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INDIAN LEGAL IMPETUS®

EDITORIAL

Manoj K. Singh
Founding Partner

Dear Friends,

It is with extreme pleasure that we bring to you the June Edition of the Indian Legal Impetus which is filled with enraging, enlightening and informative articles dealing with a catena of legal subjects such as Arbitration, criminal Law and the laws relating to the conduct of free, fair and impartial elections in India. We sincerely hope that you will find this issue of Indian Legal impetus informative and engaging and keeping in tune with the latest interpretation of laws in the wake of recent judgements by the Hon'ble Courts.

First up, we have several articles analyzing the recent judgements on the Arbitration and Conciliation Act and how the judiciary has recognized the growing need of lesser intervention and need for giving more teeth to the Alternate Dispute Resolution in India as a preferred mode of Dispute Resolution. Further, there is an article analyzing the recent judgement in the case of Bharat Broadband Network Limited Versus United telecoms Limited [Civil Appeal No. 3972 of 2019 (Arising out of special Leave Petition (Civil) no. 1550 of 2018)]decided on 16.04.2019. The author in the said article, discusses step forward towards achieving the goal of having Arbitration as the better alternative and also to ensure an independent and Impartial Tribunal, which can decide the disputes in an unbiased manner.

The next article is Arbitration as an answer to the snail-paced litigation in India: the pro- arbitration stand of the judiciary which discusses the pro- arbitration Approach of the Judiciary. The next article in this segment focuses on the Scope of examination under Section 11(6a) of the Arbitration & Conciliation Act, 1996.

The next article is an analysis of the role of an Arbitral tribunal to enforce a contempt proceeding under section 17 of the Arbitration and Conciliation Act, 1996. In response to the proposition it was culled out that the intention of the law commission behind the change was to give more teeth to the interim orders of the Arbitral Tribunal as well as to secure enforcement and that cannot be implemented effectively if the charge was solely taken control by the Arbitral Tribunal. With assistance from the Court the change will prove to be beneficial to accord efficacious remedy to the aggrieved party.

The next segment highlights the important provisions of the Indian evidence Act, 1872, regarding the principle of burden of proof and adverse inference titled as "Onus to prove a fact lies on the person who alleges it".

The next segment highlights the recent interpretation given to Section 498A, of the Indian Penal code, "Jurisdiction to Entertain a Complaint for Offences under Section 498A, of the Indian Penal code" vide this article the entire provisions of section 498A is discussed and the observation of the Hon'ble Courts that the place where the wife takes shelter after leaving or being driven away from the matrimonial home on account of acts of cruelty committed by the husband or his relatives, would be dependent on the factual situation, and would also have jurisdiction to entertain a complaint alleging commission of offences under Section 498A of the Indian Penal Code.

The next segment highlights the law relating to the registration of the memorandum of family. This article explores requirement of registration of a memorandum of family settlement involving immovable properties.

We also have a law analysis of the statutory provisions vis-à-vis victim compensation in India and the laws regarding the same.

Further, we have a very interesting article on "Litigation Funding In India".

The last segment is with respect to the role of the judiciary in conducting free and fair elections in India.

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

Thank you.

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FREE AND FAIR ELECTIONS: ROLE OF JUDICIARY

Anmol Kumar and Apara Mahishi

A democracy boasts of certain traits - an important one being free and fair elections. Pre-election measures to prohibit certain people from being elected as people's representatives is critical to the functioning of democracy - as once elected, representatives assume office for a period of five years and the brunt of any bad decision taken by such representatives will have to be borne by the voters. It therefore, becomes pertinent for the voters to make the right call which would be possible only if they are apprised of the actual credentials of the candidates contesting in the elections. An ideal candidate would put forth his true intentions and would completely refrain from indulging in malpractices in order to influence the voters of their respective constituencies; but such is not the case when it comes to contemporary elections. Certain instances of malpractices during elections are enumerated below:

1. Using an 'apolitical' to promote the political agenda - Famous personalities from different spheres, not even remotely allied with a political party, are summoned to lure the voters in favour of a particular political party.

2. Abuse of religion and caste to pile up votes – An age old strategy adopted by the candidates is pitching one religion/ caste against another in order to appeal to the religious sentiments of the masses which ought to be kept away from the purview of elections in order for it to be termed as a free and fair election. Members of one or more communities are aroused to vote on religious or caste lines. Although the Election Commission imposes sanctions on such candidates, there are still some who find a way to fit in religion/ caste in their electoral campaign.

3. Incentives for votes - A substantial sum of money spent by candidates is used to pay voters for votes in cash or liquor, or to pay those attending rallies for their time and such incentives are kept below the radar of the Election Commission.

4. Black money comes into play - As per the threshold set by the Election Commission, a candidate can spend, for his/her canvassing for Lok Sabha elections, between Rs 50 lakh and Rs 70 lakh, depending on the state they are contesting the Lok Sabha election from. For all states, except Arunachal Pradesh, Goa and Sikkim, a candidate can spend a maximum of Rs 70 lakh on canvassing. The cap for Arunachal Pradesh, Goa and Sikkim is Rs 54 lakh and, it is Rs 70 lakh for Delhi and Rs 54 lakh for other Union territories. [1] However, it is a common practice for contesting candidates to exceed this threshold, exponentially, when it comes to drawing in votes.

5. Taking over of the election booths by the political influencers – Certain political parties in the past have been involved in the unprofessional conduct of capturing the voting booths in order to compel the voters to vote for a particular political party.

6. Electoral list comprising of duplicate voters – It is not uncommon to stumble across lakhs of duplicate voters in the electoral list as has been evidenced in the elections conducted previously.

7. Tampering of Electronic Voting Machines during and after the polling process –There have been instances wherein some EVMs were tampered in a way for votes to be casted in favour of a particular political party. Further, this practice can also take place after the polling and before the commencement of counting of votes.

Judicial decisions ushering in electoral reforms commenced in the year 1978, when the Hon'ble Supreme Court of India interpreted Article 324 of the Constitution to empower the Election Commission with unbridled powers in conducting and supervising elections in *Mohinder Singh Gill and Another v. Chief*

1 *https://www.hindustantimes.com/india-news/cost-of-an-election-who-can-spend-what-and-how-much/story-gbiG8nbx2mLhePAeQ6fmoM.html*

Election Commissioner, New Delhi and Others[2] wherein the court held that the Constitution contemplates free and fair election and vests comprehensive responsibilities of superintendence, directions and control of the conduct of elections by the EC. This responsibility may cover powers, duties and functions of many sorts, administrative or others, depending on the circumstances.

Dealing with the contentious issue that elections in the country are fought with the help of money power which is gathered from black sources and once elected to power it becomes easy to collect substantial amount of black money which is used towards retaining this newly acquired power and for the purpose of re-election, the Hon'ble Supreme Court in *Common Cause v. Union of India & Ors.*[3] held that the political parties that had not been filing tax returns violated the provisions of the Income Tax Act, 1961, and the burden lies with the candidate to prove that expenditures were incurred by the party and not the candidate himself/ herself. The court then addressed the constitutional issue of the role of the Election Commission in bringing transparency to the process of election. The court concluded that the Election Commission's constitutional authority includes issuing directions for political parties to submit, for its scrutiny, the details of all expenditures incurred or authorized by the parties in connection with the election of their respective candidates.

Treating the right to vote as akin to freedom of speech and expression under Article 19(1)(a) of the Constitution of India and enforcing the right to get information as a natural right flowing from the concept of democracy, in the case of *Union of India v. Association for Democratic Reforms & Anr.*[4], the judiciary brought about a major electoral reform by holding that a proper disclosure of the antecedents by candidates in election in a democratic society might influence intelligently, the decisions made by the voters while casting their votes. Observing that casting of a vote by misinformed and non-informed voter or a voter having one-sided information only is bound to affect the democracy seriously, the court gave various directions making it obligatory on the part of the candidates seeking to be elected, to furnish information about their personal profile, background, qualifications and antecedents. The Court further directed the Election Commission to call for information on affidavit from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/ her candidature:-

1. Whether the candidate is convicted or acquitted or discharged of any criminal offence in the past, if any and whether he was punished with imprisonment or fine.

2. Prior to six months of filing of nomination, whether the candidate is accused in any case punishable with imprisonment for 2 years or more.

3. The assets (immovable, movable, bank balances, etc.) of a candidate and of his/ her spouse and that of their dependents.

4. Liabilities, if any, particularly whether there are any overdues of any public financial institutions or government dues.

5. The educational qualifications of the candidate.

In the landmark judgments titled *Abhiram Singh v. C.D. Commachen (dead) by lrs. & Ors with Narayan Singh v. Sunderlal Patwa & Ors*[5], the Hon'ble Supreme Court reaffirmed the secular character of the Indian state, ruling that election candidates cannot seek votes on the grounds of the religion, caste, creed, community or language of voters.

The Hon'ble Supreme Court in *Krishnamoorthy v. Sivakumar and Ors.*,[6] held that the disclosure of criminal antecedents of the candidates must remain in the public domain on sworn affidavit in order to enable the electorate to be well versed with the credentials of the purported candidates. The relevant portion is extracted as follows- "*The purpose of referring to the instructions of the Election Commission is that the affidavit sworn by the candidate has to be put in public domain so that the electorate can know. If they know the half-truth, as submits Mr. Salve, it is more dangerous, for the electorate are denied of the information which is within the special knowledge of the candidate. When something within*

2 (1978) 1 SCC 405

3 (1996) 2 SCC 752

4 (2002) 5 SCC 294

5 CIVIL APPEAL NO. 8339 OF 1995

6 MANU/SC/0108/2015

special knowledge is not disclosed, it tantamount to fraud, as has been held in S.P. Chengalvaraya Naidu (Dead) By L.Rs. v. Jagannath (Dead) By L.Rs. and Ors. While filing the nomination form, if the requisite information, as has been highlighted by us, relating to criminal antecedents, are not given, indubitably, there is an attempt to suppress, effort to misguide and keep the people in dark. This attempt undeniably and undisputedly is undue influence and, therefore, amounts to corrupt practice. It is necessary to clarify here that if a candidate gives all the particulars and despite that he secures the votes that will be an informed, advised and free exercise of right by the electorate. That is why there is a distinction between a disqualification and the corrupt practice. In an election petition, the Election Petitioner is required to assert about the cases in which the successful candidate is involved as per the rules and how there has been non-disclosure in the affidavit. Once that is established, it would amount to corrupt practice. We repeat at the cost of repetition, it has to be determined in an election petition by the Election Tribunal."

The Hon'ble Supreme Court in *Public Interest Foundation & Ors.v. Union of India & Anr.* [7] put forth certain conditions to be conformed with by the contesting candidates prior to the elections. The relevant portion is extracted as follows - *"Keeping the aforesaid in view, we think it appropriate to issue the following directions which are in accord with the decisions of this Court :- (i) Each contesting candidate shall fill up the form as provided by the Election Commission and the form must contain all the particulars as required therein. (ii) It shall state, in bold letters, with regard to the criminal cases pending against the candidate. (iii) If a candidate is contesting an election on the ticket of a particular party, he/she is required to inform the party about the criminal cases pending against him/her. (iv) The concerned political party shall be obligated to put up on its website the aforesaid information pertaining to candidates having criminal antecedents. (v) The candidate as well as the concerned political party shall issue a declaration in the widely circulated newspapers in the locality about the antecedents of the candidate and also give wide publicity in the electronic media. When we say wide publicity, we mean that the same shall be done at least thrice after filing of the nomination papers."*

CONCLUSION

Therefore, it can be rightly summed up that the Judiciary has taken upon itself the task of refining the electoral system of India. The Parliament and the Election Commission both are slowly climbing up the ladder towards electoral reforms as well. Judicial directions on doling out freebies and donations, proscribing religion and caste based rallies, debarring convicted and incarcerated persons from contesting elections were long overdue and the judiciary has been playing a pertinent role to tackle the same.

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7 WRIT PETITION (CIVIL) NO. 536 OF 2011

ONUS TO PROVE A FACT LIES ON THE PERSON WHO ALLEGES IT

Sara Siddiqi

In this article the focus is on the principle that where a party in possession of best evidence i.e. material document which would throw light on the issue in controversy, withholds it, the court may draw an adverse inference against him. It is important to highlight the important provisions of the Indian Evidence Act, 1872, regarding the principle of burden of proof and adverse inference.

BURDEN OF PROOF

Under Indian Law, the general rule provides that the onus to prove a fact is on the person asserting it.[1]

Chapter VII of the Indian Evidence Act, 1872, deals with matters relating to 'Burden of Proof'. The term '*Proved*' is defined under Section 2 of the Act by stating that 'a fact is said to be proved when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists'. Thus, proof means that 'matter' from which the court either believes the existence of a fact or considers its existence so probable that a prudent man should act upon the supposition that it exists.

Section 101: Section 101 of the Act attempts to define burden of proof. It states that "whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person". Example: A desires the Court to give judgment that B shall be punished for a crime which A says B has committed. A must then, prove that B has committed the crime.[2]

The burden of proof lies on the party which substantially asserts the affirmative of the issue and not upon the party who denies it. Moreover, it is but reasonable that the suitor who relies upon the existence of a fact, should be called upon to prove his own case.

This expression means two things. It means sometimes that a party is required to prove an allegation before judgment can be given in its favour and it also means that on a contested issue one of the two contending parties has to introduce evidence. It was held in the case of *Narayan Bhagwantrao Gosavi Balajiwala vs. Gopal Vinayak Gosavi*[3] that the burden of proof is of importance whereby reason of not discharging the burden, which was put upon it, a party must eventually fail.

The party on whom the onus of proof lies must, in order to succeed, establish a prima facie case. He cannot, on failure to do so, take advantage of the weakness of his adversary's case. He must succeed by the strength of his own right and the clarity of his own proof.

Section 102: Section 102 provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on the either side. Like for example: A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed, as the bond is disputed and the fraud is not proved. Therefore the burden of proof is on B.[4]

In the case *Anil Rishi vs. Gurbaksh Singh*[5], the apex court held that with a view to prove forgery or fabrication in a document, possession of the original sale deed by the defendant, would not change the legal position. A party in possession of a document can always be directed to produce the same. The plaintiff could file an application calling for the said document from the defendant and the defendant could have been directed by the learned Trial Judge to produce the same.

Thus, in terms of this section, the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

1 *Commissioner of Trade Tax, U.P. and Ors. vs. Kajaria Ceramics Ltd. (12.07.2005 - SC) : MANU/SC/0405/2005*

2 *Illustration (a) of Section 101 in The Indian Evidence Act, 1872*

3 *AIR 1960 SC 100*

4 *Illustration (b) of Section 102, Indian Contract Act, 1872.*

5 *(02.05.2006 - SC) : MANU/SC/8133/2006*

The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others.[6]

Section 103: This provision provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. For example: B wishes the court to believe that, at the time in question, he was elsewhere. B must prove it.[7]

In the case of *Surya Pharmaceutical Ltd. vs. Air India Limited*[8] a reference was made in regard to the facts of the case, to Section 103 from the Evidence Act. It was held that a plain reading of the above provisions clearly show that in case the respondent desired the court to believe that in the contract in question, there exists a clause limiting its liability to US $20 per kilogram, then it was for the respondent/defendant to prove this fact.

Section 106: According to Section 106, when any fact is especially within the knowledge of any person, the burden of proof proving that fact is upon him. This section however, is an exception to the general rule contained in Section 10. The principle underlying Section 106 provides that the burden of proof applies only to such matters of defence which are supposed to be especially within the knowledge of the defendant. It cannot apply when the fact is such as to be capable of being known also by a person other than the defendant. In the case *Sardar Gurbaksh Singh vs. Gurdial Singh*[9], it was held by the Bombay High Court that the non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of her case.

Thus, it is the binding duty of a party, personally knowing the whole circumstances of the case, to give evidence on his own behalf and to submit to cross-examination.

Also in a case resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him.[10]

PRINCIPLE OF ADVERSE INFERENCE

Adverse Inference means a legal inference, adverse to the concerned party, drawn from absence of requested evidence or from silence.

Section 114: Section 114 provides that the court may presume the existence of certain facts, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustration (g) of the section provides that the court may presume that evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it.

This illustration enables the court to draw an adverse inference, if the party does not produce the relevant evidence in his power and possession.[11]

Non-production of the documents admittedly available with the appellant that would lend credence to the version set up by the appellant that the incident of corrupt practice was reported to him and/or to his election agent would give rise to an adverse inference against the appellant.[12]

However, it was held by the Supreme Court in case of *Municipal Corporation, Faridabad vs. Siri Niwas*[13], that, presumption as to adverse inference for non-production of evidence is always optional and it is one of the factors which is required to be taken into consideration in the background of facts involved in the dispute. The presumption, thus, is not obligatory because notwithstanding the intentional non-production, other circumstances may exist upon which

6 *Ibid.*

7 *Illustration (b) of Section 103, Indian Contract Act, 1872.*

8 *(19.08.2008 - DELHC) : MANU/DE/1178/2008*

9 *(1927) 29 BOMLR 1392*

10 *State of Rajasthan vs. Kashi Ram (2006) 12 SCC 254, 265 (para 23): AIR 2007 SC 144*

11 *Sharda vs. Dharmpal (28.03.2003 - SC) : MANU/SC/0260/2003*

12 *Pradip Buragohain vs. Pranati Phukan, 2010(4)ALLMR(SC)985, 2010(4) GLT17, JT2010(6)SC 614,*

13 *(06.09.2004 - SC) : MANU/SC/0727/2004*

such intentional non-production may be found to be justifiable on some reasonable grounds.

Withholding has been distinguished from failure and it is stated that an adverse inference can be drawn against a party if there is withholding of evidence and not merely on account of the failure of the party to obtain evidence.[14]

In the case of *State Inspector of Police vs. Surya Sankaram Karri*[15], the Supreme Court held that it is now well settled that when a document being in possession of a public functionary, who is under a statutory obligation to produce the same before the court of law, fails and/or neglects to produce the same, an adverse inference may be drawn against him. The learned Special Judge in the aforementioned situation was enjoined with a duty to draw an adverse inference. Also, where a party failed to produce documents asked for by any authority, the authority would be entitled to draw inferences as it might think justified.[16]

CONCLUSION

The phrase 'burden of proof' is used in two distinct meanings in the law of evidence i.e. the burden of establishing a case and the burden of introducing evidence. The former remains throughout the trial where it was originally placed, whereas the latter may shift constantly as evidence is introduced by one side or the other. The burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it and the case where a party in possession of best evidence i.e. material document withholds it, the court may draw an adverse inference. Thus, the principle is based on the fact that no one shall be allowed to take advantage of his own wrong.[17]

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14 *Srichand vs. State of Maharashtra, AIR 1967 SC 450*

15 *(2006) 7 SCC 172,(24.08.2006 - SC) : MANU/SC/8438/2006*

16 *C.M.P. Co. op. Societies vs. State of M.P., AIR 1967 SC 1815*

17 *BEST ON EVIDENCE, Section 411.*

REGISTRATION OF MEMORANDUM OF FAMILY SETTLEMENT

Harsimran Singh

INTRODUCTION

Under a family settlement or arrangement, members of a family (descending from a common ancestor) settle and resolve their disputed claims in order to maintain harmony and goodwill in the family. This article explores requirement of registration of a memorandum of family settlement involving immovable properties.[1]

The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises like family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and are enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend.[2]

For a family settlement arrangement to achieve its desired goal, the term "family" has to be understood in the broader sense since it includes not only close relations or legal heirs, but also persons who may have an antecedent title, a semblance of a claim or even if they have a *spes successionis* (the chance of an heir apparent succeeding to an estate).

The courts have, therefore, leaned in favor of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect, the *Rule of Estoppel* is pressed into service and is applied to shut out plea of a person who is a party to family arrangement and seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits.[3]

The primary tenet for testing the validity of family settlements is the mutual consideration which flows between the parties (being family members) while putting an end to the claims and counterclaims between them.

STATUTORY MANDATE

Section 17 of the Registration Act, 1908, provides for compulsory registration of the following documents:

(a) instruments of the gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) …

(e) non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

1 *A write up on Family Settlements – Court's Perspective from the author here was earlier included in the Issue XI of Volume X of Indian Legal Impetus being the monthly newsletter of Singh & Associates, Advocates and Solicitors https://www.manupatrafast.com/NewsletterArchives/listing/ILI%20Singh%20Associates/2017/Nov/Vol%20X%20Issue%20XI.pdf*

2 *"Kerr on Fraud" at p. 364*

3 *Kale and Ors. Vs. Deputy Director of Consolidation and Ors. (AIR 1976 SC 807)*

Sub-section (2) of section 17 provides that clauses (b) and (c) of sub-section (1) will inter alia not apply to (i) any composition deed; or to (ii) any document other than the documents specified in sub-section (1A) not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest.

PRECEDENTS

In the case of *Ram Charan Das vs. Girja Nandini Devi* (AIR 1966 SC 323), the Hon'ble Supreme Court has therein observed, "*such family settlement between the members of the family bonafide to put an end to the dispute amongst themselves is not a transfer. It is also not the creation of an interest. In a family settlement, each party takes a share in the property by independent title which is admitted to that extent by the other parties. Every party who takes benefit under it need not necessarily be shown to have, under the law, claim to share in the property. All that is necessary to show is that the parties are related to each other in some way and have a possible claim to the property or a claim or even a semblance of a claim on some other ground as, say, affection". … "Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding the property amongst members of the family. The word "family" in the context is not to be understood in a narrow sense of being a claim to share in the property in dispute.*"

If a family settlement or a family arrangement is found to be bonafide, voluntary, without coercion, under influence, misrepresentation and stands acted upon, it deserves to be upheld and accepted by the courts, even if it involves release or relinquishment or surrender of disposition, assignment, or transfer. (*Smt. Vidyawati Devi Rathi vs. C.G.T* (1988) 169 ITR 708; *CIT vs. A Indiramma* (1986) 160 ITR 829 (Karnataka); *K. Venugopal vs. CIT* (2001) 248 ITR 251 (Mad); *CGT vs. D. Nagrirathinam* (2004) 266 ITR 342 (Madras))

If such an arrangement is entered into bonafide and the terms thereof are fair in the circumstances of a particular case, courts will more readily give consent to such an arrangement rather than avoid it. (*Pulliah vs. Narasimham* AIR 1966 SC 1836)

"It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties, and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to its share and recognizing the right of the others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned, and therefore no conveyance is necessary." (*Sahu Madho Das v. Mukhand Ram* AIR 1955 SC 481)

In *Madho Das*'s case (supra) it was also held by the Hon'ble Court that "*But, in our opinion, the principle can be carried further....we have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges, that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and simple from him or her, or as a conveyance for consideration when consideration is present. … The legal position in such a case would be this. The arrangement or compromise would set out and define that the title claimed by A to all the properties in dispute was his absolute title as claimed and asserted by him and that it had always resided in him. Next, it would affect a transfer by A to B, C and D (the other members to the arrangement) of properties X, Y and Z; and thereafter B, C, and D would hold their respective titles under the title derived from A. However, in that event, the formalities of law about the passing of title by transfer would have to be observed, and now either registration or twelve years adverse possession would be necessary.*"

While discussing *Madho Das* case (supra), the Hon'ble Court held that these observations do not mean that some title must exist as a fact in the persons entering into a family arrangement. They merely mean that it is to be assumed that the parties to the arrangement had an antecedent title of some sort and that the agreement clinches and defines what that title is. … In the circumstances, it can be assumed that the parties

recognized the existence of such antecedent title to the parties to the property as was recognized by them under the family arrangement. It is not so much an existing right as a claim to such a right that matters. The observations further indicate that by family arrangement no title passes from one in whom it resides to the person receiving it and as no title passes no conveyance is necessary. (*Tek Bahadur Bhujil Vs. Debi Singh Bhujil and Ors.* AIR 1966 SC 292)

The decision and observations made in *Madho Das* case (supra) apply to a case where one of the parties claimed the entire property, and such claim was admitted by the others, and the others obtained property from that recognized owner by way of gift or by way of conveyance. In the context of the document stating these facts, the court held the real position to be that the persons obtaining the property from the sole owner derived title to the property from the recognized sole owner and such a document would have to satisfy the various formalities of law about the passing of title by transfer. (*Tek Bahadur Bhujil case* (supra))

In the matter titled *Kale and Ors. Vs. Deputy Director of Consolidation and Ors.* (AIR 1976 SC 807)[4], the Hon'ble Supreme Court put the binding effect and the essentials of a family settlement in a concretized form, and reduced the matter into the form of the following propositions:

> "*(1) The family settlement must be a bona fide one to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;*
>
> *(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;*
>
> *(3) The family arrangements may be even oral in which case no registration is necessary;*
>
> *(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the record or for information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of section 17(2) (sic) (Section 17(1)(b)) of the Registration Act and is, therefore, not compulsorily registrable;*
>
> *(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title, but under the arrangement the other party relinquishes all its claims or titles in favor of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed, and the family arrangement will be upheld, and the Courts will find no difficulty in giving assent to the same;*
>
> *(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable, the family arrangement is final and binding on the parties to the settlement.*"

Where the purported document was not a mere memorandum of family settlement rather a family settlement itself; in other words, where in a settlement document there is a relinquishment of the rights of other heirs of the properties, such document was compulsorily registrable under section 17 of the Registration Act. (*Sita Ram Bhama Vs. Ramvatar Bhama* AIR 2018 SC 3057)

4 *Being on authority on the subject of registration of the memorandum of family settlement*

A document recording previous partition (i.e., not a deed for affecting any *partition in praesenti*) need not be registered. The registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the record or for information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and is, therefore, not compulsorily registrable. (*Holaram and Ors. Vs. Babita Jain and Ors.* MANU/CG/0114/2019)

The Hon'ble Apex Court in the matter tiled "Thulasidhara and Ors. Vs. Narayanappa and Ors.[5]" relied upon its earlier judgment in Kale case (supra) and reiterated that an unregistered family settlement would operate as a complete estoppel against the parties to such a family settlement. Further, the Hon'ble Court also relied upon Subraya M.N. v. Vittala M.N. and Ors.[6] , wherein it was held by the Apex Court that when family arrangement/settlement is orally made, no registration is required and that would be admissible in evidence, however, when reduced in writing, registration is essential, without which it was not admissible in evidence. Clarified that, even without registration, written document of family arrangement / settlement can be used as corroborative evidence as explaining the arrangement made thereunder and conduct of the parties. Inter alia based on above precedents, the Hon'ble Supreme Court concluded that even an unregistered document of family arrangement can be used as corroborative piece of evidence for explaining the nature of settlement / arrangement arrived at between the parties.

CONCLUSION

In case, validity of a memorandum of family settlement is challenged on the grounds of non-registration and/ or deficient stamp duty the court will look into the intention of the proposed memorandum of family settlement. That is, if the court is of the opinion that the proposed memorandum of family settlement is a document:

(i) merely prepared, after the family arrangement had already been made, either for the record or for information of the court for making necessary mutation;

(ii) wherein the parties to the proposed family settlement arrangement have an antecedent title, claim or interest and even a possible claim in the properties that are acknowledged by the parties to the settlement;

(iii) whereby the parties intend to recognize, demarcate, allot and record the assets (including movable and immovable properties) devolved upon them through laws of succession;

(iv) merely create a right in favor of the parties to it for obtaining another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest;

then the court may conclude that registration of proposed memorandum of family settlement is not required, hence no stamp duty payment as per value of the immovable properties involved therein.

However, if the court is of the opinion that by the proposed memorandum of family settlement new rights are created in the immovable properties including relinquishment of existing rights, the court may hold that the proposed memorandum of family settlement is compulsorily registrable.

NOTE: *This article is for academic purposes and should not be construed as a legal advice. In case of any queries / comments please feel free to contact harsimran@singhassociates.in or call at +911146667000*

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5 *MANU/SC/0669/2019 – Order dated 01/05/19*

6 *(2016) 8 SCC 705*

SCOPE OF EXAMINATION UNDER SECTION 11(6A) OF THE ARBITRATION & CONCILIATION ACT, 1995

Prashant Daga & Divya Kashyap

INTRODUCTION

The Arbitration and Conciliation Act, 1996 [hereinafter referred as "**Act**"] was enacted with the objective of providing speedy and effective dispute resolution mechanism and to reduce the burden of courts. For this reason, the Act provides for minimum interference of the judicial authorities in the matters related to arbitration.[1] Further, in order to make arbitration a preferred mode of settlement of disputes, the Act was amended in 2015, bringing in certain much needed changes. Vide the 2015 amendment, a major shift was seen in the approach of the courts in dealing with an application under Section 11 of the Act regarding appointment of arbitrators. Section 11(6A) adumbrates that the scope of enquiry while considering an application under Section 11 by the High Court/ Supreme Court shall be confined to the "examination of the existence of an arbitration agreement".

PRELUDE

Prior to the 2015 amendment, the scope of enquiry under Section 11 of the Act was very broad. The seven judge bench of Hon'ble Supreme Court in *SBP & Co.* vs. *Patel Engineering Ltd.*[2] and in *National Insurance Co* v. *Boghara Polyfab*[3] divided the scope of enquiry into three categories:

(i) Issues which the Chief Justice or his designate is bound to decide;

  (a) Whether the party making the application has approached the appropriate High Court.

  (b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act is a party to such an agreement.

(ii) Issues which the Chief Justice or his designate may choose to decide;

  (a) Whether the claim is a dead (long barred) claim or a live claim.

  (b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

(iii) Issues which should be left to the Arbitral Tribunal to decide.

  (a) Whether a claim made falls within the arbitration clause (for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

  (b) Merits or any claim involved in the arbitration.

It was further held that an enquiry under Section 11 is in the nature of a judicial enquiry. Thus, apart from those issues which should be left for the arbitral tribunal to decide, the court has the power to conclusively determine the issues mentioned at (i) and (ii) stated above and thus, takes the former set of issues out of the jurisdiction of arbitral tribunal and diminishes the scope of power of arbitral tribunal under Section 16 of the Act. In order to check this overreaching power of courts, 2015 amendments were introduced so as to confine the scope of enquiry of courts to the examination of 'existence of an arbitration agreement'.

It has been more than three years since the amendment has been in place, yet there seems to be no clarity on the amended scope of enquiry under Section 11 of the Act. Following are the relevant judicial pronouncements in this regard:

DURO FELGUERA

The Division Bench of the Hon'ble Supreme Court in *Duro Felguera S.A. Vs. Gangavaram Port Limited*[4]

1 *See, Section 5 of the Act.*

2 *SBP & Co. Vs. Patel Engineering Ltd. 2005 (8) SCC 618*

3 *National Insurance Co Vs. Boghara Polyfab (2009) 1 SCC 267*

4 *Duro Felguera S.A. Vs. Gangavaram Port Limited (2017) 9 SCC 729.*

analysed the scope of amended Section 11 of the Act. The issue before the court was whether composite reference of all the disputes between the parties in connection with the "Works" covered under all the five Package Contracts and the Corporate Guarantee dated 17.03.2012 executed by Duro Felguera could be made under Section 11 of the Act. While answering the question in negative, the Court at para 13 held that:

"13. The scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. (supra) and Boghara Polyfab (supra). This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected."

Thus, the Court adopted the literal rule of interpretation of Section 11(6A) and referred the matter to individual arbitration by constituting 6 different arbitral tribunals instead of a composite reference.

ANS CONSTRUCTION

In *ONGC* v. *ANS Constructions Limited and another*[5], an appeal was filed before the Supreme Court against the order of High Court of Karnataka at Bengaluru allowing an application under Section 11 filed by ANS Constructions Limited. The Appellant bolstered their claim on the basis that there was no dispute in existence between the parties. It was contended that since the contract had been discharged, there was no outstanding dues left and hence there was no dispute between the parties. The Respondent submitted that there was a dispute with regard to clearance of Running Account bills and the 'no dues certificate' was also issued under duress. The Court at para 25 dealt with the issues concerning arbitrability of disputes and held that:

"25…If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable. But in case the party is not able to establish such a claim or appears to be lacking in credibility, then it is not open to the courts to refer the dispute to arbitration at all."

After assessing the claims of the Respondent (the task which is to be done by the Arbitral Tribunal under the express terms of the agreement), the Hon'ble court gave its conclusion in the following words: *"In the circumstances, there was full and final settlement of the claim and there was really accord and satisfaction and in our view no arbitrable dispute existed so as to exercise power under Section 11 of the Act. The High Court was not, therefore, justified in exercising power under Section 11 of the Act."*

Thus, the court instead of confining the enquiry to the 'existence of *arbitration agreement*', as envisaged under Section 11, concentrated upon enquiry on 'existence of *arbitrable dispute*'.

UNITED INDIA INSURANCE CO. LTD & ANR.

The question of interpretation of Section 11(6A) arose before the three judge bench of Hon'ble Supreme Court of India in *United India Insurance Co. Ltd and Anr* Vs. *Hyundai Engineering and construction Co. Ltd and Ors.*[6] The question before the court was whether in terms of the insurance agreement, the matter could be referred to arbitration. The arbitration clause in the said matter stated: *"...It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as herein before provided, if the Company has disputed or not accepted liability under or in respect of this Policy..."*

The court held that the aforesaid arbitration clause is a conditional one. That is a precondition and sine qua non for triggering the arbitration clause. To put it differently, an arbitration clause would enliven or invigorate only if the insurer admits or accepts its liability under or in respect of the concerned policy. Here also, even after admitting that there was an arbitration agreement in existence, the court did not refer the matter to arbitration as it was not triggered which implies there was not arbitrable dispute between

5 *ONGC Vs. ANS Constructions Limited and another (2018) 3 SCC 373.*

6 *United India Insurance co. Ltd and Anr v. Hyundai Engineering and construction co. ltd and ors, Civil appeal no. 8146 of 2018 dated 21 August 2018.*

the parties. Nonetheless, the learned single judge of the High Court (whose order was reversed by the Supreme Court) displayed a pro-arbitration approach by referring the dispute to arbitration as his scope of enquiry was limited to examination of existence of arbitration agreement only.

ZOSTEL HOSPITALITY

In *Zostel Hospitality Private Limited and Ors Vs. Oravel Stays Private Limited*[7], the Learned Senior Counsel for the Respondent opposed the application filed under Section 11(6) on the ground that disputes were not covered by the arbitration clause. The three judge bench of the court held that:

"In our considered opinion, in such a suit, even if an application under Section 8 of the Act would have been moved, no stay could have been granted. On a scan of the arbitration clause, there can be no doubt that a clause of arbitration exists between the parties in the Term Sheet. Whether the claims are arbitrable or not, is within the domain of the arbitration"

The Court further relied on Duro Felguera and stated: "*In view of the aforesaid, we are of the opinion that the respondents can raise the issue of arbitrability of the disputes before the arbitrator. Needless to say, our expression of the view that an arbitration clause exists and the arbitrator should be appointed.*" Thus, once the court finds that there exists an arbitration agreement, it should leave the disputes relating to arbitrability to be decided by the arbitral tribunal[8].

DURGA TRADING CORPORATION

Once again, the issue of scope of enquiry under Section 11 came up before the Supreme Court in the case of *Vidya Drolia* Vs. *Durga Trading Corporation*[9] while deciding whether the issues relating to tenancy agreement/lease agreement be arbitrable or not. The court at para 7 noted that:

"It will be noticed that "validity" of an arbitration agreement is, therefore, apart from its "existence". One moot question that therefore, arises, and which needs to be authoritatively decided by a Bench of three learned Judges, is whether the word "existence" would include weeding-out arbitration clauses in agreements which indicate that the subject-matter is incapable of arbitration."

The division bench in the aforesaid matter referred the question of true scope of enquiry under Section 11 along with another question as to whether the disputes under Transfer of Property Act are arbitrable or not to a three-judges bench of the court. Nonetheless, the court made the finding that there is no bar per se to make the disputes concerning lease agreement non-arbitrable.

GARWALE WALL ROPES LTD.

The question with regard to interpretation of Section 11(6A) recently came up before the Hon'ble Supreme Court once again in *Garwale Wall Ropes Ltd Vs. Coastal Marine Constructions and Engineering Ltd*[10]. Here, the issue was whether the arbitration clause present in an unstamped agreement could be considered as valid for the purpose of Section 11 of the Act. Answering this question in negative, the division of the court held that unless it is stamped, the said arbitration agreement is not enforceable (after relying on *SMS Tea estate*[11]). The Court considered only 'existence' of arbitration agreement and not arbitrability of dispute. It made reference to Section 7 and concluded that since the agreement was unstamped it could not be enforced unless the penalty as per relevant stamp act was paid. The court went ahead and clarified the judgement in *United India Insurance Co. Ltd & Anr.* and said that 'existence' shall mean existence in policy and *as a matter of law*. This way Court did not encroach upon the jurisdiction of arbitral tribunal and confined as to existence of only arbitration agreement as per the law.

ARBITRABILITY OF DISPUTES VIS-A-VIS EXISTENCE OF ARBITRATION AGREEMENT

The 246th Law Commission Report suggested that the enquiry under Section 11(6A) of the Act is similar to that prescribed under Section 8 of the Act. It is pertinent to note that there is a stark difference in both the amended provisions. While the latter confines the scope of judicial authority to the *prima facie* enquiry into 'validity' of an arbitration agreement, the former restricts it to the 'existence' of arbitration agreement.

7 *Zostel Hospitality Private Limited and Ors v. Oravel Stays Private Limited (AP(C) 28/2018 dated 19 September 2018*

8 *Arasmeta Captive Power Company Ltd. & Anr. Vs. Lafarge India Pvt. Ltd. (2013) 15 SCC 414*

9 *Vidya Drolia Vs. Durga Trading Corporation, Civil Appeal No. 2402 of 2019 dated 28.02.2019.*

10 *Garwale Wall Ropes Ltd Vs. Coastal Marine Constructions and Engineering Ltd. Civil Appeal No. 3631/2019 dated 10.04.2019.*

11 **SMS Tea Estates (P) Ltd Vs. Chandmari Tea Co. (P) Ltd. (2011) 14 SCC 66**

However, neither section 8 nor Section 11 encompasses the enquiry into "existence of arbitrable dispute". The tests for the arbitrability of the dispute have been settled by the Hon'ble Supreme Court in the case of *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and Others*[12], wherein the court held that:

(i) *Whether the disputes are capable of adjudication and settlement by arbitration*?

(ii) *Whether the disputes are covered by the arbitration agreement*?

(iii) *Whether the parties have referred the disputes to arbitration*?

As per the Act, arbitration agreement means an agreement referred to in Section 7 which exhaustively lays down the essentials of an arbitration agreement. Further, the Supreme Court in the cases of *K K Modi* Vs. *K N Modi*[13] and *Jagdish Chander* Vs. *Ramesh Chander*[14] has already settled the law relating to the meaning of arbitration agreement and as noted above in *Garwale Wall Ropes Ltd (supra),* existence means an existence as a matter of law.

At this juncture, it is efficacious to note Section 16 of the Act which enshrines '*kompetenz-kompetenz principle*' meaning that the arbitral tribunal is competent to rule upon its own jurisdiction. In the light of Section 16, the arbitral tribunal has the power to rule upon the "arbitrability of disputes" as well. The legislature has consciously used the phrase 'existence/ validity of arbitration agreement' to take away the power of the court to rule on substantive arbitrability of disputes to bring coherence in the power of court to refer the dispute to arbitration under Section 8 and 11 vis-a-vis power of arbitral tribunal to rule upon its own jurisdiction and prevent the menace of *SBP & Co* and *Boghara Polyfab*.

CONCLUSION

In the light of the abovementioned judicial pronouncements, it is clear there is a difference of opinion of the Court with regard to scope of enquiry under the amended Section 11 of the Act. Although the Hon'ble Supreme Court has authoritatively determined in *Zostel Hospitality* (supra) that issues related to determination of procedural arbitrability lie outside the scope of power of Courts under Section 11 of the Act. However, the question pertaining to power of courts to deal with substantive/subject matter arbitrability of disputes is yet to be determined by the Supreme Court.

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12 *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and Others (2011) 5 SCC 532.*

13 *K K Modi Vs. K N Modi (1998) 3 SCC 573.*

14 *Jagdish Chander Vs. Ramesh Chander (2007) 5 SCC 719.*

STATUTORY PROVISIONS VIS-À-VIS VICTIM COMPENSATION IN INDIA

Rishab Khare

THE CODE OF CRIMINAL PROCEDURE, 1973

SECTION 357

The object and reasons of the Code of Criminal Procedure Code, 1973, state that Section 357 was intended to provide relief to the victimized and the marginalized sections of the community.

"According to S.357, the Court is enabled to direct the accused, who caused the death of another person, to pay compensation to the persons who are, under the Fatal Accident Act, 1855, entitled to recover damages from the person sentenced, for the loss resulting to them from such death which the accused person has been so sentenced. The object of the section therefore, is to provide compensation payable to the persons who are entitled to recover damages from the person even though fine does not form part of the sentence."[1]

It needs to be mentioned here, that S. 357 of the act provides wide range of powers to the court while it ponders over the question of awarding compensation. Under clause (3), the court may exceed its pecuniary limit while awarding compensation.

Furthermore, the amended code empowered the court to pass and order whereby directing the accused to adequately compensate the victims.

In *Ankush Shivaji Gaikwad vs. State of Maharashtra*[2], the Hon'ble Apex Court observed,

"While the award or refusal of compensation under Section 357 of Code of Criminal Procedure, in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation."

The Hon'ble Court in *Dhampur Sugar Mills Ltd. v. State of U. P. and Ors*[3] observed, "Applying the tests which emerge from the above cases to Section 357, it appears to us that the provision confers a power coupled with a duty on the courts to apply its mind to the question of awarding compensation in every criminal case. We say so because in the background and context in which it was introduced, the power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite Legislature having gone so far as to enact specific provisions relating to victim compensation, courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. It follows that unless Section 357 is read to confer an obligation on courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision."

In *Hari Singh v. Sukhbir Singh and Ors*[4], the court summarized the relevance of the scheme of victim compensation in India in the following manner:

1. The power of courts to award compensation to victims is additional and not ancillary in nature.

2. This scheme is intended to ensure that the aggrieved party or the victim will be provided sufficient redressal under the criminal justice system.

3. It is a constructive approach to crime redressal system in a way that it bridges the gap between the accused and the victim.

4. The power to award compensation is an additional duty upon the courts.

5. It is incumbent upon the court to show that it has sufficiently applied its mind vis-à-vis victim compensation while delivering its judgment.

6. If application of mind is considered to be non-mandatory, the whole purpose of victim compensatory

1 *Accessed at http://shodhganga.inflibnet.ac.in/bitstream/10603/28181/10/10_chapter%203.pdf on 18.04.2018*

2 *(2013) 6 SCC*

3 *(2007) 8 SCC 338*

4 *3(1988) 4 SCC 551*

scheme shall be rendered futile.

7. Court needs to record its reasons in writing while awarding compensation to the victim.

In a number of cases the court has observed that, "… Section 357 Cr.P.C. confers a duty on the court to apply its mind to the question of compensation in every criminal case. It necessarily follows that the court must disclose that it has applied its mind to this question in every criminal case…"[5]

THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2008

SECTION 357A

Section 357A has been inserted in the code via the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009) that deals with victim compensation scheme under the Cr.P.C.

The section provides that all the states in active co-ordination with the central government should prepare a scheme in order to effect victim compensation.

However, at the conclusion of the trial, the court can order for additional compensation if it is satisfied that the compensation granted is inadequate. Compensation can also be granted in cases where the victim has been identified but the offender has not been identified.[6]

However, it is important to note here that no straightjacket formulae can be laid down while granting compensation to the victim. The figure has to be decided on case to case basis with due regard to the facts and circumstances of each case.

S. 357A of the Criminal Code can be summarized into the following:

1. Clause (1) of Section 357A provides for a framework for the purpose of awarding compensation to victim or persons dependent on such victim who has/have sustained injury on account of crime committed upon them. It is pertinent to mention here that Tamil Nadu was the first ever state to establish 'Victim Assistance Fund' of 1 Cr. Rupees. This fund was established to compensate the near and dear ones of murder victims or victims who have sustained grievous injury.

2. Clause (2) of the section provides for granting of compensation by the District Legal Service Authority or the State Legal Service Authority upon the recommendation of the court to the victim under the scheme mentioned in Clause (1).

3. Clause (3) provides for granting of compensation in cases where the compensation fixed by the legal service authority is inadequate in the opinion of the court.

4. Clause (4) provides that when the victim has been identified but the accused has not been, such victim or his or her dependants can make an application to the District Legal Service Authority for obtaining compensation.

5. Clause (5) provides that when such application under Clause (4) has been made, the District Legal Services Authority shall conduct its enquiry before awarding such compensation. It has also been made incumbent upon the authority to award compensation within two months of completion of enquiry.

6. Clause (6) provides that Legal Services Authority, if the case requires, may pass an order for immediate first-aid treatment or other relevant medical benefits to be made available to such victim. However, this benefit can be granted to the victim only when a certificate to that effect has been provided by the police station in charge or the magistrate having jurisdiction over the area. Under the clause, the appropriate authority can also award any other interim relief as it may deem fit.

THE CRIMINAL LAW (AMENDMENT) ACT, 2013

Under the amendment act, various sections were inserted in the criminal code:

Section 357B: The compensation payable by the State Government u/s 357A are in addition to the fines

5 *NEPC Micon Ltd. and Ors. v. Magma Leasing Ltd. (1999) 4 SCC 253*

6 *Pillai P SA, Criminal Law, Lexis Nexis Butterworth Wadhwa, Nagpur, 2012, 11th ed., p. 714.*

imposed and paid to the victim u/s 326A or 376D of Indian Penal Code, 1860.

Section 357C: All hospitals, public or private, shall provide medical assistance to the victim without charging any cost to the victims of offences u/s 376A, 376, 376B, 376C, 376D or 376E of Indian Penal Code, 1860. It has also been made incumbent upon such hospitals to report such incidents to the police authorities.

After the criminal law amendment, S. 376D of Indian Penal Code provides that any fine imposed under this section shall be paid to the victim

3.2 THE PROBATION OF OFFENDERS ACT, 1958

The Probation of Offenders Act empowers the court to release the offender on admonition or after display of good conduct. A few sections namely S. 3 and 4 empower the court to direct the accused to give "reasonable compensation" for the injury sustained by the victim. This section also covers the cost of legal proceedings sustained by the victim.

Furthermore, Section 5 of the act empowers the court to release the offender on a condition that he pays adequate compensation to the victim with due regard to the facts and circumstances of the case.

In *Rajeswari Prasad v. R.B. Gupta*[7], the hon'ble court observed "Phraseology of the section makes it amply clear that such a power vests only with the court releasing an offender and is purely in its discretion. Even an appellate court or High Court cannot interfere unless it is of the view that such power has been exercised capriciously and unreasonably."

THE MOTOR VEHICLES ACT, 1988

The Motor Vehicles Act, 1988, was enacted to consolidate and amend the law relating to accidents arising from motor vehicles. Chapter ten of the act with sections 140-144 provides for interim compensation on no fault basis. The compensation under the provisions can be granted only on a condition when a prima facie evidence is available to that effect.

The objective behind awarding compensation under the Motor Vehicle Act is to reinstate the injured claimant in the pre-accident position. However, no amount is adequate to compensate the loss of life or limbs of the accused.

Section 140 to 144 provides for compensation upto Rupees 50,000/- to the victim on "no fault" basis that is to say that he is not required to prove negligence and wrongful conduct on the part of vehicle owner. Furthermore, contributory negligence on the part of the victim is inconsequential for the purpose of granting compensation under the act.

Also, another sparkling feature of the act is that it enables the court to award compensation to the victim when the accused is not traceable. An example in this regard will be hit and run cases.

CONCLUSION AND SUGGESTIONS

The media and politics have now started focusing on victim's rights and their interests as they both call for greater law and order stance. On another footing, it has been argued that the interests of victims are being played with to cater the entertainment need of media and to serve the political agenda as well. Therefore, victim's interests are to be focused on first and should be kept on a higher pedestal. The initiatives to further this cause should be victim centered as per their needs and interests and the perpetrator should be dealt accordingly to secure justice and equity.

The criminology studies revolve around the victims as they are its integral part of it. However, the system still lags to secure their basic rights and interests. However, it is to be seen carefully that the accused should not escape the culpability while the victim's rights and interest are focused upon. As far as the authorities are concerned, they must take the victims with more seriousness and should co-operate in all aspects.

The stand of judicial courts and pronouncements should be made more sensitive so as to maximize the scope of victim compensation. Apart from the formalized rape victims, the victim compensation stands in the court of law is very arbitrary and hence should be made more effective to serve the interests of the victims and the justice system.

In the landmark care of *Ankush Shivaji Gaikwad v. State of Maharashtra*[8], the Hon'ble court laid down that:

7 AIR 1961 SC 19

8 AIR 2013 SC 2454

"While the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation"

The primary objective of the criminal justice system is to secure and protect the interest of the victims. Often, rather than keeping the accused behind the bars, the courts should direct the accused to pay certain amount as compensation to the affected party to ensure the justice delivery system. This compensatory scheme can also become an adequate substitute to the accused being sent to jail for a light sentence of imprisonment. To secure the proper enforcement of order of compensation, imposition of fine upon the accused cannot be treated as in lieu of not imposing a sentence, rather should be considered as recourse for rehabilitation of the victim in the cases of heinous crimes.

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APPOINTMENT OF ARBITRATOR IN CONTRAVENTION OF SECTION 12(5) OF THE ARBITRATION AND CONCILIATION ACT, 1996, IS NON-EST

Nilava Bandyopadhyay

The Hon'ble Supreme Court in a recent matter[1] had the occasion to interpret section 12(5) of the Arbitration and Conciliation Act, 1996 (the A&C Act).

Bharat Broadband Network Ltd. (BBNL) had floated a tender dated 05.08.2013 inviting bids for a turnkey project for supply, installation, commissioning, and maintenance of GPON equipment and solar power equipment. United Telecoms Limited (UTL) participated in the tender and was the successful L1 bidder. BBNL issued an Advance Purchase Order (APO) on 30.09.2014.

Clause III.20.1 of the General (Commercial) Conditions of Contract (GCC) provides for arbitration. The said clause also provides that *"…in the event of any question, dispute or difference arising under the agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BBNL...and if the CMD or the said officer is unable or willing to act as such, then to the sole arbitration of some other person appointed by the CMD or the said officer. …The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act 1996. There will be no object to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a Government Servant/PSU Employee he has expressed his views on all or any of the matters in dispute…."*

Since disputes and differences arose between the parties, UTL, by its letter dated 03.01.2017, invoked the arbitration clause and called upon BBNL's CMD to appoint an independent and impartial arbitrator for adjudication of disputes which arose out of the aforesaid APO dated 30.09.2014. By a letter dated 17.01.2017, the CMD of BBNL, in terms of the arbitration clause contained in the GCC, nominated one Shri K. H. Khan as Sole Arbitrator to adjudicate and determine disputes that had arisen between the parties.

The issue arose, after the pronouncement [on 03.07.2017] of the Hon'ble Supreme Court in the matter *TRF Ltd. v. Energo Engineering Projects Ltd.*,[2] wherein it was held that since a Managing Director of a company which was one of the parties to the arbitration, was himself ineligible to act as arbitrator, such ineligible person could not appoint an arbitrator, and any such appointment would have to be held to be null and void.

BBNL despite the fact that it appointed the Sole Arbitrator, in view of the law laid by the Hon'ble Supreme Court in TRF Ltd. (*supra*), made a prayer before the Sole Arbitrator that since he is de jure unable to perform his function as arbitrator, he should withdraw from the proceedings to allow the parties to approach the High Court for appointment of a substitute arbitrator in his place. The Sole Arbitrator, by an order dated 21.10.2017, rejected the plea of BBNL, although without giving any reasons.

This led to a petition being filed by BBNL before the High Court of Delhi under Sections 14 and 15 of the A&C Act, to state that the arbitrator has become de jure incapable of acting as such and that a substitute arbitrator be appointed in his place. This plea of BBNL did not find any favour from the High Court and the High Court vide judgment dated 22.11.2017, dismissed the BBNL's Petition inter alia holding that the very person who appointed the arbitrator is estopped from raising a plea that such arbitrator cannot be appointed after participating in the proceedings. The High Court also held that in view of the proviso to Section 12(5) of the A&C Act, inasmuch as BBNL itself has appointed the Sole Arbitrator, and UTL has filed a Statement of Claim without any reservation, also in writing, the same would amount to an express agreement in writing,

1 *Bharat Broadband Network Limited Versus United Telecoms Limited [Civil Appeal No. 3972 of 2019 (Arising out of Special Leave Petition (Civil) No.1550 of 2018) decided on 16.04.2019]*

2 *(2017) 8 SCC 377*

which would, therefore, amount to a waiver of the applicability of Section 12(5) of the Act.

Before the Hon'ble Supreme Court, it was argued by BBNL that in view of section 12 to 14 of the A&C Act and the judgment in TRF Ltd. (*supra*), the appointment of Sole Arbitrator is void ab initio. It was also argued by BBNL that since there is no express agreement in writing between the parties subsequent to disputes having arisen between BBNL and UTL, the proviso to section 12(5) of the A&C Act will not be applicable in the present case.

On the other hand, it was argued by UTL that section 12(4) of the A&C Act makes it clear that a party may challenge the appointment of an arbitrator appointed by it only for reasons of which it became aware after the appointment has been made. In the facts of the present case, since Section 12(5) and the Seventh Schedule were on the statute book since 23.10.2015, BBNL was fully aware that the Managing Director of BBNL would be hit by Item 5 of the Seventh Schedule, and consequently, any appointment made by him would be null and void. This being so, Section 12(4) of the A&C Act acts as a bar to the petition filed under Sections 14 and 15 by BBNL. Coming to the proviso to Section 12(5) of the A&C Act UTL argued that "express agreement in writing" in the proviso to Section 12(5) of the A&C Act is clearly met in the facts of the present case. This need not be in the form of a formal agreement between the parties, but can be culled out, as was rightly held by the High Court, from the appointment letter issued by BBNL as well as the Statement of Claim filed by UTL.

The Hon'ble Supreme Court, while deciding the issue at hand, referred three judgments of the Hon'ble Supreme Court, which deal with section 12(5) of the A&C Act, i.e., Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.[3], HRD Corporation v. GAIL (India) Ltd.[4] and TRF Ltd. (*supra*).

In Voestalpine (*supra*) the Hon'ble Court held that *"Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the "circumstances" which give rise to "justifiable doubts" about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exist, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of subsection (5) of Section 12 and nullify any prior agreement to the contrary.…"*

In HRD Corporation (*supra*) the Hon'ble Court, after setting out the amendments made in Section 12 and the Fifth, Sixth, and Seventh Schedules to the Act, held as follows:

"12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1) (a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds…."

3 (2017) 4 SCC 665

4 (2018) 12 SCC 471

In TRF Ltd. (supra), the Hon'ble Supreme Court referred to Section 12(5) of the A&C Act in the context of appointment of an arbitrator by a Managing Director of a corporation, who became ineligible to act as arbitrator under the Seventh Schedule and held that:

"In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. …"

The Hon'ble Court also noted that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 (Amendment Act, 2015), makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

The Hon'ble Court further observed that Section 12(5) of the A&C Act is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non-obstante clause the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) of the A&C Act by an express agreement in writing.

The Hon'ble Court also observed that whether an ineligible person could himself appoint another arbitrator was only made clear by the Hon'ble Court's judgment in TRF Ltd. (*supra*) on 03.07.2017. Therefore, BBNL was right in its contention that appointment of the Sole Arbitrator in the present case goes to "eligibility", i.e., to the root of the matter, and it is obvious that the Sole Arbitrator's appointment would be void. The Hon'ble Court held that the judgment in TRF Ltd. (*supra*) nowhere states that it will apply only prospectively, i.e., the appointments that would be made after the pronouncement of the judgment.

Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23.10.2015.

The Hon'ble Court also held that there exists no express agreement between BBNL and UTL regarding non-applicability of section 12(5) of the A&C Act or waiving the objections regarding appointment of the Sole Arbitrator. The Hon'ble Court also held that in light of TRF Ltd. (*supra*) the appointment of the Sole Arbitrator was non-est. Therefore, the Hon'ble Court set aside the appointment of the Sole Arbitrator and also set aside the award(s) passed by the said Sole Arbitrator during the pendency of the present dispute.

The Hon'ble Supreme Court in *Bihar State Mineral Development Corporation and Another vs. Encon Builders (I) Pvt. Ltd.*[5] has held that *"…It is further well settled that justice should not only be done but manifestly seen to be done."* This judgment is a further step forward towards achieving the goal of having Arbitration as the better alternative and also to ensure an independent and impartial Tribunal, which can decide the disputes in an unbiased manner.

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5 *(2003)7 SCC 418*

ARBITRATION AN ANSWER TO THE SNAIL-PACED LITIGATION IN INDIA: THE PRO-ARBITRATION STAND OF THE JUDICIARY

Swati Sinha

Recently I met a friend who was thoroughly disgruntled with the shape his litigation case was taking even after three years. Everything seemed lost for him even before he had actually lost it. He wished he had pursued a different course of action. This is typical of all those who choose to pursue litigation in courts for years. Therefore, we are confronted with the task of finding an alternative to resolve our disputes. This is where Arbitration as an Alternate Dispute Resolution comes forward as an answer to the ordeal of litigation.

Arbitration as an Alternate Dispute Resolution is fast evolving into the desired option for achieving dispute resolution and has become a more plausible alternative than going through the whole hog of litigation in India. It is notable here that Indian Judiciary itself has recognized the need for an Alternate Dispute Resolution and was instrumental in shaping Arbitration and encouraging arbitration by taking a pro – arbitration stand.

Pro-arbitration Stand by the Judiciary - In terms of the recent judgments recognising the pendency and backlog of cases that has plagued the judiciary

In **ICOMM Tele Ltd Vs. Punjab State Water Supply & Sewerage Board and Another, 2019 SCC Online SC 361** the Hon'ble Apex Court came down heavily on the on the pre-deposit of 10% of the amount claimed in order to avoid frivolous claims by the party invoking Arbitration which was contained in the Arbitration Clause 25(viii) of the notice inviting tender. The Apex Court referred to its earlier decision in **General Motors (I) (P) Ltd v. Ashok Ramnik Lal Tolat, (2015) 1 SCC 429** and observed that it is a settled law that arbitration is an important alternate dispute resolution process which is to be encouraged because of high pendency of cases in courts and cost of litigation. Any requirement as to deposits would certainly amount to 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 the court fees that may be charged for filing a suit in Civil Court .

In view of the above pro arbitration stand by the Hon'ble Apex Court, it was thus held 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 "

In **Damont Developers Pvt Ltd Vs. BRYS Hotels Pvt Ltd; 2019 SCC Online Del 7478** petitioner sought for appointment of an arbitrator under the terms of Section 11(6) of the Arbitration and Conciliation Act, 1996. The Hon'ble High Court maintaining a pro-arbitration stand held:

" In the present case, there is a valid arbitration agreement between the parties contained in Clause 10(e) of the MOU dated 17th September, 2016. The Petitioner has validly invoked the arbitration vide notice dated 27th September, 2018. Under Section 11(6A) of the Arbitration and Conciliation Act, this Court has to confine only to the existence of an arbitration agreement and all other objections including the objection as to insufficient stamping have to be considered by the Arbitrator "

The Hon'ble Supreme Court in **Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd Vs. Jade Elevator Components, 2018** was posed with a question on whether an agreement between parties giving an option to the parties to choose dispute resolution by court or arbitration is a valid arbitration agreement or not .

The dispute handling clause contained in Clause 15 of the Agreement read as under:

"15 Dispute handling – Common processing contract disputes, the parties should be settled through consultation; consultation fails by treatment of to the arbitration or the Court. "

The apex Court, while relying on the decision in **Indtel Technical Services (P) Ltd Vs. W.S Atkins Rail Ltd; (2008) 10 SCC 308,** observed that emphasis has been laid on the intention of the parties to have their disputes resolved by arbitration. It was therefore, held that Clause 15 refers to arbitration or court and there is an option and the Petitioner has rightly invoked the arbitration clause.

The fillip of reform in the Indian Judicial system has been slow and despite an acknowledgment that the Indian Judiciary needs an overhaul in its working considering the given backlog of cases no drastic steps have been adopted by the Judiciary and there seems to be a tacit reconciliation with the state of affairs. It is under these circumstances Arbitration was recognized as a faster, less expensive and more private option than litigation and is a step towards addressing the woes of litigation in India and time and again has been encouraged and endorsed by the Courts themselves.

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CAN THE ARBITRAL TRIBUNAL ENFORCE A CONTEMPT PROCEEDING UNDER SECTION 17 OF THE ARBITRATION AND CONCILIATION ACT, 1996?

Shelly Tyagi

Section 17 of the Arbitration and Conciliation Act, 1996, provides for grant of interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute for which subsection (2) of the section confers a discretion on the arbitral tribunal to require a party to provide appropriate security in connection with such measures.

Post the 2015 amendment, Section 17 allows the interim orders passed by the tribunal to be treated at par with the orders of the court and shall be enforced in the same manner but in no scenario can the arbitrator be regarded as a court of law. When implying the above, if any party breaches to comply with the order of the tribunal whether or not a contempt proceeding be initiated by the arbitrator himself has been discussed in the following judgements.

To what extent an arbitrator can exercise his judicial implementation is what that has been enumerated in the case of *Alka Chandewar v. Shamshul Ishrar Khan*[1]. The Supreme Court canvassed an interpretation whereby the arbitration tribunal was brought within the ambit of both Contempt of Courts Act, 1979 and Order 39 Rule 2A Code of Civil Procedure, 1908. It stated that the arbitral tribunal need not turn to the High Court every time for contempt of its orders. Section 17 ensures a right to the parties to approach the arbitral tribunal rather than awaiting enforcement orders from the Court.

The inadequacy set out under section 17 lacked a ground rule as to what remedy shall be resorted to, if the parties failed to meet the orders of the tribunal. Not only the process was long and mechanical but lacked certainty as to its compliance. Post amendment, Section 17 of the Act grants the arbitral tribunal the power to get the interim orders enforced which were earlier left to the anticipation of the Court when the said representation was made by the tribunal. The subsection 2(2) to the section 17 takes into account the incommodious procedure of the arbitral tribunal of having to apply to the High Court every time for contempt of its order. As a result, the interim order shall be deemed to be an order of the court for all purposes where the phrase 'for all purposes' as marked in the subsection (2) has been heavily relied on.

This point was ushered in the case of *Sundaram Finance Ltd. vs. P. Sakthivel and Ors*[2] wherein it was stated that even though the tribunal is empowered to provide interim measures, it cannot in any event enforce it on its own, thus, necessitating knocking the doors of the District Court. The Madras High Court here reiterated the fact that what is to be performed by the Court here was a pure ministerial act and thus no judicial order was warranted from the District Court for implementing the interim order passed by the tribunal under section 17 of the Act and since such interim order is appealable in view of section 37(2)(b) of the act there is a built in safeguard also.

It can be further said that the procedure for enforcement and preservation of the interim order cannot be done without the assistance of the Court. In order to ensure urgent relief after the award has been enforced, the remedy provided under section 17 may not be efficacious because it is possible that the Arbitral Tribunal may not be readily available.[3] Also the plain reading of the section evidently shows the discretion provided to the Arbitral Tribunal demarcated by the use of the word 'may' which connotes only a permissive power upon the tribunal.

Accordingly as mandated in the case of *Sundaram Finance Ltd. v. P. Sakthivel and Ors*, the District Courts shall take note of the legislative amendment along with the decision of the Supreme Court in *Alka Chandewar v. Shamshul Ishrar Khan and give effect to the interim order passed by the Arbitral Tribunals suitably.*

1 MANU/SC/0818/2017

2 MANU/TN/5438/2018

3 M. Ashraf vs. Kasim V.K, MANU/KE/3314/2018

Examining the cases above, it can be concluded that if a party fails to comply with the orders of the arbitral tribunal and the tribunal is satisfied of the contempt it can consequently make a representation to the Court which is now a competent authority and will deal with the contempt in the same manner as the contempt of court. The intention of the law commission behind the change was to give teeth to the interim orders of the tribunal as well as to secure enforcement and that cannot be implemented effectively if the charge was solely taken control by the arbitral tribunal. With assistance from the Court the change will prove to be beneficial to accord efficacious remedy to the aggrieved party.

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FATE OF LITIGATION FUNDING IN INDIA

Sara Siddiqi

Litigation Funding, also known as Third Party Funding, in simple words means the practice of a third party funding litigation, in exchange for proceeds that result from the lawsuit. Litigation Funding was introduced in order to facilitate access to justice to an indigent or an impecunious person, who was unable to fund the proceedings. However, now the need to maintain a healthy cash flow in business, and the need to manage and allocate the risks of proceedings as well as the need for alternative avenues for investment have led to exploring of the concept of Litigation Funding.

Litigation funding or third party funding is not limited to litigation only, but also covers arbitration disputes. Companies need payments as per contracts, faster arbitration and court processes to ease the cash flows.

The use of Litigation funding is very well established in the jurisdictions like U.S.A., U.K. and Australia and has been picking up pace in countries like Singapore and Hong Kong. In U.S.A., Third Party Litigation Funding/ Legal Financing agreements are not prohibited and even lawyers are permitted to fund the entire litigation and take their fee as a percentage of the proceeds if they win the case. In U.K., Section 58B of the Courts and Legal Services Act, 1990, permits litigation funding agreements between legal service providers and litigants or clients, and also permits third party Litigation Funding or Legal Financing agreements, whereby the third party can get a share of the damages or winnings.

Singapore has passed amendments to its Civil Law Act legalizing third party funding for arbitration and associated proceedings. Similarly, Hong Kong legalized third party funding for arbitrations and mediations.

In comparison, the use of Litigation funding in the Indian jurisdiction is at an immature stage. In *Bar Council of India vs. A.K. Balaji and Ors.*[1] , it was observed by the Hon'ble Supreme Court that even though Bar Council of India Rules strongly suggest that advocates in India cannot fund litigation on behalf of their clients, there appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation.

It is important to note that there is no express legislation in India which prohibits Third Party Funding. This can be conceived from the amendments in Order XXV of the Code of Civil Procedure, carried out by few sates including Madhya Pradesh and Maharashtra, with respect to security for costs. It provides for the power of the plaintiff to implead and demand security from third person financing litigation.

Some developments are however giving momentum to this concept. On March 26, 2019, Hindustan Construction Company Ltd. (HCC) entered into an agreement with a consortium of investors led by US-headquartered BlackRock to monetize an identified pool of arbitration awards and claims for a consideration of Rs 1,750 crore.

HCC has created a pool of arbitration awards and claims and transferred its beneficial interest and rights to a special purpose vehicle controlled by BlackRock-led investors. Companies need payments as per contracts, faster arbitration and court processes to ease the cash flows, therefore the recent development in Litigation funding or third party funding, is another paradigm shift in the Arbitration regime in India

CONCLUSION

Although Litigation funding has not been blessed with a specific legislation in India, there is no express bar on obtaining Litigation or third-party funding. This development in Litigation funding or third party funding, would go a long way in further making India an arbitration friendly jurisdiction.

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1 (13.03.2018 - SC) : MANU/SC/0239/2018

JURISDICTION TO ENTERTAIN A COMPLAINT FOR OFFENCES UNDER SECTION 498A, OF THE INDIAN PENAL CODE

Prateek Dhir

The bench comprising of Justice Ranjan Gogoi, Justice L. Nageshwara Rao and Justice Sanjay Kishan Kaul, in the Criminal Appeal titled No.71 of 2012 as *Rupali Devi vs. State of Uttar Pradesh & Ors.* along with other criminal appeals, has clarified that the courts at the place where a wife takes shelter after leaving or driven away from the matrimonial home on account of facts of cruelty committed by the husband or his relatives, would, dependent on the factual situation, also have jurisdiction to entertain a complaint alleging commission of offences under Section 498 A of the Indian Penal Code.

The question that arose for determination of appeals, before the Hon'ble Apex Court was , "Whether a woman forced to leave her matrimonial home on account of acts and conduct that constitute cruelty can initiate and access the legal process within jurisdiction of the courts where she is forced to take shelter with the parents or other family members?".

DIFFERENT VIEWS OF THE HON'BLE SUPREME COURT QUA JURISDICTION OF THE COURTS, IN THE MATTERS OF COMMISSION OF OFFENCES UNDER SECTION 498 A OF THE INDIAN PENAL CODE:

The Hon'ble Court while deciding the jurisdictional aspect of the **commission of offences under Section 498 A of the Indian Penal Code,** in the instant Criminal Appeals took into the consideration, the view taken by the Hon'ble Court in the matters of **(i) Y. Abraham Ajith and Others v. Inspector of Police, Chennai and Another[1] (ii) Ramesh and Others v. State of Tamil Nadu[2] (iii) Manish Ratan and Others v. State of Madhya Pradesh and Another[3] (iv) Amarendu Jyoti and Others v. State of Chhattisgarh and Others[4],**

1. *(2004) 8 SCC 100*
2. *(2005) 3 SCC 507*
3. *(2007) 1 SCC 262*
4. *(2014) 12 SCC 362*

account of cruelty committed to a wife in a matrimonial home she takes shelter in the parental home and if no specific act of commission of cruelty in the parental home can be attributed to the husband or his relatives, the initiation of proceedings under Section 498A in the courts having jurisdiction in the area where the parental home is situated will not be permissible. The Hon'ble court has further observed and stated, in light of the abovementioned cases that**, *"The core fact that would be required to be noted in the above cases is that there were no allegations made on behalf of the aggrieved wife that any overt act of cruelty or harassment had been caused to her at the parental home after she had left the matrimonial home"*,** thus the circumstances, manner and place in which the offence was committed or is being committed, play a vital role, in order to establish the continuing offence.

Contrary to the views mentioned above, the Hon'ble Apex Court has further taken into consideration the outlook taken in the matters of **(i) Sujata Mukherjee v. Prashant Kumar Mukherjee [5]; (ii) Sunita Kumari Kashyap v. State of Bihar and Another[6] and (iii) State of M.P. v. Suresh Kaushal & Anr.[7]**, wherein it has been duly observed that, in light of the facts prevailing, either the offence under Section 498A is a continuing one or the consequences of the offence under Section 498A have occurred at the parental home and, therefore, the court at that place would have jurisdiction. The views taken by the Hon'ble Apex Court are varying since they are dependent on the existing facts and circumstances in the matter, which may vary from case to case.

RELEVANT PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE DEALING WITH THE JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS:

Section 177 of the Code of Criminal Procedure states, ***"Ordinary place of inquiry and trial - Every offence***

5. *(1997) 5 SCC 30*
6. *(2011) 11 SCC 301*
7. *(2003) 11 SCC 126*

shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed."

Section 178 of the Code of Criminal Procedure states, ***"Place of inquiry or trial-***

(a) When it is uncertain in which of several local areas an offence was committed, or
(b) Where an offence is committed partly in one local area and partly in another, or
(c) Where an offence is a continuing one, and continues to be committed in more local areas than one, or
(d) Where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas."

Section 179 of the Code of Criminal Procedure states, ***"Offence triable where act is done or consequence ensues - When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued."***

The Hon'ble Supreme Court has rightfully observed and stated that, ***"Section 178 creates an exception to the 'ordinary rule' engrafted in Section 177 by permitting the courts in another local area where the offence is partly committed to take cognizance. Also if the offence committed in one local area continues in another local area, the courts in the latter place would be competent to take cognizance of the matter. Under Section 179, if by reason of the consequences emanating from a criminal act an offence is occasioned in another jurisdiction, the court in that jurisdiction would also be competent to take cognizance."***

WHAT CONSTITUTES CONTINUING CAUSE OF ACTION

The Hon'ble Supreme Court in deciding as to what constitutes the continuing offence have relied upon, State of Bihar v. Deokaran Nenshi[8], wherein it has been duly observed that, ***"A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arise out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or 6 complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."***

CONCLUSION

Cruelty has appropriately been defined in the Black's Law Dictionary which says, "The intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human; abusive treatment; outrage (abuse, inhuman treatment, indignity)". The basic object of the Section 498A Indian Penal Code, is to combat the increasing cases of cruelty on wife by the husband and the relatives of the husband. While deciding the instant matter, the Hon'ble Supreme Court has analyzed that the provisions contained in Section 498A of the Indian Penal Code, undoubtedly encompasses both mental as well as the physical well being of the wife and in light of the Section 179 Criminal Procedure Code, the Hon'ble Court has held that the Courts at the place where the wife takes shelter after leaving or driven away from the matrimonial home on account of acts of cruelty committed by the husband or his relatives, would, dependent on the factual situation, also have jurisdiction to entertain a complaint alleging commission of offences under Section 498A of the Indian Penal Code.

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8. *(1972) 2 SCC 890*

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