquisite received by any of the persons falling within the four categories mentioned therein would become the income of such person; in other words, if the benefit or perquisite is received by a director it will be the income of the director, if the benefit or perquisite is received by a person who is substantially interested in the company it will be the income of such person having substantial interest in the company; if the same is received by a relative of the director or if the same is received by a relative of such person having substantial interest in the company, it will be the income of the relative of the director or of such person having a substantial interest in the company. There is no warrant for treating the value of any benefit or perquisite received by the director's relative or the relative of a person having a substantial interest in the company as the income of the director or of such person having substantial interest in the company, unless there is some legal fiction or a deeming provision by which the value of such benefit or perquisite received by a relative of the director or by a relative of a person having a substantial interest in the company is to be regarded as the income of the director or of such person having a substantial interest in the company."*

1 *Commissioner of Income Tax Vs. Kamalini Gautam Sarabhai [1994] 208 ITR 139 (Guj.)*

2 *Diwan Rahul Nanda Vs. Deputy Commissioner of Income Tax, [2008] 25 SOT 454 (Mum) at para 14.*

3 *[1978] 112 ITR 436*

In short, Section 2(24)(iv) of the Act will normally come into play only when the company in which the directors or its relatives have taken advantage in respect of any obligation which the director and their relatives are expected to discharge.[4]

In *Commissioner of Income-Tax vs S. Kannan*[5] , it was observed by the Hon'ble High Court that "*in order that the aforesaid provision applies, it has to be shown that during the relevant accounting year the director had obtained from a company any benefit whether convertible into money or not. Once the assessee is in the tax net and the amount becomes his income as per section 2(24)(iv) he has to pay tax on it and thereafter it is his choice how he utilizes that money. He may gift these amounts to his mother and sisters out of love and affection. The taxing event being completed will not get whittled down on account of the fact that these amounts were ultimately utilized for the benefit of the mother and three sisters or that was the real intention of the author of the letter as submitted by learned counsel for the assesses.*"

Section 2(24) (iv) of the Act is applicable on the following assessees: Director[6], person having substantial interest in the company[7] or by a relative of such persons.[8] In certain cases, if the benefit is indirectly received by the director through re-routing of the fund then the same is held to be taxable in the hands of the director.[9]

MEANING OF BENEFIT/ PERQUISITE UNDER THIS SECTION

The dictionary meaning of the word 'benefit' is advantage or profit or anything contributing to improvement of condition. If a person derives any advantage, it can be said that he was benefited. If he gains something either monetarily or otherwise it can be said that he was benefited. If he is able to improve his condition, it can be said that he has benefited to that extent. Thus, the word 'benefit' implies an element of advantage, profit or gain. Moreover, the word 'benefit' occurs in a provision which treats the benefit given by a company as income of the person who can be said to have obtained it, with the result that it would become taxable in his hands.[10]

Further, the definition makes it manifest that it is enough that a director of a company receives a benefit from the company, and it is not essential to expressly say that the benefit was being conferred upon him to enable him to act as a director. At the same time, the words 'has a substantial interest in the company', in section 2(24)(iv), qualify the words 'a person' and not the words 'a director', and as such, it is not necessary for the amount to be treated as a benefit within the meaning of section 2(24)(iv) that the director should have a substantial interest in the company. Even if the benefit received by the director of the company is of capital nature, it can also be brought under the term 'value of any benefit' as contemplated under section 2(24)(iv). The intention of the Legislature is to tax any benefit if it is received by a director, etc., irrespective of the fact whether the director is an employee-director or the benefit received was in the nature of capital, or whether there is any direct receipt in the transaction or whether there is any detriment to the company or not in the transaction.[11].

The term "Perquisite" has a known normal meaning, namely, a personal advantage, which would not apply to a mere reimbursement of necessary disbursements.[12] Before a person could be said to have obtained a benefit or perquisite from a company, there should be some legal or equitable claim, even though it be contingent or contested in nature. A mere receipt of money or property which one is obliged to return or repay to the rightful owner as in the case of a loan or credit,

4 *DCIT Vs. Smt. Nisha Anil Jain [2015] 62 taxmann.com 161 ITAT Pune at para 12.*

5 *[1994] 210 ITR 585 KAR*

6 *Commissioner of Income Tax Vs. S. Varadarajan, [1996] 89 Taxman 457 (Mad.) in which the court held that the service rendered by the Director has no connection for taking any benefit derived by the Director under section 2(24)(iv).*

7 *Ashok W. Phansalkar Vs. Income-tax Officer, 12(2) (4), Mumbai [2010] 38 SOT 136 (Mum.).*

8 *Sudha Burman Vs. Commissioner of Income Tax, [2007] 160 TAXMAN 148 (DELHI) (Delhi High Court, DB). This was a case in which foreign trips of the wife of director funded by the Company were held to be income of the assessee-wife since the same was not in relation to business of the company.*

9 *Ravi Prakash Khema Vs . Commissioner of Income tax [2008] 167 Taxman 115 (Mad.) at para 13.*

10 *Supra, Note 1.*

11 *Supra, Note 1.*

12 *Owen Vs. Pook (1969) 74 ITR 147 (HL)*

cannot definitely be taken as a benefit or perquisite obtained from the company. [13] In case of *Commissioner of Income Tax vs. A.R. Adaikappa Chettiar and Ors.*[14] the Madras High Court made the following observations in this regard: *"The words 'benefit or perquisite obtained' from a company would take in, in our opinion, only such benefit or perquisite which the company had agreed to provide and which the person concerned could claim as of right based on such agreement and that a mere advantage derived from the company without its authority or knowledge will not amount to a benefit or perquisite obtained."*

GENERAL PRINCIPLES CONCERNING APPLICABILITY OF SECTION 2(24) (IV)

- In order for this Section to apply, the persons referred therein shall have received benefit, in case there is no benefit received that situation is not covered within the meaning of that clause.[15]
- All benefit received by the referred persons are taxable irrespective of whether these are of capital or revenue nature. In order to tax the benefit received by a director from the company, it is not necessary that the director should be an employee director. The service rendered by the director has no connection for taking any benefit derived by the director under Section 2(24) of the IT Act, 1961.[16]
- Further, to understand whether the benefit/perquisite falls under the scope of Section 2(24)(iv), the same yardstick has to be applied as applied in the cases of Section 17(2)(iii) and Section 40A(5) of the Act.[17]
- The provision is not intended to restrict the right of the company to advance security deposits to its directors or relatives against the valuable consideration i.e. for obtaining house property on rent[18] or advance interest-free loans.[19]
- The use of the words "whether convertible into money or not" clearly relates to a benefit other than cash payments.[20]
- The onus lies upon the assessee to assert and prove that the benefit was given to him not under any enforceable right. Moreover, as we have already indicated above, no such requirement is contemplated by Section 2(6C) itself. It is in absolute terms. A director would be liable to assessment in respect of the value of any benefit or perquisite received by him from the company of which he is a director under all circumstances without exception.[21]
- Value Assessment: Since such benefits/ perquisites are drawn by directors who are not drawing any salary, thus rules for valuing perquisites/benefits are of no use.[22]

CONCLUSION:

Section 2(24) (iv) of the Income-tax Act is a special piece of enactment, which covers benefits both of capital and revenue nature. This provision is intended to take care of passing of benefits by a company to its directors, who occupy the position of fiduciary relationship and hold an office of trust. The main object of this enactment is to prevent abuse/ misuse of official position by the directors of the company to their own advantage.

13 *[1973]91 ITR 90 (Mad)*

14 *Id.,At para 19.*

15 *Shah Rukh Khan Vs. Assistant Commissioner of Income-tax, Cen. Cir. 29, Mumbai [2017] 79 taxmann.com 227 (Mumbai - Trib.)*

16 *Commissioner of Income Tax Vs. S. Varadarajan, [1996] 89 Taxman 457 (Mad.) in this court has held that 'trucks' so purchases at the value less than FMV is a benefit.*

17 *Commissioner of Income-tax Vs. P.R.S. Oberoi [1990] 52 TAXMAN 267 (Cal.) at para 12.*

18 *Supra, Note 2.*

19 *Supra, Note 10.*

20 *Krishan Bans Bahadur Vs. The Commissioner of Income Tax [2008] 306 ITR 411 (Delhi)*

21 *Lakshmipat Singhania Vs. Commissioner of Income Tax [1974] 93 ITR 162 (All)*

22 *Income Tax Officer, Ward-36(1), Kolkata Vs. Raghu Nandan Modi [2017] 82 taxmann.com 208 (Kolkata - Trib.)*

RECENT TRENDS UNDER THE REAL ESTATE (DEVELOPMENT AND REGULATION) ACT, 2016

Anmol Kumar & Parth Rawal

The Real Estate (Development and Regulation) Act, 2016, hereinafter referred to as "RERA", is a central legislation which aims to bring the real estate sector under its ambit, thereby aligning the interests of the allottees and the promoters. RERA was enacted under Entry 6 and 7 (dealing with contracts and the transfer of property) of the Concurrent List of the Constitution of India. It was enacted in March 2016 and came into effect from May 2017.

RERA was enacted to regulate the largely unregulated sector of real estate and to provide an appropriate grievance redressal mechanism. There were a lot of contentious issues such as delays, price non-transparency, and quality of construction along with numerous instances wherein promoters cheated the allottees. This culminated into the generation of a large amount of black money in the real estate sector which ultimately eroded the public wealth of the country and damaged the economy.[1]

Prior to the enactment of RERA, there existed a redressal mechanism under the Consumer Protection Act, 1986, hereinafter referred to as "CPA". Under the CPA, in respect of a real estate project, a consumer as defined under Section 2(d) could approach the State Consumer Disputes Redressal Commission or the National Consumer Disputes Redressal Commission depending on the pecuniary jurisdiction as provided under Section 11 and Section 22 of the CPA. Though the CPA adopted a summary procedure, there have been instances wherein the consumer complaints have lingered on for a long duration completely defeating the intention of legislature. Although the CPA has been widely criticized for inordinate delay in granting relief to the consumers, the same cannot be solely attributed to the mechanism as has been provided under the CPA. Barring the consumer complaints pertaining to the Real Estate Projects, the consumer forums are also by statute bound to entertain various other consumer complaints as well thereby creating a huge burden on the consumer forums. [2]

The enactment of RERA is considered to be a step in the right direction as it exclusively deals with the real estate sector which is presently attracting a lot of heat due to the inordinate delays by the promoters in handing over the possession of the apartments to the respective allottees.

While RERA was supposed to be a beneficial legislation for the allottees and the promoters, it suffers from certain drawbacks as enumerated here:

- <u>Dilution of the Central Act of RERA by State legislatures and failure of certain states to enact RERA:</u>

  RERA was enacted under Entry 6 and 7 (dealing with contracts and the transfer of property) of the Concurrent List. This accorded power to states to make changes to the provisions of Central RERA which had been enacted in March 2016. But as per Article 254 of the Indian Constitution, presidential assent is required for bringing changes in a central act. However, the Act which was intended to be a beneficial legislation has had different implications in different states because of dilution of the Central Legislation by State Acts.

One of the most recent examples is that of West Bengal Housing & Industrial Regulation Act, 2017(WBHIRA), whose constitutional validity has been challenged in Supreme Court on the grounds of dilution of Central Act without presidential assent. There is a direct conflict between Central RERA and WBHIRA, for instance - whether Registration will be under RERA or WBHIRA.

The West Bengal Housing & Industrial Regulation Act has also amended the definition of Force Majeure,

1 *Indiankanoon.org. (2019). Neelkamal Realtors Suburban Pvt .Ltd vs The Union Of India And 2 Ors on 6 December, 2017. [online] Available at: https://indiankanoon.org/doc/82600930/ [Accessed 7 Feb. 2019].*

2 *Wipo.int. (2019). [online] Available at: https://www.wipo.int/edocs/lexdocs/laws/en/in/in076en.pdf [Accessed 8 Feb. 2019].*

which in turn has led to a situation where the builder can avoid paying compensation for non-fulfillment of the conditions stipulated under the contract by claiming force majeure which runs contrary to the intention of legislature while drafting the Central Act.

Another instance is the amendment of the definition of Garage to include open parking space which has strictly been excluded by Central Legislation.

The same situation is also prevalent in several other states. The state law in Maharashtra was earlier repealed despite a presidential assent and Kerala too did not implement its own Act. [3]Moreover, certain states such as [4]Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim and Tripura are yet to notify rules.[5]

- Issues pertaining to the compensation as provided under Section 71 of RERA:

  Section 71 provides for appointment of a judicial officer for awarding compensation in addition to the refund granted by the Real Estate Regulatory Authority. Though the intent of the Legislature was to provide some additional relief to the allottees via the said provision, the same is yet to be complied with by majority of the state governments. Therefore, unless the respective state governments appoint the requisite judicial officer, the compensation as enumerated under Section 71 of RERA shall not be awarded to the allottees thereby, defeating the intention of the Legislature altogether.[6]

- Issues pertaining to refund as enumerated under Section 37 of RERA [7]:

  Though the Real Estate Regulatory Authority, under the said provision, has been vested with the power to issue directions regarding refunds to the promoters or the real estate agents as may be necessary, a peculiar stand has been taken up by the authorities of certain state governments. A recent example is the stand taken up by the Haryana Real Estate Regulatory Authority (HARERA) which stipulates that if a project is completed up to the extent of 40% or more then the authority shall not award refund of the amount already deposited, to the allottees as that would hinder the construction of the already delayed real estate project. Though the stand taken by HARERA is a pragmatic one, it fails to take into account that there are certain allottees who have not been handed over possession of their respective apartments for years and years beyond the agreed due date of possession and so are no longer interested in the prospect of owning the apartment solely due to the financial and mental stress that has been caused to them. It is also pertinent to mention here that RERA itself does not lay down any provision that prima facie talks about the percentage or slab of completion of construction which if satisfied would not entail refund of the amount deposited by the allottees.[8]

CONCLUSION

The Real Estate (Development and Regulation) Act, 2016, was enacted to provide an effective grievance redressal mechanism and provides regulations in a highly unregulated sector. Though the Act has addressed the issues of the allottees to a certain extent, a number of lacunae still remain unaddressed. There still exists opaque enforcement mechanisms under the Act coupled with ambiguity with regards to the application of the Act. The decision rendered in *Simmi Sikka v/s Emaar MGF Ltd* [9] has attempted to broaden the ambit of the Act by bringing the unregistered projects under its fold; the Act is still in its nascent phase and requires some refinements in order to handle the prevailing trends in the real estate sector.

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3 ForumIAS Blog. (2019). *Real Estate Regulation Act (RERA): A Critical Evaluation*. [online] Available at: https://blog.forumias.com/real-estate-regulation-act-rera-a-critical-evaluation/ [Accessed 10 Feb. 2019].

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5 *Moneycontrol. (2019). Supreme Court admits homebuyers' petition challenging constitutional validity of WBHIRA. [online] Available at: https://www.moneycontrol.com/news/business/real-estate/supreme-court-admits-homebuyers-petition-challenging-constitutional-validity-of-wbhira-3512861.html [Accessed 6 Feb. 2019].*

6 *Up-rera.in. (2019). [online] Available at: http://up-rera.in/pdf/reraact.pdf [Accessed 10 Feb. 2019].*

7 *Ibid*

8 Moneycontrol. (2019). Refund may not be allowed if project is 40 percent complete: HARERA Gurugram chief. [online] Available at: https://www.moneycontrol.com/news/business/real-estate/refund-may-not-be-allowed-if-project-is-40-percent-complete-harera-gurugram-chief-2889041.html [Accessed 12 Feb. 2019].

9 *Credai.org. (2019). [online] Available at: https://credai.org/assets/upload/judgements/resources/haryana-real-estate-regulatory-authority----ms-simmi-sikka-vs--ms-emaar-mgf-land-limited.pdf [Accessed 9 Feb. 2019].*

SINGH & ASSOCIATES

FOUNDER MANOJ K SINGH

ADVOCATES & SOLICITORS

NEW DELHI
E-337, East of Kailash
New Delhi - 110065, INDIA

GURUGRAM
7th Floor, ABW Tower, MG Service Road
Sector 25, IFFCO Chowk, Gurugram
Haryana - 122001, INDIA

MUMBAI
Unit No. 101, 10th Floor
Sakhar Bhavan, Plot No. 230
Ramnath Goenka Marg
Nariman Point, Mumbai - 400021, INDIA

BENGALURU
N-304, North Block, Manipal Centre
47, Dickenson Road
Bengaluru - 560042, INDIA

india@singhassociates.in
www.singhassociates.in