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INDIAN LEGAL IMPETUS®

EDITORIAL

Manoj K. Singh
Founding Partner

Dear Friends,

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

The first article highlights the issue surrounding relatively high costs associated with conducting arbitrations in India and disproportionate fee charged by the Arbitrators during the course of proceedings. The article takes into consideration the inter-relationship between Schedule IV and Section 38 of Arbitration and Conciliation Act, 1996. The article takes into consideration various judicial authorities while dealing with the subject.

The second article goes on to throw light on the constitutional intricacies surrounding the Constitution (One Hundred and Twenty-Fourth Amendment) Bill, 2019 to grant reservation in higher education and public employment to "economically weaker sections". The article highlights different constitutional provisions and judicial pronouncements to assess the roadmap ahead for the successful implementation of the reservation for Economically Weaker Sections and how such a step is a welcome change.

The next article addresses the question of locus standi of third parties w.r.t Section 9 of the Arbitration and Conciliation Act, 1996. The article goes on to ascertain through statutory enactments and judicial authorities that a person who invokes Section 9 of the Arbitration and Conciliation Act, 1996 should be a party to the arbitration agreement in order to assert its locus-standi as far as Section 9 applications are concerned.

The next article highlights the growing need to protect individual's privacy in today's era of digitalization and how the executive plans to deal with the same. The article takes into consideration European Union's General Data Protection Regulation (EU GDPR) and demonstrates how it shall act as a guiding light to data protection regulation in the world. The article also lists out the visible consequences that "Personal Data Protection Bill, 2018" will have towards data protection in India.

The article to follow does in depth analysis of Section 29 A of the Arbitration and Conciliation Act, 1996. The article highlights the scope and nature of Section 29 A whereby the parties to the arbitral proceedings are at liberty to approach the court for extension of time period for culmination of arbitral proceedings under specified circumstances including the power to substitute the arbitrator if the delay in proceedings is attributable to it. The court can also provide for various terms and conditions subject to which the extension of time has been granted. The above-mentioned statutory provision attempts to pave the path for speedy disposal of arbitral proceedings.

The next article brings forth the various intricacies associated with creative works made by Artificial Intelligent machines. The article discusses the relevance of such works and the need to confer them protection under the copyright regime. It has been suggested that the work "made for hire doctrine" is the best way forward.

The seventh article in the current edition attempts to highlight the advent of dawn raids in the realm of competition law. The article deals with the pre-requisites for conducting such search and seizure operations, rights of the company subjected to such raids along with the obligations of the accused enterprise in various stages of such a raid. The article has been supported by various judicial pronouncements in India as well as the European Union.

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

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

Thank you.

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CONUNDRUM AROUND THE FOURTH SCHEDULE VIS-À-VIS SECTION 38 OF THE ARBITRATION & CONCILIATION ACT, 1996

Divya Kashyap & Prateek Dhir

INTRODUCTION

"The remedy for healthy development of arbitration in India is to disclose the fees structure before the appointment of arbitrators so that any party who is unwilling to bear such expenses can express his unwillingness. Another remedy is Institutional Arbitration where the arbitrator's fee is pre-fixed. The third is for each High Court to have a scale of arbitrator's fee suitably calibrated with reference to the amount involved in the dispute. This will also avoid different designates prescribing different fee structures. By these methods, there may be a reasonable check on the fees and the cost of arbitration, thereby making arbitration, both national and international, attractive to the litigant public. Reasonableness and certainty about total costs are the key to the development of arbitration. Be that as it may."[1]
The abovementioned observations of Justice R.V. Raveendran highlight that one of the primary concerns regarding arbitration in India prior to 2015 was the high costs associated with the same – including the arbitrary, unilateral and disproportionate fixation of fees by several arbitrators. In order to provide for a workable solution to the problem, the Law Commission of India, vide its 246th Report, recommended for a model schedule of fees for arbitrators, which was later introduced as the Fourth Schedule in the Arbitration & Conciliation Act ("**Act**") by way of amendment carried out w.e.f. October 23rd, 2015.

INTERPRETATION OF SCHEDULE IV VIS-A-VIS SECTION 38 OF THE ARBITRATION & CONCILIATION ACT, 1996

The Schedule IV does not specify whether the 'sum in dispute' mentioned therein would be the amount of the claim and the counter claim separately, or cumulatively. However, in *Delhi State Industrial Infrastructure Development Corporation Ltd. (DSIIDC) Vs. Bawana Infra Development (P) Ltd.*[2] ,Hon'ble Justice Navin Chawla of the Delhi High Court interpreted the Fourth Schedule and observed that the model schedule of fee recommended by the Law Commission is based on the fee set by the Delhi International Arbitration Centre ("**DIAC**"). Since the fee schedule set by the DIAC specifically provides that the "Sum in dispute" shall include the counter claim made by any party. Therefore, the intent of the legislature and the purpose sought to be achieved clearly points to the conclusion that "Sum in dispute" would be a cumulative value of the claim and counter claim. It was further observed in the same judgment that, "*Even in the general parlance, "sum in dispute" shall include both claim and counter claim amounts. If the legislature intended to have the Arbitral Tribunal exceed the ceiling limit by charging separate fee for claim and counter claim amounts, it would have provided so in the Fourth Schedule."*[3]

It is pertinent to note that the proviso to Section 38 (1) of the Act provides that the Arbitral Tribunal may fix a separate amount of deposit for the claim and counter claim. Further, proviso to Section 38 (2) of the Act provides that in case of failure of a party to pay fee towards claim and counter-claim and where other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the Arbitral Tribunal may suspend or terminate the arbitration proceedings in respect of such claim or counter-claim, as the case may be. Hence, it is clear that the Act has provided consequences of failure of parties to deposit the requisite fees.

The Hon'ble Delhi High Court in the matter of *Chandok Machineries Vs. S.N. Sunderson and Co.*[4] endeavored to interpret Section 38 of the Act and held that a reading of Section 38 of the Act would show that the Arbitral Tribunal may fix separate amounts of deposit for the claim and the counter-claim. Para 39 of the judgment is

1 *Sanjeev Kumar Jain vs. Raghubir Saran Charitable Trust and Ors. (2012) 1 SCC 455*

2 *2018 (4) ArbLR 168 (Delhi)*

3 *Supra, Note 2*

4 *O.M.P. (COMM.) 321/2017*

reproduced here - *"39. A reading of Section 38 would show that the Arbitral Tribunal may fix separate amounts of deposit for the claims and counter claims. Though the deposit is payable in equal shares by the parties, on the failure of a party to pay its share of the deposit, the other party may pay that share and in case of failure of the other party to pay the aforesaid share in respect of the claims or the counter claims, the Arbitral Tribunal may suspend or terminate the arbitration proceedings in respect of such claims or counter claims."*

The above mentioned principle also found place in *Gammon India Ltd. Vs.Trenchless Engineering Services (P) Ltd.*[5] wherein the Hon'ble High Court has held that the Arbitral Tribunal is entitled to a separate fee for the claim and the counter-claim.

An appropriate understanding of the applicability of Section 38 (1) was explained by Justice Navin Chawla at para 15 of the *Bawana Infra* case[6] :

"15. Proviso to Section 38 (1) of the Act can only apply when the Arbitral Tribunal is not to fix its fees in terms of the Fourth Schedule to the Act. It would not have any bearing on the interpretation to be put to the Fourth Schedule. It is noted that as regards fee even under the Amended Act, the Arbitral Tribunal is free to fix its schedule of fee in an ad-hoc arbitration which is conducted without the intervention of the Court. Even where the Arbitral Tribunal is appointed by the Court under Section 11 of the Act, in absence of rules framed under Section 11 (14) of the Act, it is not in every case that the Arbitral Tribunal has to fix its fee in accordance with the Fourth Schedule to the Act. Therefore, the proviso to Section 38 (1) of the Act would have no bearing on the interpretation being put to the Fourth Schedule and the phrase "Sum in dispute" therein."

SEPARATE FEE FOR CLAIMS AND COUNTER CLAIMS - WHETHER RES INTEGRA OR NOT?

A separate fees to be fixed by the Arbitral Tribunal regarding claims and counter claims is not Res Integra. Under the Code of Civil Procedure, 1908, O.8 R. 6-A provides that the effect of counter claim shall be that of a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on claims and counter claims. Thus, the settled principle of law is that when in a suit a counter-claim is filed, the defendant is required to pay separate court fee for the counter claim. The purpose of counter-claim is to avoid multiplicity of the proceedings. When counterclaim of the defendant is dismissed on adjudication, it forecloses the rights of the defendant subject to appeal and separate judgment is required to be pronounced under Rule 6A (2) by the Court with respect to counter claim.[7] In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without.[8] Thus, it is clear that counter claim is an independent suit and in this regard, separate court fee is required to be paid relegating the defendant to file a separate suit.

Thus, the position as to whether separate fees can be charged for claims and counter claims in the light of the Fourth Schedule to the Act has been explained by Justice Rajiv Shakdher in *Paschimanchal Vidyut Vitran Nigam Limited V/s IL & FS Engineering & Construction Company Limited*[9] in the following words - *"8.3 In this case, the admitted position is that none of the parties had approached the Court for appointment of an arbitrator in terms of the Arbitration Agreement obtaining between them. Parties had, it appears, agreed on the constitution of the Arbitral Tribunal. In these circumstances, in my view, the Court would have no role to play in fixing the fees of an Arbitral Tribunal as no such power is vested in the Court at present."*

It is to be kept in mind that the Legislature is conscious of the fact that one model may not work for all domestic and ad hoc arbitrations. The fees scale could vary depending on the territory over which the concerned High Court exercises jurisdiction. The cost of living index and the nature and the value of claims that are lodged, would be factors that the concerned High Court may like to bear in mind while framing rules in respect of the fees that ought to be charged by an Arbitral Tribunal.

CONCLUSION

From the above observations of courts, it is clear that the Fourth Schedule of the Act is suggestive in nature. If it was otherwise, then there was no need for the

5 *2014 (3) MhLJ 946*

6 *Supra. Note 2*

7 *Bhajan Singh Vs. Jasvir Kaur (2016) 182 PLR 489 at Para 14*

8 *Jag Mohan Chawla and another Vs. Dera Radha Swami Satsang & Ors. (1996) 4 S.C.C. 699*

9 *O.M.P. (MISC.) (COMM.) 164/2018 decided on 16.08.2018.*

legislature to provide under Section 11 (14) of the Act that the concerned High Courts should frame rules as may be necessary for determination of fees and the manner of its payment, albeit, after taking into account the rates specified in the Fourth Schedule. As far as ad-hoc Arbitrations are concerned, even under the Amended Act, the Arbitral Tribunal is free to fix its schedule of fee which is conducted without the intervention of the Court. The Fourth Schedule to the Act is not mandatory, but provides for a reasonable fee structure that may be adopted by the High Court in form of Rules, while appointing an arbitrator under Section 11 of the Act and may also be used by the parties and the arbitrators for arriving at a consensus on the fees payable to the Arbitral Tribunal.[10] Reference to the Fourth Schedule is made for the purpose of fixing the maximum fee provided under the Fourth Schedule and not for saying that the 'sum in dispute' mentioned therein would include the fee for adjudicating counter-claim as well.

***

10 National Highways Authority of India vs. Gammon Engineers and Contractor Pvt. Ltd. O.M.P. (T) (COMM.) 39/2018, IA Nos. 6559 and 9228/2018 Decided On: 20.07.2018

ECONOMIC RESERVATIONS: A CONSTITUTIONAL CHALLENGE

Apara Mahishi

INTRODUCTION

The Constitution (One Hundred and Twenty-Fourth Amendment) Bill, 2019, was introduced in the Lok Sabha on January 08, 2019, with an aim to provide reservation in higher education and public employment to 'economically weaker sections' of the society. The Bill was passed in the Lower House of the Parliament with only three members voting against it out of the 326 members present and voting, and subsequently being passed by Rajya Sabha as well without any recommendations. On being approved by both the Houses of the Parliament, when the President of India gave his assent to the Bill, the Constitution (One Hundred and Third Amendment) Act, 2019, came into force with effect from January 14, 2019 as notified in the official gazette by the Central Government.

This hurried passage of the amendment has raised certain doubts on the intentions of the Government, questioning the democratic accountability. However, this Article does not delve into the political issue of the amendment and will be limited to the discussions on the legal perspective, critically analyzing the provision as to whether it is constitutionally valid.

THE AMENDMENT

The provisions that have been amended by the Constitution (103rd Amendment) Act, 2019, are Articles 15 and 16 wherein Clause 6 has been inserted to the Articles as follows:

> *"In article 15 of the Constitution, after clause (5), the following clause shall be inserted, namely:*
>
> *(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—*
>
> *(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and*
>
> *(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent of the total seats in each category.*
>
> *Explanation — For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage."* [1]
>
> *"In article 16 of the Constitution, after clause (5), the following clause shall be inserted, namely:—*
>
> *(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent of the posts in each category."* [2]

ANALYSIS

The amendment to Article 15 of the Constitution relates to advancement of economically weaker sections of the citizens and their reservation for admission to educational institutions (including private institutions, aided or unaided by the State), whereas Clause 6 of Article 16 relates to reservation of economically weaker sections in case of public employments. The explanation appended to the amended Article provides for the meaning of "economically weaker sections" which shall be decided

1 *Section 2 of The Constitution (One Hundred and Third Amendment) Act, 2019*

2 *Section 3 of The Constitution (One Hundred and Third Amendment) Act, 2019*

by the State from time to time on the basis of "family income" and "other indicators of economic disadvantage". It is pertinent to note that the reservations made for the economically weaker sections would be to a maximum limit of ten percent, in addition to the existing reservations provided under the Articles and would exclude the classes that have already benefited by way of the previous clauses of the Articles (i.e. Scheduled Castes, Scheduled Tribes and Other Backward Classes).

CHALLENGE

The Constitutional 103rd Amendment has been challenged by way of a petition filed in the Supreme Court by a non-governmental organization named Youth for Equality and several others, on the ground that the amendment violates the basic structure of the Constitution and it exceeds the capping of fifty percent as fixed for reservations by the Apex Court. It is argued that the 103rd amendment is in violation of the *basic structure* because there is a contradiction in the logic of the existing provisions of Article 15 and 16 and the amended provisions. Moreover, the amendment provides for a ten percent economic reservation over and above the existing reservations, which implies that the reservation would *exceed the 50 percent capping* as set up by judicial precedents, because the present status of reservation quota has already reached 50 percent. Another argument of challenging the constitutionality of the amendment is that of *arbitrariness*. The definition of "economically weaker sections" is arbitrary in the sense that it does not specifically provide as to what constitutes 'other indicators of economic disadvantage' and the definition is left to be determined by the State from time to time.

BASIC STRUCTURE DOCTRINE

Until the case of *I.C. Golaknath v. State of Punjab*[3], the Supreme Court had been holding that any provision of the Constitution of India, including the Fundamental Rights, could be amended by passing a Constitution Amendment Act, as per the requirements of Article 368. However, in the case of *Golaknath*, the previous decisions were overruled and it was held that the Fundamental Rights contained in Part III of the Constitution would be excluded from the ambit of the power of amendment conferred by Article 368, thereby making the Fundamental Rights not amendable.

A full bench was constituted in the case of *Kesavananda Bharati v. State of Kerala* [4], wherein the landmark "basic structure doctrine" was laid down by the Hon'ble Supreme Court of India, overruling the 1967 judgment of *Golaknath*. According to this doctrine, the objectives specified in the Preamble, contain the basic structure of the Constitution and the same cannot be amended in exercise of the powers conferred under Article 368 of the Constitution. The Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the basic structure or framework of the Constitution.[5] Any amendment of the Constitution which affects the basic features in the abovementioned manner is liable to be interfered with by the Court on such a ground. So far as the question lies as to what constitutes a 'basic feature', it would be determined by the Court in each case that comes before it.[6] Nonetheless post the Kesavananda Judgment, a large number of features have been acknowledged as basic feature of the Constitution by various judgments.

An obvious understanding of the basic structure doctrine makes it clear that all it requires is that a basic feature, equality in this case, is not damaged or destroyed and it is difficult to see how the economic reservations would damage or destroy the concept of equality. The government has sought protection under the Directive Principles of State Policy which enjoins the State to *promote the educational and economic interests of the weaker sections of the people* as provided under Article 46 of the Constitution. Thus, Article 15(6) and 16(6) has been formulated with an aim to eliminate discrimination on the basis of economic status, giving an opportunity to the section of people who are deprived of adequate representations in the educational institutions or jobs, hence striving towards equality and not challenging the basic structure.

JUDICIAL PRONOUNCEMENTS ON RESERVATIONS

There have been several decisions of the Supreme Court since 1951, which tried to analyze the criteria to be adopted for making reservations for the backward classes. In the case of *State of Madras v. Champakam Dorairajan and Another,*[7] the Supreme Court for the first

3 *AIR 1967 SC 1643*

4 *AIR 1973 SC 1461*

5 *Supra*

6 *Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299*

7 *AIR 1951 SC 226*

time had dealt with the issue of reservation. Pursuant to Supreme Court's judgment in this case the Parliament amended Article 15 and inserted Clause (4). The Supreme Court, in *M.R. Balaji v. State of Mysore*,[8] has fixed a limit to reservations and held that the 50 percent ceiling limit ought not to be crossed for the purpose of reservations. Not considering 'caste' as the sole criterion or dominant test in determining social backwardness of groups or classes of citizens, but in fact considering economic backwardness as a contributing factor, the Supreme Court has further observed as follows: *"Social backwardness is on the ultimate analysis the result of poverty, to a very large extent."*

In the landmark judgment of *Indra Sawhney v. Union of India,* [9] the Supreme Court has discarded economic backwardness as a criterion for reservations as follows: *"Reservation of seats or posts solely on the basis of economic backwardness i.e., without regard to evidence of historical discrimination, as aforesaid, finds no justification in the Constitution."* It has also excluded *'creamy layer'* amongst the backward classes from the ambit of reservation. Regarding the capping of reservations, it has been held that: *"Reservation in all cases must be confined to a minority of available posts or seats so as not to unduly sacrifice merits. The number of seats or posts reserved under Article 15 or Article 16 must at all times remain well below 50% of the total number of seats or posts."* The judgment has however clarified that the expression "weaker sections" of the people under Article 46 is wider than the expression "backward class" and includes those who are socially, economically backward or rendered as weaker sections due to any natural calamity or physical handicap.

CONCLUSION

The framers of the Indian Constitution, at the time of drafting the Constitution had kept in mind the prevalent state of affairs that adversely affected the equality of the country. There were a large number of under-privileged sections of people who experienced social discrimination through centuries under the garb of caste system and the members of such so-called lower classes required an adequate representation in the society. Efforts had, thus, been made to bring these weaker sections at par with the other sections of the society through the policy of reservations, which is considered as a positive or protective discrimination implemented in the Constitution. With the changing times, caste no longer can be the sole criterion for detecting socially backward classes because some of them have achieved economic status, thereby finding a social standing as well. However, even today poverty still remains a barrier to attaining equality and there is a significant discrimination between the people of a different economic status. The Government has thus by means of economic reservations taken a step forward to eradicate this form of discrimination as a means to achieving equality in the nation.

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8 *AIR 1963 SC 649*

9 *AIR 1993 SC 477*

LOCUS STANDI OF THIRD PARTIES UNDER SECTION 9 OF THE ARBITRATION AND CONCILIATION ACT, 1996

Prateek Dhir & Pierre Uppal

INTRODUCTION

Section 9 of the Arbitration and Conciliation Act, 1996 **(hereinafter referred to as the "Act")** is broadly based on the UNCITRAL Model Law on International Commercial Arbitration, 1985. Section 9 of the Act, provides opportunity to the parties to an Arbitration Agreement, to not only seek relief before or during the commencement of the arbitral proceedings but also after the passing of the arbitral award, provided such relief is sought by the parties before the enforcement of the award. However, in cases where third party rights are getting affected, only a court can grant such reliefs. Such third party to the Arbitration Agreement can always avail the remedy in law and approach the Court to resolve and claim the damages for the grievance arisen with the parties to the Arbitration Agreement, showing separate cause of action and engage into litigation in its own individual capacity but not under the ambit of the Arbitration Agreement to which it was never part of. A third party to an Arbitration Agreement has no Locus Standi to seek a remedy from the Court under Section 9 of the Act since it is not a party to the Arbitration Agreement in the first place.

Section 9 of the Arbitration and Conciliation act, 1996 reads as:

"*A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—*

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."[1]

QUALIFICATION FOR INVOKING JURISDICTION OF THE COURT UNDER SECTION 9 OF THE ACT

On literal interpretation of the Section 9 of the Act, it can be ascertained that the section has a limited scope and is only confined to the parties to the Arbitration Agreement. The definition of the word, "Party" has been precisely stated in Section 2(h) of the Act. Section 2(h) of the Act defines a "Party" as "a Party to the Arbitration Agreement". Thus, the right conferred under Section 9 of the Act is only available to a Party to an Arbitration Agreement before or during the ongoing arbitral proceedings. The existence of an arbitration agreement or an arbitral clause is the sine quo non for the contracting parties to refer their disputes to arbitration and avail from the court any interim relief in terms of this section. The Hon'ble High Court of Madras in the matter of **Harita Finance Ltd. vs ATV projects India ltd**.[2], has observed that,

"*10. From the above it is clear that to invoke Section 9* of the Act -

1 *Section 9, Arbitration and Conciliation Act, 1996*

2 *2003(2)ArbLR376*

(i) There should be a dispute which had arisen with respect to the subject matter in the agreement and referable to the arbitral Tribunal.

(ii) There has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings at the time of filing application under Section 9 of the Act. The issuance of a notice in a given case is sufficient to establish the manifest intention to have the dispute referred to an arbitral Tribunal. *But it is also not necessary that notice as contemplated under Section 21* of the Act invoking arbitration clause must be issued to the opposite party before filing the application under *Section 9 could be filed. But, if an application is made in such circumstances under Section 9* of the Act, the Court must satisfy that the arbitration agreement is in existence and the applicant intends to take the dispute to arbitration.

(iii) Apart from this, the application can be entertained under Section 9 of the Act before this Court only if in a given case the subject matter of the arbitration comes within the original civil jurisdiction, both pecuniary and territorial." Thus, the right conferred by this section cannot be said to be one arising out of a contract. It is a right conferred on a party to an Arbitration Agreement. Thus, only a person who is a party to an Arbitration Agreement can invoke the jurisdiction of the Court. A person who is not a party to the Arbitration Agreement cannot enter the Court for protection because a "Party" means a party to the "Arbitration Agreement". The relief sought under Section 9 of the Act is intended to safeguard the justice to the aggrieved party until the eventual enforcement of the award. Here, the measure of protection is a step in aid of enforcement. It is intended to ensure that enforcement of the award results in a realizable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the ambit of execution. Contextually, therefore, the scheme of Section 9 postulates an application for the grant of an interim measure of protection after the making of an arbitral award and before it is enforced for the benefit of the party which seeks enforcement of the award.[3] The significant qualification which the person invoking jurisdiction of the Court under Section 9 must possess is of being a 'party' to an arbitration agreement. In short, filing of an application by a party by virtue of its being a party to an Arbitration Agreement is for securing a relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the Act.[4]

The Hon'ble Supreme Court in the matter of *Ashok Traders vs. Gurumukh Das Saluja (A.I.R. 2004 SC 1433) has held, "13. A & C Act, 1996, is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under Section 9 under the scheme of A & C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application under Section 9 of the Act is enforcing a right arising from a contract? 'Party' is defined in Clause (h) of Sub-section (1) of Section 2 of A & C Act to mean a party to an arbitration agreement. So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of Court under Section 9 can be (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in Sundaram Finance Ltd. v. NEPC India Ltd. - MANU/SC/0012/1999: [1999]1SCR89 the doubts stand cleared and set at rest and it is not necessary that arbitral proceedings must be pending or at least a notice invoking arbitration clause must have been issued before an application under Section 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the Court under Section 9 must possess is of being a 'party' to an arbitration agreement, A person not party to an arbitration agreement cannot enter the Court for protection under Section 9. This has relevance only to his locus standi as an applicant."*

The Hon'ble High Court of Madras in matter of **L & T Finance Limited vs. C.T. Ramanathan Infrastructure Pvt. Ltd.**[5] has placed its reliance upon the above said judgment and has stated, *"The Hon'ble Supreme Court in* **Firm Ashok Traders vs. Gurumukh Das Saluja** *(A.I.R. 2004 SC 1433) was pleased to lay down that since remedy under section 9 flows from arbitration agreement, a third party who is not a party to the arbitration agreement or arbitration proceedings, cannot seek any*

3 *Dirk India Private Limited vs. Maharashtra State Electricity Generation Company Limited, 2013 (7)BomCR 493*

4 *Firm Ashok Traders and Ors. vs. Gurumukh Das Saluja and Ors., AIR 2004 SC 1433*

5 *A. No. 5314 of 2012*

relief in this section, nor he can be pleaded as party in any application under section 9 of the Arbitration and Conciliation Act, 1996. Therefore, it is in the rarest of rare case, that the relief against Garnishee would be competent under Sec. 9 of the Arbitration and Conciliation Act and not otherwise." For appreciating the scope of Section 9, and locus standi of the party, the term 'Party' has to be understood, following the definition of the said term in Section 2(1)(h), which states that unless the context otherwise requires 'party' means a party to an arbitration agreement.

CONCLUSION

The qualification, which the person invoking jurisdiction of the Court under Section 9 must possess is of being a 'party' to an Arbitration Agreement; a person not a party to an Arbitration Agreement cannot enter the Court for protection under Section 9. Hence, the Courts should be extra vigilant while granting such interim relief to the parties and ensure that a party who doesn't have a locus standi in light of the Arbitration Agreement in issue, do not derive any benefit and further burden the Courts with frivolous litigation. The Courts shall take extra caution while adjudicating upon the applications filed under Section 9 of the Act and always ensure that the interim orders are issued to facilitate the arbitration and not otherwise.

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INDIA ON DATA PRIVACY - PERSONAL DATA PROTECTION BILL, 2018

Rupesh Gupta

India is finally moving ahead towards having a comprehensive Data Protection Law which is the need of the hour to truly ensure a person's privacy in today's digital age.

On January 04, 2019, the Union Minister of Electronics and Information Technology, Mr. Ravi Shankar Prasad, informed the Rajya Sabha that the data protection law has been finalized and the Bill will be tabled in Parliament soon.

In today's digital age, a primary point of concern for the individuals is breach of their privacy. Historically, companies have flouted rules and continually breach the privacy of the people. India currently lacks any comprehensive data protection regime which can protect people against such gross violations of their privacy in this digital age.

As of now, India's data protection regime is primarily governed by the Information Technology Act, 2000, and the Information Technology (Reasonable Security Practices and Sensitive Personal Data or Information) Rules, 2011. However, these laws miserably fail to protect the interest of the individuals in today's time. Thus, there is an important need for a comprehensive data protection regime and the Draft Data Protection law seems to a step in the right direction.

The current hallmark of data protection regulation in the world is the European Union's General Data Protection Regulation (EU GDPR)[1] which came into effect on May 25, 2018. Some of the salient rights provided are as follows:

1. The right to have personal data minimized.
2. The right to have knowledge as to where the data is being stored.
3. The right to have access to the data, to correct it.
4. The right to be forgotten wherein the data subject has the right to ask the company to delete their personal data permanently.

The "Personal Data Protection Bill, 2018" is on lines with the EU GDPR regulation and enshrines the above mentioned articles. Such rights have far reaching consequences. Though, they cause certain problems for the law enforcement agencies, the benefits far outweigh the cons. The Bill, when implemented, will require the enterprises to revisit their policies regarding data protection and processing, and require them to revisit their IT design and infrastructure to comply with the requirements of the Bill, which may lead to significant costs of doing business in India.

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1 *The General Data Protection Regulation (EU) 2016/679 («GDPR») is a regulation in EU law on data protection and privacy for all individuals within the European Union (EU) and the European Economic Area (EEA). It also addresses the export of personal data outside the EU and EEA areas. The GDPR aims primarily to give control to individuals over their personal data and to simplify the regulatory environment for international businesses by unifying the regulation with the EU.*

ANALYSIS OF SECTION 29A OF ARBITRATION AND CONCILIATION ACT: APPROACH OF JUDICIARY

Prashant Daga

BACKGROUND

In order to prevent unnecessary delay in passing of the arbitral award, a restrain has been placed on the arbitral tribunal to pass the award within 12 months from the date the arbitral tribunal enters upon reference.

Section 29A of the Act is intended to sensitize the parties as also the Arbitral Tribunal to aim for culmination of the arbitration proceedings expeditiously. It is with this legislative intent, Section 29A was introduced in the Act by way of the Arbitration and Conciliation (Amendment) Act, 2015. This provision is not intended for a party to seek substitution of an arbitrator only because the party has apprehension about the conduct of the arbitration proceedings by the said arbitrator. The only ground for removal of the arbitrator under Section 29A of the Act can be the failure of the arbitrator to proceed expeditiously in the adjudication process.[1]

ANALYSIS

1) *Whether retrospective / prospective in nature*: The legislative intent was obviously not to make the provisions of Section 29A of the Act retrospective in nature. Section 26 of the Amendment Act is clear that the amendments apply prospectively, insofar as arbitral proceedings are concerned.[2]

2) *When does initial period of 12 month commence*: The aforesaid period is to be reckoned from the date of reference (i.e. when notice of appointment is received by the arbitrator). The period is calculated from the first reference.[3] It is proposed in 2018 amendment bill that said period shall be reckoned from the period of completion of the pleadings.[4] Such period of 12 months can be further extended by the consent of both the parties for 6 months i.e. effectively 18 months (12+6).

3) *Time period for moving to court for extension of time*: In case the award is not made within the period mentioned in point 1) then both parties (through joint application) or either of the parties can file an application for extension of the time period for making/passing of award. Such an application can be filed *within reasonable period*[5] from either before or after the expiry of 12 months (in case other party doesn't give consent for extension of the time period) or 18 months.

4) *Consequences of non delivery of award within 12 months/18 months:* Although the said provision provides that mandate of arbitrator shall terminate unless the period of delivery of award is extended by the court if the party(ies) are able to show sufficient cause. Following will be sufficient cause:

   a. Documents/evidence in arbitration proceeding is voluminous[6]

   b. Parties/arbitral tribunal was diligent, and delay is not attributable to them[7]

   c. 29A filed for extension of time for filing amendment to SoC, because amendment if filed will require further extension.[8]

1 *NCC v. Union of India, 2018 SCConline Del 12699*

2 *Republic of India through ministry of defense v. agusta westland international ltd, (2019) SCConline Del 6419*

3 *International Trenching Pvt. Ltd v. Power Grid Corporation of India Ltd 2017 SCC OnLine Del 10801*

4 *https://www.prsindia.org/sites/default/files/bill_files/The%20Arbitration%20and%20Conciliation%20%28Amendment%29%20Bill%2C%202018.pdf*

5 *FCA India Automobiles Pvt. Ltd. (formerly known as Fiat Group Automobiles India Private Limited) v. Torque Motor Cars Pvt. Ltd. & Anr., 2018 SCC OnLine Bom 4371*

6 *supra note 3*

7 *supra note 3, Puneet solanki and another v. Sapsi electronics pvt ltd, 2018 SCC OnLine Del 10619.*

8 *ASF insignia Sez P. ltd v. Punj Lloyd Ltd, 2017 SCConline Del 10124*

d. Invested enough time and money, no purpose in stalling arbitration[9] , time and money invested, and stage is evidence[10]

e. Construction dispute, voluminous document has been filed[11]

f. Delay due to certain applications being filed, AT given time to complete the proceedings[12]

g. Arbitral tribunal is not at fault and has to consider the submissions of the parties[13]

h. At the final stage, arguments have been over, to meet the ends of justice[14]

Following is not a sufficient grounds:

i. arbitrator has deliberately decided to postpone the award to prevent any inconsistent award being passed if a similar arbitration proceeding is going on however the proceeding may be distinct and will have no bearing on the award[15]

5) *Power to substitute arbitrator*: While extending the period under sub-section 4, it shall be open to the court to substitute one or all of the arbitrators. The Courts have granted substitution on the following ground:

a. Arbitral tribunal responsible for delay[16]

b. if the conduct of arbitrator is contrary to basic principles of law like non recording of evidence.[17]

However, the court has generally refrained from granting substitution, categorically in the following cases:

a) Order passed with the consent of the respondent, merely aggrieved by the order of arbitral tribunal not a ground for setting aside the arbitrator. The issue of only expeditious disposal can be considered no other[18]

b) Mere statement by the partiers/bald allegations against the arbitrator - not prima facie backed by materials.[19]

c) Thus, there is no immediate termination of mandate of the arbitrator. Also, mere delay in delivery of award is not a ground for substitution of arbitrator.[20]

d) No fault of the arbitrator, rather the party(ies) are at fault[21]

6) The Court can extend the period under Section 29A(4) subject to terms and conditions:

a. reduction in the fees of arbitrator.

b. substitution of arbitrator

c. imposition of actual or exemplary cost on either of the parties

d. direct parties to co-operate with each other[22]

e. direct the arbitrator to not grant any unnecessary adjournment.[23]

f. direct to record the conduct of the parties in minutes of the meeting of award[24]

9 *Vil Rohtak Jind Highway Private Limited v. NHAI, 2018 SCC OnLine Del 12000*

10 *Tecnimont SPA and Anr v. National Fertilizers Limited, 2018 SCC OnLine Del 13250*

11 *Abir Infrastructure Pvt. Ltd v. beas valley Power Corporation, 2018 SCC OnLine HP 1562*

12 *Bharat Heavy electricals ltd v. M/s Capital Control India pvt ltd, (2017) SCC online Del 10854*

13 *Delhi tourism and transportation Development corporation v. kore security services, 2018 SCConline Del 11816*

14 *Mora Tollways ltd v. Bihar State Road Development Corporation limited and anr., 2018 SCConline Pat 2333.*

15 *Ratna Infrastructure Projects Pvt. Ltd. v. Meja Urja Nigam Private limited, 2018 SCC OnLine Del 12466.*

16 *Olympic oil industries v. practical properties pvt ltd, 2018 SCC online Del 8887*

17 *FIITJEE Ltd.v. Dushyant Singh and anr, 2018 SCC OnLine Del 13157*

18 *Ssangyong Engineering & Construction Co. Ltd v. National Highways Authority of India (NHAI), 2018 SCC OnLine Del 10184*

19 *Supra note 10*

20 *Rajasthan Small Industries Corporation limited v. M/s Ganesh Contrainers movers syndicate, Civil Appeal no. 1039/2019*

21 *Supra note 1*

22 *supra note 5*

23 *supra note 5*

24 *supra note 5*

g. direct to pay the cost of Section 29A proceedings.[25]

7) *Length of extended period*: It varies and depends on the discretion of the court. However, the court has granted min. of 3 months to max. of 12 months. Below is the brief statistical analysis of the extension(s) granted[26]:

No. of months	No. of times the court granted extension of such period
3 months	2
6 months	7
9 months	3
12 months	4

Pictorial description of the above:

It is discernible from above that court has easily extended the time period by 6 months (in 40% cases) and also didn't refrain from extending it by 12 months (in 27% cases). There is no bar under the act for max. extension that can be granted by the court under Section 29A(4). Thus, Court can grant extension of more than 12 months as well.

8) *Scope of enquiry under Section 29A*: Enquiry under Section 29A is limited to examining the issue of expeditious hearing of arbitration and nothing more. It cannot be use for Section 12, 13 or for challenging the impartiality of the Tribunal.[27] If the arbitrator made the award within six months, then arbitrator is entitled to additional fees. The said provision also provides for reduction in fees of arbitrator.

Thus, it is evident from above that courts have refrained from granting substitution of arbitrator unless it finds that arbitral tribunal has contributed in the delay of proceedings. Hon'ble Court(s) while restricting the scope of enquiry under Section 29A, has adopted a liberal interpretation and granted extension without the imposition of 'harsh' conditions either on the parties or on the Ld. Tribunal.

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25 *supra note 1*

26 *The aforesaid is the data of cases of Delhi High Court, Bombay High Court. The statistics mentioned therein is just to give general understanding how liberal the court are in extending the time period. Total 16 cases have been considered as available in public domain.*

27 *Puneet solanki and another v. Sapsi electronics pvt ltd, 2018 SCC OnLine Del 10619*

LOOKING FOR THE AUTHORS BEHIND WORKS CREATED AUTONOMOUSLY BY AI MACHINES

Kartikeya Prasad

Authorship of creative works has been a highly debated topic for over 200 years. Till now, assigning authorship to a human was not that difficult as most of the new technologies assisting in creation of copyrightable works, like cameras and computers, were mere tools and humans were the actual brains behind the creation. However, with the recent rapid growth of AI systems and new learning methods, more and more works are being created by machines without any human interference. Copyright offices around the world are unprepared and are not able to acknowledge the importance of these new sources of creativity.

Denial of copyright has resulted in the AI created works to be released into the public domain. There is an urgent need to reinterpret the laws or create new ones to accommodate works created autonomously by non-humans, as giving exclusive rights over the works would act as a major incentive for the AI developers. This article proposes to reinterpret the terms "employer" and "employee" for the purpose of work made for hire doctrine, rather than redefining the term "authorship" to include non-humans.

Most countries, including USA, UK, and the EU nations, have refused to grant copyright to anyone when there is no active human contribution to the creation of the work. In *Naruto v. Slater*[1], one of the most recent cases to talk about the issues related to human and non-human authorship, the Ninth Circuit had to answer the question of animal authorship in photos. In this case, a monkey named Naruto had taken a picture of itself by using a photographer's camera. The court refused to attribute the ownership to the monkey and focused on the wording of the Copyright Act which speaks of a 'person' to be involved in the creative process, and for a work to be copyrightable, a human must be involved in the creative process.

What is the right question? The author is of the opinion that determining copyrightability of AI created works by questioning whether a computer can be called as the author of a work is the wrong place to start with. We should focus more on writings than authors and it is better to ask whether a computer can create a copyrightable work rather than asking if it can be an author. There have been many attempts with different approaches to formulate a method to give protection to works created autonomously by AI systems. Most of them either propose a new *sui generis* right or amending the copyright laws. Both of these methods require a substantial amount of change to the present legal regime, which is not desirable.

REINTERPRETATION OF WORK MADE FOR HIRE DOCTRINE TO CLASSIFY AI SYSTEMS AS EMPLOYEES

As the developers and the companies owning AI systems have no direct role to play in the creation of works by the AI, it is impossible under the current copyright regime to assign them the copyright. The "Work Made for Hire" (WMFH or WFH) doctrine presents a feasible option to achieve this. According to this doctrine, in case a work is made for hire, an employer must be considered as the author even if an employee had created the work.[2] These guidelines can be extrapolated to the AI industry to issue authorship to the programmers or owners. The WFMH doctrine is an exception to the general rule which states that ownership of copyright rests with the person who actually created the work, and as a result it serves as a perfect template to regulate works created autonomously by AI machines. The Indian Copyright Act, 1957, names the employer as author[3], as it acts as an incentive and gives them control over the commercial aspect of the creation. Apart from awarding the employer for the investment made by him, a major reason to credit him as the author, instead of the employees, is to establish accountability and responsibility over the actions of the creators. This reasoning would conceptually fit well with AI created works.

1 *Naruto v Slater*, No 16-15469 (9th Cir. 2018).

2 *US Copyright Office, Circular 9: Works Made for Hire (Sep. 2012),* <https://www.copyright.gov/circs/circ09.pdf> *accessed 13 February 2019.*

3 *Section 17, Indian Copyright Act, 1957.*

Section 17 statutorily recognizes the author of the work to be the first owner of the copyright. However, this provision is subject to certain exceptions. Section 17(a) and (b) talk about situations where the employer is the first owner of the copyright in works created by authors under his employment. Section 17(c) includes all the other types of works created by an author and which are not mentioned in either clause (a) or (b).

Where a man employs another to do work for him under his control, so that he can direct the time when the work shall be done and the means to be adopted to bring about the end, and the method in which the work shall be arrived on, then the contract is contract of service. If, on the other hand, a man employs another to do certain work but leaves it to that other person to decide how that work shall be done and what step shall be taken to produce that desired effect, then it is a contract for service. In *Beloff v. Pressdram*[4], it was held that the true test is whether the employee is part of business and his work is integral part of the business, or whether his work is not integrated into the business but is only accessory to it or the work is done by him in business on his own account. In the former case it is a contract of service and in the latter a contract for service.[5] When an AI machine creates a work autonomously, it could be treated as work created under contract for service.

There are many questions left unanswered when it comes to implementing the WMFH model on AI created works. Are the works copyrightable to begin with? And if they are not copyrightable, can the employer possess the copyright through the WMFH doctrine? What happens when an AI machine goes beyond the purview of its "employment"? For analysing the Work Made for Hire doctrine, an AI created work should be treated differently than a work created by an employee for a software company. There are no human authors behind an AI created work, whereas in a traditional employer-employee relationship, the employees create the works as per their prior agreement with the employer. The employees create the work with the involvement of the employer.[6] The reasoning provided for giving copyright to employers is to justify the large costs entailed in nurturing talent and gradually creating a copyrightable work.

Implementing this doctrine under the current copyright regime is impossible without a new legislation or amendments to existing laws. Works created autonomously by an AI machine do not come under WMFH as the relationship between the programmer and the AI system is not exactly an employer-employee relationship in the agency sense. According to section 2(d)(vi), an author is someone who caused the computer-generated works to be created. If the courts decide to interpret it liberally or there is an amendment to the Act expanding the definition of author, then it would be possible to grant ownership of copyright in the works created autonomously by the AI machines to those who were responsible for the creation of the AI systems.

BENEFITS OF ADOPTING THE WORK MADE FOR HIRE MODEL

Although the WMFH model has its own potential disadvantages, most of these drawbacks can be fixed with a little help from the legislature and the judiciary. Among all the proposed approaches, the WMFH model provides policymakers the least amount of headache, as there is no need to completely overhaul the copyright laws or create a new type of rights for AI created works. This model only requires small amendments to current legislations and a more accommodating interpretation by the courts. It also changes our understanding of computers, as the current legal systems around the world treat computers as a tool and try to find the human behind the machine. Although there is no intention of labelling them as persons, modern AI systems can act creatively and independently, and thus this model imposes the same rules that regulate works produced by employees.

Another problem being solved by this model is that of accountability gap. As the AI machines are seen as employees or contractors, the owner, programmer, or the user is held accountable for any action taken by the AI. This way, the legal system would be able to have a tight control over creative AI systems, and the users of AI systems will try their best to avoid damages, counterfeiting and infringing upon 3rd parties' rights.
By reinterpreting the employer-employee relationship for work for hire doctrine, the potential attribution of

4 *Beloff v. Pressdram Ltd., [1973] 1 All E.R. 241 (Ch. D.)*

5 *<http://www.legalserviceindia.com/articles/copy_owner.htm> accessed on 13 February 2019.*

6 *E Jordan and others, 'Employment Relations Research Series 123 Employment Regulation Part A: Employer Perceptions and the Impact of Employment Regulation Executive Summary' <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/f/11-1308-flexible-effective-fair-labour-> accessed 13 February 2019.*

copyright to non-humans or machines can be avoided as legal (companies) or natural (programmers) persons are given the copyright for works created by an AI. This would help prevent works from being released into the public domain, which is the current position in many countries, including US, as per *Naruto v Slater*. It ensures that all AI created works have a human author, thus negating the need for a debate over human versus non-human authorship.

Many AI users choose not to file for a copyright, as the general assumption is that their application would be rejected. This results in the failure to reveal participation of AI machines in the creative process. However, in many cases they intentionally don't disclose any contribution made by the AI system, and not properly accrediting the rightful author is a fair ground for annulling a copyright claim.[7] By transferring the copyright to a human employer, policymakers can ensure that works created autonomously by AI machines are documented properly and registered with full disclosure of any contribution made by the AI.

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7 *17 USC § 411(a).*

ADVENT OF DAWN RAIDS IN INDIA: A CASE OF AGGRESSIVE ANTI-TRUST REGIME

Rishab Khare & Khushboo Tomar

Dawn Raids are referred to the various surprise searches and seizure activities conducted by the Anti-trust Agencies. The purpose of such raids is to catch the suspected organizations off-guard.

The power to conduct dawn raids is derived from Section 41 of the Competition Act, 2002. The Director General (DG), Competition Commission of India (CCI) is required to obtain a warrant from a Magistrate before conducting a raid after satisfying the said Court with material documents and evidences of anti-competitive conduct.

JUDICIAL OPINION VIS-A-VIS DAWN RAIDS IN INDIA

In *M/s. Bull Machines Pvt. Ltd. vs. M/s. JCB India Ltd. & Anr.* [1], the Ld. CCI observed as below:

"14. The entire case of abuse as laid and made by the Informant is predicated upon the alleged bad faith litigation filed by JCB before the Hon'ble High Court of Delhi. It is the case of the Informant that the bad faith litigation initiated by JCB against it alleging infringement of its design rights was totally false and that the said legal proceedings before the Hon'ble High Court of Delhi were only initiated to harass it and prevent the launch of 'Bull Smart', which in effect would have competed with backhoe loaders of JCB in the relevant market. Furthermore, it is the case of the Informant that the injunction was obtained on the basis that the Informant had allegedly infringed the registered designs and copyrights of JCB while manufacturing 'Bull Smart', whose designs / copyrights themselves were obtained fraudulently.

15. The Commission observes that the predation through abuse of judicial processes presents an increasing threat to competition, particularly due to its relatively low anti-trust visibility.

16. In view of the allegations projected in the information and as detailed hereinabove, the Commission is of prima facie opinion that JCB by abusing their dominant position in the relevant market sought to stifle competition in the relevant market by denying market access and foreclosing entry of 'Bull Smart' in contravention of the provisions of Section 4 of the Act.

17. Accordingly, the Commission directs the Director General (DG) to cause an investigation into the matter and to complete the investigation within a period of 60 days from receipt of this order."

PROCEDURE BEFORE CONDUCTING "DAWN RAID"

Due to the nature of Dawn Raids which are inherently invasive in nature, it has been made mandatory for agencies to strictly comply with procedural safeguards enlisted under the law. The essential aspects of the procedure that needs to be taken care of prior to the conduct of any "Dawn Raid" are:

1 It has been incumbent upon the Director General under the Competition law to assist the Competition Commission of India in complying with the rules and regulation under the Anti-trust law. However, the Director General is required to be impartial while conducting his investigation. The procedure adopted by the Director General and his conclusions regarding the investigations have to be reasoned in order to deal with the arguments of the accused organization.

2 The other safeguard under the prevailing law is that the Director General can commence his investigation only after the conclusion of a "prima facie" case by the Competition Commission of India. However, such conclusion should not affect the nature of investigation by the Director General.

3 On receiving the order to carry out the investigation, the Director General is required to prepare a questionnaire that has to be sent to the accused enterprise/organization.It is pertinent to mention

1 *Competition Commission of India, Case no. 105 of 2013*

that the Director General is invested with the powers of that of a civil court. Thus, as a matter of prudence, accused organization should furnish the correct details in order to avoid any subsequent liability.

4 The expression "reason to believe" has a wider meaning than that of being satisfied. It must be based on cogent evidence and reasons.

Though the jurisprudence vis-à-vis Director General's power is in its early stage, it can be safely concluded that the DG has to remain fair and impartial and his powers to conduct investigation is not unfettered.

RIGHTS OF A COMPANY SUBJECTED TO DAWN RAID:

1 The Company may ask the Director General some time to call the in-house counsel or external counsel to arrive. However, it is the discretion of the officer-in-charge whether to provide such time or not.

2 The company can ask for the identity details of the officer conducting dawn raid and also the copy of the order of the Chief Metropolitan Magistrate in order to verify the authenticity of "Dawn Raid".

3 Maintain copies of the record and also to maintain a copy of all the questions and answer given in reply.

4 The enterprise has the right to object to any interference with the privileged documents such as confidential exchange between client and attorney.

Also, the powers of the investigative agency are curtailed to quite an extent. Some of these restrictions are:

1. It cannot use force against any person
2. It cannot exceed the scope of the reason for which the dawn raid has been conducted
3. It cannot tamper within the scope of legal privilege

OBLIGATIONS OF THE ACCUSED ENTERPRISE

In order to avoid any liability, it is compulsory for any accused enterprise to:

1 Furnish correct details to the questions asked vis-à-vis the documents recovered and maintain records of all the questions and answers given in reply.

2 Provide the correct details of the location of the documents when asked by the officer in charge.

3 In case the investigator decides to seize the information in soft copy, the investigator has to restrain himself from seizing the information which is "legally privileged" under the law. Thus, when such documents/information is being searched or seized, it is advisable for the representative of the accused enterprise to be present while search and seizure operations are being conducted.

4 It is the responsibility of the accused enterprise not to obstruct the search and seizure operations.

5 Also, it is the responsibility of the accused enterprise not to conceal the documents which are required to be produced by such enterprise.

6 Also, it is incumbent upon such enterprise not to provide false information. Any information provided should be accurate as per the personal knowledge of the representative of the accused enterprise.

RESPONSIBILITY OF THE ACCUSED ENTERPRISE BEFORE THE INVESTIGATING TEAM DEPARTS

1 It is advisable for the accused enterprise to know if the investigators would return the next day.

2 Maintain a copy of the documents recovered and seized by the investigators.

3 It is further advisable to maintain the minutes of the exercise in order to record the disputes and disagreements that happened during the exercise.

4 It is further advisable to maintain records of the interviews conducted by the Inspector.

RESPONSIBILITY OF THE ACCUSED ENTERPRISE AFTER THE INVESTIGATING TEAM DEPARTS

1 As a matter of prudence, the accused enterprise should compile the notes, recheck the list of documents seized by the Inspector.

2 Consult the in-house counsel or external counsel to assess the potential issues that might arise and the strategy to deal with the same in future.

It further needs to be noted regarding the dawn raids, that the documents seized by the inspector can be retained by him only for a period which is necessary for the conduct of investigation. After the investigation has been completed, he is bound to return the seize documents to the accused enterprise. Also, the Inspector is required to inform about such seizure to the Chief Metropolitan Magistrate whose permission was taken to conduct "dawn raids".

"DAWN RIDS" UNDER COMPETITION (AMENDMENT) BILL, 2012 ("BILL")

It was introduced in the Lok Sabha on December 07, 2012. The Bill if passed into law would have greater ramifications on the way Dawn Raids are conducted.

1 The Bill seeks to empower the Chairman of the Competition Commission to empower the Director General to conduct dawn raids if during an investigation, the investigator has a reason to believe that the accused enterprise has omitted to provide or has concealed the relevant documents or if there is a threat that the documents might be destroyed.[2]

2 The Bill allows the statutory authorities to use reasonable force to carry out Dawn Raids.The commission may seek aid from the local police authorities to carry out the Dawn Raids under the Act.

The proposed changes will no doubt go a long way in adding teeth to investigating powers of the Director General and prevent the defaulting companies from covering up their tracks.

The Bill itself provides sufficient checks and balances to prevent the arbitrary use of powers by the Director General. The Director General should have a "reason to believe" that the defaulting company has omitted to provide the relevant details or is trying to conceal the documents or any information.

Thus, the requirement of "reason to believe" being a sine-qua-non is of wide ramifications. In *Calcutta Discount Company Limited v. Income Tax Officer*[3], the Hon'ble Supreme Court of India while dealing with the term "reason to believe" observed,

"The expression 'has reason to believe'…does not mean a purely subjective satisfaction of the Income-tax Officer but predicates the existence of reasons on which such belief has to be founded. That belief, therefore, cannot be founded on mere suspicion and must be based on evidence and any question as to the adequacy of such evidence is wholly immaterial at that stage."

It has been felt by various experts of the subject that The commission might undertake fishing activities under the garb of conducting "Dawn Raids"[4].

However, the bill is also criticized that it excludes the current scope of judicial check , as once the bill is passed, it will not be required for the Director General to obtain the permission of the Chief Metropolitan Magistrate in order to carry out the Dawn Raids.

DAWN RAIDS OR FISHING EXPEDITIONS

As per the bill, the commission should have "reasonable belief" before ordering Dawn Raids to be conducted by the Director General.

The Commission may take relevant guidance from the European Commission case of *Nexans France SAS and Nexans SA v. European Commission*[5].

The ECJ held that the reasons given for an inspection decision *"need not necessarily delimit precisely the relevant market"*, but the European Commission is required to state in the decision *"the essential characteristics of the suspected infringement, indicating inter alia the market thought to be affected"*. The

2 *Section 14 the Bill*

3 *1961 SCR (2) 241*

4 *Mihir Kamdar, Dawn raids amendment: Small step or giant leap?; India Business Law Journal; February 2013, pp. 59.*

5 *Case T-135/09*

European Commission must *"identify the sectors covered by the alleged infringement with which the investigation is concerned with a degree of precision sufficient to enable the undertaking in question to limit its cooperation to its activities in the sectors in respect of which the Commission has reasonable grounds for suspecting an infringement of the competition rules, justifying interference in the undertaking's sphere of private activity, and to make it possible for the Court of the European Union to determine, if necessary, whether or not those grounds are sufficiently reasonable for those purposes."*[6]

"For example, if two merging firms begin to implement the provisions of their merger documents without first obtaining clearance from the Commission, the Commission may on reasonable belief of such circumstances issue dawn raid orders to investigate such firms to declare such combinations void under section 6(1) of the Act."[7]

CONCLUSION

It has been observed that the Competition Commission has placed reliance on circumstantial evidence to achieve its objectives. It won't be an exaggeration to say that "Circumstantial Evidence is a Rule and Dawn Raid is an exception".

It is pertinent to mention here that cartels are often established in leniency. Thus, circumstantial evidence is based on a weaker footing as compared to direct evidence. In order to give more powers to the Competition Commission of India and Direct General, the proposed bill seeks to oust the requirement of judicial warrant before conducting Dawn Raids in certain cases.

Till now, there have been only two cases where Dawn Raids have been conducted. It is widely hoped that the proposed bill, if passed will give more powers to the investigative agency. However, the primary need of the hour is that there have to be sufficient guidelines and regulations for the Director General to conduct "Dawn Raids".

These guidelines and regulation will not only serve as a guiding light for the investigative agencies but also empower the enterprises to put an effective mechanism in place. In absence of any guideline or regulation vis-à-vis dawn raids, enough confusion has been created and it needs to be done away with soon. Increased search and seizure activities including Dawn Raids will facilitate the detection and prevention of cartelization.

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6 *Ibid para 44-45*

7 *Ibid.*

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

Anmol Kumar & Parth Rawal

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

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

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

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

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

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

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

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

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

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

> The West Bengal Housing & Industrial Regulation Act has also amended the definition of Force Majeure, which in turn has led to a situation where the builder can avoid paying compensation for non-fulfillment of the conditions stipulated under the contract by claiming force majeure which runs contrary to the intention of legislature while drafting the Central Act.
>
> Another instance is the amendment of the definition of Garage to include open parking space which has strictly been excluded by Central Legislation.

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

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

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

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

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

CONCLUSION

The Real Estate (Development and Regulation) Act, 2016, was enacted to provide an effective grievance redressal mechanism and provides regulations in a highly unregulated sector. Though the Act has addressed the issues of the allottees to a certain extent still there remain a number of lacunas that remain unanswered. There still exist opaque enforcement mechanisms under the Act coupled with ambiguity with regards to the application of the Act.

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

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

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

7 *Ibid*

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

The decision rendered in *Simmi Sikka v/s Emaar MGF Ltd* [9] has attempted to broaden the ambit of the Act by bringing the unregistered projects under its fold; the Act is still in its nascent phase and certainly requires some refinement in order to handle the prevailing trends in the real estate sector.

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

NATIONAL FINANCIAL REPORTING AUTHORITY (NFRA)

Rishub Kapoor

On 1ST March 2018 Union Cabinet approved the establishment and functioning of National Financial Reporting Authority (NFRA)[1],followed by approval by capital market regulator Securities Exchange Board of India (SEBI).

Ministry of Corporate Affairs (MCA) through its notification dated 21st March 2018, approved the establishment and functioning of National Financial Reporting Authority (NFRA) under section 132 of Companies Act 2013.[2] The Authority functioning will be governed by National Financial Reporting Authority (Manner of Appointment and other terms and conditions of service of chairperson and members) Rules 2018[3].

OBJECTIVE

The purpose behind constitution of NFRA is to enhance institutional oversight over auditors and to improve market integrity, transparency and protection of the interest of investors and other stakeholders like banks, lending institutions, suppliers, etc.

NEED FOR NFRA

In the US, failure of ENRON resulted in the introduction of stringent self-regulations by the U.S accounting and auditing profession in 2002, which lead to the need and introduction of the Sarbanes-Oxley Act 2002 that ushered in new corporate governance and disclosure requirements by corporate entities.

In India, the exposure of Satyam Scam resulted in floating the same idea, which was to have an authority to protect the interest of investors and provide true and fair view of financial statements of companies. Further the recent financial scams and defaults on account of debt of big market players ignited the need for such Authority.

Moreover 132 listed companies were put under Additional Surveillance Measure List whose scrips were suspended by SEBI for abnormal price rise, not supported by the fundamentals of the companies. Thus reiterating the need for an independent audit regulator.

LEGAL BACKGROUND

Section 132 of Companies Act 2013 [4] provides that National Financial Reporting Authority (NFRA) shall be responsible for-

a) *Making recommendations to the Central Government on the formulation and laying down of accounting and auditing policies and standards for adoption by companies or class of companies or their auditors, as the case may be;*

b) *Monitor and enforce the compliance with accounting standards and auditing standards in such manner as may be prescribed;*

c) *Oversee the quality of service of the professions associated with ensuring compliance with such standards, and suggest measures required for improvement in quality of service and such other related matters as may be prescribed; and*

d) Have the power to investigate, either suo motu or on a reference made to it by the Central Government, for specified class of bodies corporate or persons, into the matters of professional or other misconduct committed by any member or firm of Chartered accountants.

COMPOSITION OF AUTHORITY

Section 132 of CA 2013 read along with National Financial Reporting Authority (Manner of Appointment and other terms and conditions of service of chairperson and members) Rules 2018 provide that:
The Authority shall consist of

(a) A Chairperson, who shall be a person of eminence and having expertise in accountancy,

1 *http://www.mca.gov.in/Ministry/pdf/rs389_04042018.pdf*

2 *http://www.mca.gov.in/Ministry/pdf/commencementNotification2103_21032018.pdf*

3 *http://www.mca.gov.in/Ministry/pdf/ReportingAuthorityRule2103_21032018.pdf*

4 *http://www.mca.gov.in/SearchableActs/Section132.htm*

auditing, finance or law to be appointed by the Central Government

(b) Three full time members.

(c) Nine Part Time members[5].

The Authority can have a maximum of fifteen members at a time.

PENALTY

Section 132 of Companies Act 2013 clearly states that where professional or other misconduct is proved, the authority can pass an order for -

1) Imposing penalty of -
   i. Not less than one lakh rupees, but which may extend to five times of the fees received, in case of individuals; and
   ii. Not less than ten lakh rupees, but which may extend to ten times of the fees received, in case of firms[6];
2) Debarring the members or the firm from engaging himself or itself from practicing as member of the Institute of Chartered Accountant of India for a minimum period of six months or for such higher period not exceeding ten years as may be decided by Authority.

ICAI V/S MCA.[7]

The Institute of Chartered Accountants of India (ICAI) have expressed dissenting views over the constitution of NFRA.

ICAI in its Standing Committee Report clearly stated that constitution of NFRA will lead to-

1) **Multiple Regulatory Bodies**: Creating NFRA would result in two regulatory bodies (ICAI and NFRA) governing the same audit profession. This would result in duplication of efforts.
2) **Constitution of NFRA will be a costly affair**.
3) **Relevance of NFRA in the context of the Companies Act 2013**: The objective of NFRA is to regulate audit quality and protect public interest. These are also the main objectives of ICAI which strives to be a world class regulator.
4) **Auditing Standards**: ICAI as a world class regulator would be more aligned to market needs and NFRA regulatory provisions are yet to be examined.
5) **The ICAI has sufficient regulatory, supervisory, organizational and budgetary independence as regards to the audit profession.**

CONCLUSION

Looking at the initial developments National Financing Regulatory Authority (NFRA) has been set up as an oversight body having quasi-judicial authority to oversee matters of professional misconduct by Auditors and Charted Accountants. It is further observed that similar oversight bodies also exist in other countries, i.e, Financial Services Authority (FSA) in United Kingdom and Public Company Accounting Oversight Board (PCAOB) in United States. However, as issues relating to conflict of mandate with regard to disciplinary matters between the NFRA and ICAI, it should not create two parallel jurisdictions governing the same issue. The NFRA should be able to function without any jurisdictional conflicts.

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5 *http://www.mca.gov.in/Ministry/pdf/ReportingAuthorityRule2103_21032018.pdf*

6 *Substituted by the Companies (Amendment) Act, 2017 w.e.f. 09.02.2018 Vide Notification No. I/I/2018-CL-I Dated 09.02.2018 for INR 10 lakhs.*

7 *http://164.100.47.193/lsscommittee/Finance/16_Finance_37.pdf*

BASIC WAGES, PF CONTRIBUTIONS AND TEST OF UNIVERSALITY!

Harsimran Singh

"Whatever is payable by all concerns or earned by all permanent employees had to be included in basic wage for the purpose of deduction under section 6 of the Act."[1]

INTRODUCTION

The Hon'ble Supreme Court of India[2] vide its judgment dated 28/02/2019[3] (the "Judgment") held that all amounts, whether or not categorized as "allowances", if paid equally across the board to all employees, should be considered as part & parcel of the "basic wage" for the purpose of calculation of provident fund ('PF') contribution under section 6 of the *Employees' Provident Fund and Miscellaneous Provisions Act, 1952* (the "Act").

MATTER BEFORE THE HON'BLE COURT

The Hon'ble Apex Court while hearing a bunch of Appeals[4] had before itself quite a variety of allowances forming part of the salary structures applied by the parties to these proceedings respectively, namely:

- travel / conveyance allowance,
- canteen allowance,
- lunch incentive,
- management allowance,
- education allowance,
- food concession,
- medical allowance,
- night shift incentives,
- city compensatory allowance, and
- special allowance

(collectively referred to as "Special Allowances")

The Hon'ble Court was to decide whether the Special Allowances paid by an establishment / employer to its employees would fall within the definition of basic wages in the context of calculating contributions to PF!

The PF Authority before the Court submitted that Special Allowances are nothing but camouflaged permissible allowance liable to deduction as part of basic wage. And that the Act was a social beneficial welfare legislation meant for protection of the weaker sections of the society, i.e. the workmen, and was therefore, required to be interpreted in a manner to sub-serve and advance the purpose of the legislation. Under section 6 of the Act, the employer was liable to pay contribution to the provident fund on basic wages, dearness allowance, and retaining allowance (if any). To exclude any incentive wage from basic wage, it should have a direct nexus and linkage with the amount of extra output. Relying on Bridge and Roof case (supra), it was submitted that whatever is payable by all concerns or earned by all permanent employees had to be included in basic wage for the purpose of deduction under section 6 of the Act. It is only such allowances not payable by all concerns or may not be earned by all employees of the concern, that would stand excluded from deduction. It is only when a worker produces beyond the base standard, what he earns would not be a basic wage but a production bonus or incentive wage which would then fall outside the purview of basic wage under section 2(b) of the Act.

In response, the employer/establishments contended that basic wages defined under section 2(b) contains exceptions and will not include what would ordinarily not be earned in accordance with the terms of the contract of employment. Even with regard to the payments earned by an employee in accordance with the terms of contract of employment, the basis of inclusion in section 6 and exclusion in section 2(b)(ii) is

1 *Bridge and Roof Co. (India) Ltd. vs. Union of India, (1963) 3 SCR 978*

2 *Judgment passed by bench comprising of Hon'ble Mr. Justice Arun Mishra and Hon'ble Mr. Justice Navin Sinha*

3 *https://www.supremecourtofindia.nic.in/supremecourt/2008/2232/2232_2008_Judgement_28-Feb-2019.pdf*

4 *Civil Appeal no. 6221/2011, 3965-66/2013, 3969-70/2013, 3967-68/2013 and Transfer Case no. 19/2019 (arising out of TP(C) no. 1273/2013)*

that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose of contribution under section 6. However, whatever is not payable by all concerns or may not be earned by all employees of a concern are excluded for the purposes of contribution. Dearness allowance was payable in all concerns either as an addition to basic wage or as part of consolidated wages. Retaining allowance was payable to all permanent employees in seasonal factories and was therefore included in section 6. But, house rent allowance is not paid in many concerns and sometimes in the same concern, it is paid to some employees but not to others, and would therefore stand excluded from basic wage. Likewise, overtime allowance though in force in all concerns, is not earned by all employees and would again stand excluded from basic wage. It is only those emoluments earned by an employee in accordance with the terms of employment which would qualify as basic wage and discretionary allowances not earned in accordance with the terms of employment would not be covered by basic wage. The Act itself excludes certain allowance from the term basic wages. The exclusion of dearness allowance in Section 2(b)(ii) is an exception but that exception has been corrected by including dearness allowance in section 6 for the purpose of contribution. *Basic wage, would not ipso-facto take within its ambit the salary breakup structure to hold it liable for provident fund deductions when it was paid as special incentive or production bonus given to more meritorious workmen who put in extra output which has a direct nexus and linkage with the output by the eligible workmen. When a worker produces beyond the base or standard, what he earns was not basic wage. This incentive wage will fall outside the purview of basic wage*.

STATUTORY MANDATE

As per the Act, the Scheme made thereunder and as examined by the Hon'ble Court, following provisions are noteworthy:

1. *Basic Wages* mean all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include- (i) the cash value of any food concession; (ii) any dearness allowance that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living, house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment; (iii) any presents made by the employer;[5]

2. The contribution which shall be paid by the employer to the Fund shall be 10% of the Basic Wages, dearness allowance and retaining allowance (if any), for the time being payable to each of the employees (whether employed by him directly or by or through a contractor)] and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires be an amount not exceeding 10% of his basic wages, dearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section. Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words 10%, at both the places where they occur, the words 12% shall be substituted. Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for the rounding off such fraction to the nearest rupee, half of a rupee or quarter of a rupee. Clarified that dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee and "retaining allowance" means an allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services.[6]

In simple & concise words, the definition of *basic wage* explicitly excludes cash value of food concessions, dearness allowance, house-rent allowance, overtime allowance, bonus, commission, presents made by the employer. Section 6 of the Act states that the contribution to PF shall be a percentage of the

5 *Section 2(b) of the Act*

6 *Section 6 of the Act*

aggregate of basic wages, dearness allowance and retaining allowance (if any) payable to each of the employees. Currently, the contribution rate is 12% for establishments with 20 or more employees, and 10% for establishments with less than 20 employees.

TEST OF UNIVERSALITY[7]

The test is uniform treatment or nexus under-dependent on individual work. [8] In other words, where the employees are free to avail or not to avail any of the allowance and/or the extent of such allowance varies amongst employees, the test of universality is, therefore, not satisfied at all. It is to be noted that any amount of contribution cannot be based on different contingencies and uncertainties.

BASIC PRINCIPLES - BRIDGE ROOF'S CASE (SUPRA)

(a) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages,

(b) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages. By way of example it was held that overtime allowance, though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment but because it may not be earned by all employees of a concern, it is excluded from basic wages.

(c) Conversely, any payment by way of a special incentive or work is not basic wages.

COURT'S VIEW

The Hon'ble Supreme Court while passing the Judgment observed as under:

Basic wage, under the Act, has been defined as all emoluments paid in cash to an employee in accordance with the terms of his contract of employment. But it carves out certain exceptions which would not fall within the definition of basic wage and which includes dearness allowance apart from other allowances mentioned therein. But this exclusion of dearness allowance finds inclusion in section 6. The test adopted to determine if any payment was to be excluded from basic wage is that the payment under the scheme must have a direct access and linkage to the payment of such special allowance as not being common to all. The crucial test is one of universality. The employer, under the Act, has a statutory obligation to deduct the specified percentage of the contribution from the employee's salary and make matching contribution. The entire amount is then required to be deposited in the fund within 15 days from the date of such collection.

Under the Judgment while applying the crucial *test of universality*, the Hon'ble Supreme Court observed that only those emoluments earned by an employee in accordance with the terms of employment, would qualify as basic wages and any discretionary allowances not earned in accordance with the terms of employment, would not be included in the calculation of basic wages. Any such payments, which are ordinarily not made universally, ordinarily and necessarily to all employees, will not fall within the definition of basic wages. Therefore, the calculation of basic wages would not take into account any special incentive or bonus given which has a direct nexus and linkage with the output of an eligible workers.

PRECEDENTS

The Hon'ble Court relied upon the following case-laws while passing the Judgment:

1) *Bridge & Roof case* (supra) - Despite the use of the terminology "all emoluments" contained in section 2(b) of the Act, there were certain exclusions laid down in sub-clauses (i) and (iii), to exclude those presents, which would not be earned in accordance with the terms of the contract of employment. Further, sub-section (ii) lies as an exception, the payments which are earned by an employee in accordance with the terms of his contract of employment. Hence, even though no logical pattern can be determined for the basis of the exceptions in the three sub-section of section 2(b) of the Act, it is conclusive that they must be earned by employees in accordance with the terms of the contract of employment. Further, section 6 includes dearness allowance for purposes of contribution to the PF. Conclusively, the basis

7 *the quality or state of being universal (existing everywhere, or involving everyone)*

8 *Daily Partap v. Regional Provident Fund Commissioner (1999)ILLJ1SC*

of its exclusion under section 2(b) and inclusion under section 6 is that whatever is payable in all concerns and is earned by all permanent employees is included for the purpose of contribution to PF;

2) *Muir Mills Co. Ltd., Kanpur vs. Its Workmen* (AIR1960 SC 985) - "any variable earning which may vary from individual to individual according to their efficiency and diligence would stand excluded from the term "basic wages";

3) *Manipal Academy of Higher Education vs. Provident Fund Commissioner* ((2008) 5 SCC 428) - The emoluments which are universally, ordinarily and necessarily paid to all employees are basic wages. The payment specially availed by those who avail of the opportunity is not basic wage. Any payment by way of a special incentive or work is not basic wage;

4) *Kichha Sugar Company Limited through General Manager vs. Tarai Chini Mill Majdoor Union, Uttarakhand* ((2014) 4 SCC 37) - "when an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning";

5) *The Daily Pratap vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh* ((1998) 8 SCC 90) - the Act was a piece of beneficial social welfare legislation and must be interpreted as such in its judgment.

DECISION

The Hon'ble Court upheld the wage structure and components of salary examined in the Appeals had been correctly determined by the PF Authority under the Act and the respective High Courts as a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution to the PF account of the employees. The Hon'ble Court held that the establishments before the court had failed to demonstrate that the allowances in question herein were being paid to its employees as an incentive for production resulting in greater output and were not paid to all employees across the board. The Hon'ble Court clarified that in order for the amount to exceed beyond basic wages, it has to be established that the workmen concerned had become eligible to get this extra amount by working beyond his normal work that he was required to put in. The Hon'ble Supreme Court concluded that in accordance with the *test of universality*, the Special Allowances formed part of the basic wage and had/are to be factored in while making PF contribution.

CONCLUSION

The Judgment clarifies that the aspect of basic wages, ensuring appropriate compliance of the provisions of the Act, which have been subject to varied interpretation and challenge by several organizations. Per Judgment, since most allowances will no longer be excluded from basic wage, the amount of contribution to be made by the establishment / employer and employee towards PF will significantly increase. While this would result in a reduction of the salary in-hand received by the employee, the accumulation in the employees' PF account would increase. As always, the onus remains on the establishment/ employer to ensure that it takes into account the relevant components of salary, in ensuring compliance with its obligations under the Act.

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HIGHLIGHTS OF THE PROPOSED AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996

Vijaya Singh

The object of the Arbitration and Conciliation Act, 1996 ("***Principal Act/Act***") is to comprehensively consolidate and amend the law relating to domestic arbitrations, international commercial arbitration and enforcement of foreign arbitral awards and also to define the law relating to conciliation and for matters connected therewith or incidental thereto.[1]

A bill "*The Arbitration and Conciliation (Amendment) Act, 2018*" was present before the 16th Lok Sabha, to amend the Act, with primary aim to strengthen the Indian arbitral institution and promote institutional arbitration. Further also to promote the alternate dispute resolution as a mechanism to solve the dispute arisen between the parties instead of approaching to the courts.

It would be worth mentioning that the Principal Act was earlier amended by the Arbitration and Conciliation (Amendment) Act, 2015 and the said amendment revolutionized the alternate dispute resolution process, with the introduction of minimal interference of the Court in arbitration proceedings, completing the arbitration process in a time bound manner and speedily disposal of the matters. Before the said amendment act of 2015 there were no strict timelines within which the proceedings were to be concluded and at times the arbitration proceedings continues for three to four years.

The present proposed amendments are been made to enlist the hurdles and obstructions for the development of institutional arbitration and to prepare a channelized route for institutional arbitration. The present amendment has been proposed by a committee constituted by the Central Government, under the Chairmanship of Justice B.N. Srikrishna, Former Judge of Supreme Court of India.

The salient features of the present Arbitration and Conciliation (Amendment) Bill, 2018, inter alia, are as follows[2]

i. To amend section 11, wherein the arbitrators to be appointed in an Arbitration proceeding shall be from the arbitral institutions designated by the Supreme Court or High Court;

ii. The Chief Justice of the concerned High Court may maintain a panel of arbitrators in case no graded arbitral institutions are available;

iii. An Arbitral Council of India ("*Council*") will be constituted, which will have its headquarters in New Delhi. The Council will be an independent body, for the purpose of grading of arbitral institutions and accreditations of arbitrator and other functions;

iv. The Statement of Claim and defense shall be completed within six (6) months from the date the arbitrator receives notice of Appointment;

v. The proposed amendment also provides for maintaining confidentiality of the proceedings other than the Award and also protect the arbitrator or arbitrators from any suit or other legal proceedings for any action or omission done in good faith in the course of the arbitration proceedings;

vi. An important amendment proposed in the present amendment bill is to clarify that Section 26 of the Arbitration and Conciliation Act, 1996 (amended as upto) is applicable to proceeding which commenced on or after 23.10.2015 and to all such court proceedings which emanate from such arbitral proceedings;

The following are some of the changes in *crux* of the Bill, 2018

1. The definition of the term *"arbitral institution"* has been inserted as *ca* in the definition sec-

1 *The Arbitration and Conciliation (Amendment) Bill, 2018*

2 *The Arbitration and Conciliation (Amendment) Bill, 2018*

tion of the Act.

2. Amendment in the Section 11 of the Arbitral and Conciliation Act, 1996, (amended in 2015) and it proposes to introduce Arbitration Council of India (ACI) with its head office at New Delhi. The Bill proposes to insert Part 1A in the Arbitration and Conciliation Act, 1996. This part provides for constitution of arbitration council, its functions and powers.

I. The Council will be a body corporate, having perpetual succession and a common seal, with power to acquire, hold and dispose of both movable and immovable property and to enter into contract, and sue or be sued in its name.

II. The Council will consist of sitting judges of Supreme Court and High Courts, an eminent person with expert knowledge in conduct of arbitration and an eminent arbitration practitioner, an academician with experience in arbitration, and secretaries of Government Departments, with a term of three years with age limit being seventy years in the case of Chairperson and sixty-seven years in the case of Member.

III. The functions of the Council will be to frame polices governing the grading of arbitral institutions, recognize professional institutes providing accreditation of arbitrators, hold training, workshops and courses in the area of arbitration in collaboration of law firms, law universities and arbitral institutes, to set up, review and update norms and ensure satisfactory level of arbitration and conciliation and to act as a forum for exchange of reviews and techniques to be adopted in order to make India a robust center for domestic and international arbitration and conciliation.

IV. The Council will also create an electronic depository of all arbitral awards made in India in order to create a database of the same. The Bill also sets out the qualifications to be an arbitrator, which includes experienced lawyers, standing counsels of government bodies and private companies, senior managerial persons at PSUs and private companies.

V. It also lays down certain general principles of fairness applicable to arbitrator such as an arbitrator shall be a person of general reputation of fairness, integrity, he must avoid entering into any financial business or other relationship that is likely to affect impartiality or might reasonably create an appearance of partiality or bias amongst the parties, the arbitrator should not have been convicted of an offence involving moral turpitude or economic offence.

VI. In addition to this the arbitrator shall be conversant with the Constitution of India, principles of natural justice, equity, common and customary laws, commercial laws, labour laws, law of torts, making and enforcing the arbitral awards and should possess robust understanding of the domestic and international legal system on arbitration. India has emerged as a hub of commercial activities in recent years, which means an increase in the commercial activities.

Further Eighth Schedule has proposed to be inserted, which will enlist the Qualification and Experience of Arbitrator.

3. In Section 17 of the Arbitration and Conciliation Act, 1996, (amended as upto) in sub section (*1*)

Un amended Section 17

"*17. Interim measures ordered by arbitral tribunal.-(1) A party may during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to the arbitral tribunal-(i) for the …….*"

Proposed amendment

"*17. Interim measures ordered by arbitral tribunal.-(1) A party may during the arbitral proceedings ~~or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36~~, apply to the arbitral tribunal-(i) for the …….*"

4. In Section 23, sub-section (4) has been proposed to be inserted wherein the time lines for completion of pleading has been provided and it states that statement of claim and defense under this section shall be completed with a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment.

5. In Section 29A of the principal Act, the sub-section (1) is substituted. It means that the awards in matters other than international commercial matter, the award has to completed with the period of twelve months from the date of the completion of the pleadings.

A proviso has proposed to be added to the Section 29A sub section (4), wherein the mandate of the Arbitrator shall continue till the application under Section 29A sub section 5 is disposed off.

Also the arbitrator has been given a right to be heard, before the fee is reduced by the Court.

6. The Section 34 (Appeal) has been proposed to be amended to the extent that the parties while making an application to set aside the award have to establish/satisfy on the basis of the record of the arbitral tribunal and not by any other document which is not on record. If the amendments are approved Section 34 will reads as;

"*34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).*

(2) An arbitral award may be set aside by the Court only if— (a) the party making the application ~~furnishes proof that~~ **proposed to be inserted** *(**established on the basis of the record of the arbitral tribunal that**)—*

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law

to which the parties have subjected it or, failing any

indication thereon, under the law for the time being

in force; or…….."

7. That in section 37 the following has been proposed to be amended:

"*37. Appealable orders.—(1) ~~An appeal~~* ***Notwithstanding anything contained in any other law for the time being in force, an appeal*** *shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:--……*"

8. Further after the section 42 of the principal Act, it has been proposed to add Section 42A, which will enlist that the confidentiality has to be maintained of the arbitral proceeding by each one, the arbitrator, the institution, the parties to the arbitration agreement other than the award.

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NOTES

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