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SUPREME COURT OF INDIA

One-Sided Clauses in an Agreement Constitute Unfair Trade Practices Under Section 2(R) Of Consumer Protection Act,1986.

~ Avani Sinha, Associate

The Supreme Court recently in the case of *Pioneer Urban Land & Infrastructure v. Govindan Raghavan*[1] decided on April 02, 2019 held that incorporation of one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2 (r) of the Consumer Protection Act, 1986.

In the present case, the Respondent- Flat Purchaser entered into an Apartment Buyer's Agreement dated 08.05.2012 with the Appellant- Builder to purchase an apartment in the said project for a total sale consideration of Rs. 4,83,25,280/-. As per the Clause 11.2 of the Agreement, the Appellant-Builder was to make all efforts to apply for the Occupancy Certificate within 39 months from the date of excavation, within a grace period of 180 days. The Appellant however failed to apply for the Occupancy Certificate as per the stipulations in the Agreement. The Respondent aggrieved by the said lapse on part of Appellant filed a Consumer Complaint before the National Commission on 27.01.2017. The Appellant during the pendency of the proceedings obtained Occupancy Certificate on 23.07.2018 and issued a possession letter to the Respondent - Flat purchaser on 28.08.2018.

The National Commission vide its order dated 23.10.2018 allowed the Complaint and held that since the last date stipulated for construction had expired about 3 years before the Occupancy Certificate was obtained, the

[1] Civil Appeal No. 12238 of 2018

Respondent could not be compelled to take possession at such a belated stage. Aggrieved by the Order passed by the NCDRC, the Builder preferred the statutory appeal under Section 23 of the Consumer Protection Act, 1986.

After hearing both the parties, the Court noted that the Builder obtained the Occupancy Certificate almost 2 years after the date stipulated in the Apartment Buyer's Agreement. As a consequence, there was a failure to hand over possession of the flat to the Flat Purchaser within a reasonable period. The Occupancy Certificate was obtained after a delay of more than 2 years when the proceedings before the NCDRC were pending. The Court concluded that delay in delivering possession of flat amounted to clear deficiency of service on the part of the Builder. Hence, the flat purchaser was entitled to terminate the agreement and seek a refund.
The Appellant Builder drew Court's attention to the specific clauses of the Agreement entered into by the parties and urged that the compensation awarded by the NCDRS too was unduly high.

The Court, however, noted the sheer discordance in the agreement when it came to the remedies available to the Builder and Flat Purchaser under the agreement. Taking note of the above incongruities of the Agreement, the Court held that contractual terms of the Agreement were ex-facie one-sided, unfair, and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the Builder, the Court ruled. The Court, therefore, dismissed the appeal and upheld the order of NCDRC.

- **Employment's Pension Scheme should be beneficial to the pensioners**

~ Adithya Reddy, Associate

In 2014, employees of various organizations came together to file Writ Petitions before the Kerala High Court against the changes brought forward by the Employees' Pension (Amendment) Scheme, 2014, which reduces the pension payable to employees.

A Special Leave Petition (SLP) was filed against the Kerala High Court judgment, which was dismissed by the Supreme Court. The Bench considered the arguments put forward by both parties and dismissed the Special Leave Petition upholding the Kerala High Court's judgment in the matter of *Employees Provident Fund Organisation & Anr. Vs. Sunil Kumar & Ors.*[2]

The Employees' Pension (Amendment) Scheme, 2014 brought the following changes into the pension scheme: -

a. Initially, even though the pensionable salary was limited to Rs. 6,500/- per month, the Scheme permitted pension to be paid to the employees on the basis of actual salary drawn which was preceded through a combined request made on the same by himself and the employer, and contribution was remitted by him on basis of the actual salary drawn by him. It was further amended by Employee's Pension (Fifth Amendment) Scheme, 2016 which provided an alternative to the employees, wherein the pension would be based on the higher salary.

b. Secondly, there is an option where the existing members as on 01.09.2014 can

[2] SLP D9610/19 decided on April 01, 2019

submit a fresh option along with their employer where the salary is exceeding Rs. 15,000/- per month, wherein the employee would have to shell out a further contribution of 1.16% on the salary exceeding Rs. 15,000/- and it would have to be done within the next 6 months. And such a power to condone the omission to exercise option within 6 months by further 6 months is with the Regional Provident Fund Commissioner, and alternatively, if there is no such option then the excess contribution made shall be diverted to the Provident Fund Account, along with interest.

c. Thirdly, the amendment provided that the monthly pension shall be decided on pro-rata basis upto 01.09.2014 at a minimum pension salary of Rs. 6,500/- and for the later period at a maximum salary of Rs. 15,000/- per month.

d. The amendment also provided for the withdrawal of benefits in the case where the member has not fulfilled the eligible services as required under the Scheme.

The SLP filed by the Employment Provident Fund Organization (EPFO) contended before the Special Bench that payment of pension on the account of contributions based on actual salaries may deplete the Pension Fund and the Scheme would be rendered unworkable. This contention was rejected by the High Court and later in the SLP before the Supreme Court, where it was held that the capping of maximum pensionable salary at Rs. 15,000/- affecting the persons who made contributions from their salaries or any benefits of their excess contributions is not only arbitrary but also unsustainable.

It was observed by the Division Bench of the High Court that the employees who are making contributions based on their actual salaries are being denied the benefits as given by the Pension Scheme, because of the effect of the Amendment. It was decided that the maximum cap of Rs. 15,000/- was not feasible as even manual labourers are paid more on a daily basis. Thus, capping of the maximum salary would be detrimental to the senior citizens as they will not be able to survive on such meagre pension amounts. The Supreme Court, thus affirmed the decision of the High Court and rejected the Special Leave Application on merits.

Pre-deposit clauses to invoke arbitration makes the arbitral process expensive and ineffective

~ Rajeev Rambhatla, Associate

The Hon'ble Supreme Court of India recently in the case *of Icomm Tele Ltd. vs Punjab State Water Supply and Sewerage Board and Ors.*[3] has observed that pre-deposit clauses to invoke arbitration tend to render the arbitral process ineffective and expensive thereby defeating the purpose of the arbitral process itself. The bench comprising of Justice Rohinton Fali Nariman and Justice Vineet Saran struck down such a clause in a notice inviting tender by Punjab State Water Supply & Sewerage Board. The case of the Appellant company (ICOMM Tele Ltd.) which was awarded the said tender was that the said arbitration clause contained in the tender condition amounts to a contract of adhesion and arbitration being an alternative dispute resolution process, a 10% deposit would amount to a clog on entering the system. On being aggrieved by the dismissal of its challenge before the Hon'ble High Court, the Appellant approached the Apex court.

The impugned clause (clause 25(viii)) reads as follows: "viii. It shall be an essential term of this contract that in order to avoid frivolous claims

[3] MANU/SCOR/08414/2019

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

The Hon'ble Judges noted that the 10% "deposit-at-call" before a party can successfully invoke the arbitration clause is on the basis that this is in order to avoid frivolous claims. The bench further observed that a frivolous claim can also be dismissed with exemplary costs, and thus it would be open to the party who has succeeded before the arbitrator to invoke this principle and thus it is open to the arbitrator to dismiss a claim as frivolous on imposition of exemplary costs if need be as opposed to incorporating such a one sided clause. The bench also added that the said clause does not really have any direct nexus to the filing of frivolous claims, as it applies to all claims (frivolous or otherwise) made at the very threshold. While allowing the appeal, The Hon'ble judges remarked:

"The important principle established by this case is that unless it is first found that the litigation that has been embarked upon is frivolous, exemplary costs or punitive damages do not follow. Clearly, therefore, a "deposit-at-call" of 10% of the amount claimed, which can amount to large sums of money, is obviously without any direct nexus to the filing of frivolous claims, as it applies to all claims (frivolous or otherwise) made at the very threshold. A 10% deposit has to be made before any determination that a claim made by the party invoking arbitration is frivolous. This is also one important aspect of the matter to be kept in mind in deciding that such a clause would be arbitrary in the sense of being something which would be unfair and unjust and which no reasonable man would agree to. Indeed, a claim may be dismissed but need not be frivolous, as is obvious from the fact that where three arbitrators are appointed, there have been known to be majority and minority awards, making it clear that there may be two possible or even plausible views which would indicate that the claim is dismissed or allowed on merits and not because it is frivolous. Further, even where a claim is found to be justified and correct, the amount that is deposited need not be refunded to the successful claimant."

Justice Nariman further commented that Primary object of arbitration is to reach a final disposal of disputes in a speedy, effective, inexpensive and expeditious manner. Deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10% would discourage arbitration, contrary to the object of de-clogging the Court system, and would render the arbitral process ineffective and expensive.

- **Disease caused by insect bite in the natural of course of events not covered under the accident insurance.**

~ Abhishek Bagga, Associate

The division bench of the Supreme Court of India, in its judgement dated March 26, 2019 in *Branch Manager, National Insurance Co. Ltd. vs. Smt. Mousumi Bhattacharjee & Ors*4., held that where a disease is caused or transmitted by insect bite/virus in the natural course of events,

[4] https://www.sci.gov.in/supremecourt/2017/2086/2086_2017_Judgement_26-Mar-2019.pdf last referred on 9.04.2019

it would not be covered by the definition of an accident.

Appeal was filed by the insurer against the judgement of the National Consumer Dispute Redressal Commission. The State Commission, in first appeal, had upheld the award of a claim under an insurance policy.

The insured took up employment as manager in Republic of Mozambique. During his stay in Mozambique, the insured was admitted to the hospital and was diagnosed with encephalitis malaria and died due to multi-organ failure. The heirs of the deceased filed a complaint under the Consumer Protection Act, 1986 (hereinafter referred to as Act) alleging that the insurer had committed a deficiency of services in not settling the claim under the insurance cover before the District Consumer Forum. The District Forum allowed the claim and called upon the insurer to pay the award amount. A statutory Appeal was filed by the Appellant before the West Bengal State Commission. The State Commission affirmed the order of the District Forum holding that a sudden death due to mosquito bite in a foreign land was accident. Subsequently, the order of the State Commission was assailed in revision before the National Commission. The National Commission held "It can hardly be disputed that a mosquito bite is something which no one expects and which happens all of a sudden without any act or omission on the part of the victim and accident may include events like snake bite, frost bite and dog bite. Hence, it would be difficult to accept the contention that malaria due to mosquito bite is a disease and not an accident".

In a policy of insurance which covers death due to accident, the peril insured against is an accident; an untoward happening or occurrence which is unforeseen and unexpected in the normal course of human events. The death of the insured in the present case was caused by encephalitis malaria. The claim under the policy is founded on the hypothesis that there is an element of uncertainty about whether or when a person would be the victim of a mosquito bite which is a carrier of a vector borne disease. The contention is that being bitten by a mosquito is an unforeseen eventuality and should be regarded as an accident. As per the World Health Organization's World Malaria Report 2018, Mozambique, with a population of 29.6 million people, accounts for 5% of cases of malaria globally. It is also on record that one out of three people in Mozambique is afflicted with malaria. In light of these statistics, the illness of encephalitis malaria through a mosquito bite cannot be considered as an accident. It was neither unexpected nor unforeseen. It was not a peril insured against in the policy of accident insurance.

The Hon'ble Supreme Court held that the interpretation placed on the terms of the insurance policy was manifestly incorrect and the impugned order of the National commission is unsustainable.

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Statutory Dues Are 'Operational Debt' Under Insolvency and Bankruptcy Code, 2016

~ Pathik Choudhury, Associate

The NCLAT Bench in *Pr. Director General of Income Tax (Admn. & TPS) Vs M/s. Synergies Dooray Automotive Ltd. & Ors*[5] held that statutory dues including income tax, value added tax, etc. will fall under the definition of "Operational Debts" under Section 5(21) of the Insolvency and Bankruptcy Code, 2016 (Hereinafter referred to as "the Code") and Income Tax Department of Central Government, Sales Tax Department of States

[5] Company Appeal (AT) (Insolvency) No. 205 of 2017

and other Local Authorities etc. who are entitled to such debts would be termed as Operational Creditors under Section 5(20) of the Code.

The question which was raised before the Appellate Tribunal was whether statutory dues come under the meaning of "Operational Debts" and whether the income Tax Department of the Central Government, Sales Tax Department of the States and Local Authorities can be treated as "Operational Creditors".

A batch of appeal was filed by the Sales Tax Department and Income Tax Department challenging the Orders passed by NCLT Mumbai and Hyderabad where resolution plans for Corporate Debtor were approved which included tax dues. The Appellants contended that tax dues cannot be included in resolution plan as tax dues falls under the purview of "first charge". The Appellants further contended that under the Code, "Operational Debts" are the debts which can only arise from the claims in respect of supply of goods and services.

The Appellate Tribunal has taken into consideration the definition of "Operational Debt" under Section 5(21) of the Code which states that "*operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority*". While interpreting the definition of "Operational Debt", the Appellate Tribunal has observed that the debt which arises during the operation of a Company is operational debt and the goods and services including employment are required for the day to day operation of a Company and to keep it as a going concern.

The Appellate Tribunal has further observed that a company will only have statutory liabilities like payment of Income Tax, Value Added Tax etc. only if the Company is operational. Therefore, the Appellate Tribunal has held that statutory dues of a Company including Income Tax, Value Added Tax, etc. shall come within the definition of "Operational Debt" and Income Tax Department of Central Government, Sales Tax Departments of the State Governments and Local Authorities who are entitled to such dues shall come within the meaning of Operational Creditors under Section 5(20) of the Code.

NATIONAL COMPANY LAW TRIBUNAL

Provident Fund, Pension Fund and Gratuity are Workmen's assets; Unrecoverable under 'Waterfall Mechanism"

~ Richa K Gaurav, Associate

The Principal Bench of NCLT at Delhi in the matter of *Alchemist Assets Reconstruction Co. Ltd. Versus Moser Baer India Limited*[6] has ruled that dues towards Provident Funds, Pension and Gratuity are assets of workmen lying with the Corporate Debtor and were not to constitute and include in the expression "liquidation estate assets".

This ruling was outcome of adjudication of an application filed by the workmen of the company in liquidation namely Moser Baer India Ltd. to exclude the amount due to them towards PF, pension and gratuity from the 'Waterfall Mechanism'- the scheme for distribution of proceeds from the liquidation of assets of the corporate debtor as envisaged under Section 53 of the Insolvency and Bankruptcy Code, 2016.

The Hon'ble Bench found "basic flaw" in the view adopted by official liquidator terming it "perverse" who adduced same meaning to the

[6] (IB)-378(PB)/2017 order dated 19.03.2019

expression 'workmen's dues' as mentioned in Explanation II of Section 53 of the Code as assigned to it under Section 326 of the Companies Act, 2013 and but the bench in light of definition of expression 'liquidation estate' under Section 36(4) (a) (III) of the Code ruled that all sums due to workman or employee from the PF, pension fund and gratuity fund were not included in the expression "liquidation estate assets".

The Hon'ble Bench further ruled in its verdict "*Once the sum due to any workman or employee from the provident fund, pension fund and gratuity fund do not constitute a part of the liquidation estate, we fail to understand as to how Section 53 could be invoked along with its explanation. According to Section 53, the proceeds from the sale of the liquidation assets are to be distributed in the manner specified therein. Therefore, the aforesaid amount of the workmen dues cannot be a part of liquidation estate assets.*"