

LEX NEWSLETTER ZONE

Litigation Bytes:

Supreme Court

- ~ Appellate Court under Section 37 of the Arbitration and Conciliation Act, 1996 cannot undertake an independent assessment of the merits of the arbitral award
- ~ Arbitral Tribunal Cannot Award Interest if agreement expressly bars its payment
- ~ Civil Court Has No Jurisdiction in Matters in Respect of Which Power Has Been Conferred On NCLT
- ~ Subsequent Filling of an Unfilled Signed Cheque is Not an Alteration

NCLT

- ~ Exception to Applicability of Limitation Act On Insolvency Petitions

Case Analysis

- ~ *Sau. Kamal Shivaji Pokarnekar Versus The State of Maharashtra & Ors.*

Section 37 of the Arbitration and Conciliation Act, 1996, cannot undertake an independent assessment of the merits of the arbitral award. The bench observed that, in such appeals, the court must only ascertain that the exercise of powers by the court under Section 34 has not exceeded the scope of the provision.

The Hon'ble Supreme Court was hearing an appeal from a division bench decision of the Delhi High court wherein the High Court had dismissed the appeal against single bench order rejecting the challenge to the majority Award passed by the Arbitration tribunal. The court observed that, while considering petition under Section 34, a court does not sit in appeal over the arbitral award and may interfere on merits on the limited grounds provided under Section 34(2)(b)(ii), i.e. if the award is against the public policy of India. The bench also took note of 2015 amendments, and briefly explained the changes. The bench noted "*The 2015 amendments to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2A) has been inserted in Section 34, which provides that in case of domestic*

SUPREME COURT OF INDIA

- ✚ **Appellate Court under Section 37 of the Arbitration and Conciliation Act, 1996 cannot undertake an independent assessment of the merits of the arbitral award**

~ Rajeev Rambhatla, Associate

The Hon'ble Supreme Court of India has recently in the case of *MMTC Ltd. vs Vedanta Ltd*¹ held that, a court while considering an appeal under

¹ MANU/SC/0221/2019

arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating of evidence."

On the aspect of Appeal jurisdiction, the Hon'ble Court observed that the only question that is to be ascertained is whether power conferred on the Court under Section 34 has not exceeded the scope of the provision. The bench observed "As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the Court under Section 34 and by the Court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

✚ **Arbitral Tribunal Cannot Award Interest if agreement expressly bars its payment**

~ Arjun Dev, Associate

The Hon'ble Supreme Court of India in *Jai Prakash Associates Limited v. Tehri Hydro Development Corporation (THDC) Limited & Anr*², held that Arbitral Tribunal Cannot Award Interest if agreement expressly bars its payment. The said Judgment was passed by three Judges bench wherein it is pointed out that 1996 Act had altered the position contained in the 1940 Act. Under the new Act, an arbitrator could not award *pendente lite* interest when there was an

express bar against award of such an interest. This legal position is contained in Section 31(7)(a) of the 1996 Act.

The facts of the arbitration proceedings are that the Jai Prakash Associates Limited was awarded the contract under which it was to execute certain Works. Agreement in this behalf was signed on 18th December, 1998. Some disputes arose between the parties. Since the agreement contained an arbitration clause, two claims raised by the Jai Prakash Associates Limited were referred for arbitration. The arbitral tribunal was of three Arbitrators. This arbitration was under the Arbitration and Conciliation Act, 1996. The majority award pronounced on October 10, 2010 allowed the two claims to certain extent. On the said claims awarded, the Arbitrators also granted interest at the rate of 10% per annum from the date when the arbitration was invoked, i.e., October 09, 2007, till 60 days after the award. Future interest at the rate of 18% per annum till the date of payment was also awarded.

The question before the Hon'ble Supreme Court in the present case was that whether the arbitration tribunal awarded interest despite of prohibition for grant of interest in the agreement is valid or not. Initially the arbitration award was challenged before the Single Bench of the Hon'ble Delhi High Court wherein it has set aside an Arbitration award to the extent it granted interest overlooking the prohibition in the agreement. Later the appellant preferred intra-court appeal which has been dismissed by the Division bench of the High Court, thereby upholding the Judgment of the Single Judge. This led the contractor to approach the Hon'ble Supreme Court.

The Hon'ble Supreme Court after going through the facts and precedents has uphold the Judgment of the Hon'ble Delhi High Court,

² CIVIL APPEAL NO(S). 1539 OF 2019 available on <https://indiankanoon.org/doc/133932061/>

which has set aside an arbitration award to the extent of granting interest overlooking the prohibition in the agreement.

✚ **Civil Court Has No Jurisdiction in Matters in Respect of Which Power Has Been Conferred On NCLT**

~ Pathik Choudhury, Associate

In the matter of *Shashi Prakash Khemka V. NEPC Micon & Others*³, the Apex Court's bench while determining the question as to whether an issue relating to transfer of shares should be adjudicated by Civil Courts or by the Company Law Board, the bench has observed that the matters in which power has been conferred on the National Company Law Tribunal, the jurisdiction of the Civil Courts is completely barred.

The Apex Court has relied upon Section 430 of the Companies Act, 2013 which states that the matters in which power with regards to adjudication has been given to National Company Law Tribunal or National Company Law Appellate Tribunal by this Act or any other law for the time being in force, shall bar the jurisdiction of the Civil Courts to entertain such suit or proceeding.

Section 430 of the Companies Act, 2013 states that "No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal."

In this case, the Appellants challenged the judgment delivered by the Hon'ble Madras High Court where it was held that the present matter has dispute in regard to title and therefore the Civil Courts should have the power to adjudicate the matter. The Apex Court while setting aside the judgement given by the Hon'ble Madras High Court passed the aforesaid order.

✚ **Subsequent Filling of an Unfilled Signed Cheque is Not an Alteration**

~ Deiya Goswami, Associate

Appeal in the case of *Bir Singh Vs. Mukesh⁴ Kumar* are against a Judgment and order dated 21-11- 2017 passed by the High Court of Punjab and Haryana at Chandigarh allowing the Criminal Revisional Application filed by the respondent accused, challenging a judgment and order dated 20-2-2016 passed by the Additional Sessions Judge, Palwal filed by the respondent-accused, inter alia, affirming a judgment and order of conviction of the respondent-accused, passed by the Judicial Magistrate, 1st Class, Palwal under Section 138 of the Negotiable Instruments Act, 1881.

The accused issued a cheque dated 04.03.2012 drawn on Axis bank, Palwal in the name of the appellant towards repayment of a friendly loan of amount Rs. 15 lakhs to the complainant. On 11.04.2012 the cheque was returned to the complainant as "insufficient fund". Further on assurance of the accused that the account will have sufficient funds, but the same was returned unpaid with the same remarks of "insufficient fund". Finally, the complainant filed a criminal complaint against the accused before the judicial magistrate 1st Class, Palwal u/s 138 of the Negotiable Instrument Act.

³ CA 1965-66/2014

⁴ Criminal Appeal Nos.230-231 of 2019 @ SLP (CRL) Nos. 9334-35 of 2018

The Court observed that when a blank cheque leaf, which is voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt. There is an existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act. So the cheque will not be invalidated if a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars.

NATIONAL COMPANY LAW TRIBUNAL

✚ **Exception to Applicability of Limitation Act On Insolvency Petitions**

~ Avni Sinha, Associate

A division bench of the NCLT Mumbai in the case of *TJSB Sahakari Bank Ltd. Vs. M/s. Unimetal Castings Ltd.*⁵ held that, a debt that is barred by limitation can be proceeded against under provisions of the Insolvency and Bankruptcy Code (IBC), if the debt continued to be recorded in the books of the corporate debtor.

In the present case, the Petitioner i.e the Financial Creditor sought CIRP of Corporate Debtor u/s 7 of Insolvency and Bankruptcy Code (IBC), 2016 on the ground that the Corporate Debtor committed default in repayment of loan facilities granted to the Corporate Debtor. The Corporate Debtor raised several objections to the petition. It was contended that Corporate Debtor is an MSME that is recognized as important for the national economy and that, declaration of its account as an NPA is illegal, void and non-est. The NCLT rejected all these contentions in view of Section

7 of the IBC that the moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted.

The Corporate Debtor also contended that, the petition is barred under Article 137 of the Limitation Act as the date of default was on 30.06.2015 whereas the Insolvency petition was filed in 23.08.2018 i.e. 3 years after the debt becoming due. To support this Contention Corporate Debtor relied on the decision of Hon'ble Supreme Court in the "B.K. Educational Services Pvt. Ltd. vs. Parag Gupta & Associates (2018 SCC Online SC 1921)".

The Petitioner submitted that the loan was shown in the balance sheet of the Corporate Debtor which is an acknowledgment of liability and hence the debt is not barred by limitation. When the liability is shown in the balance sheet that is clear acknowledgement of debt by the Corporate Debtor that would extend the period of limitation.

The Hon'ble Division Bench upon perusal of documents filed by the Petitioner rejected the objection raised by the Corporate Debtor in view of the admission in its balance sheet. The Bench held that the Petition is within Limitation Petition period and the Corporate Debtor defaulted in repaying the loan availed.

CASE ANALYSIS

✚ **Sau. Kamal Shivaji Pokarnekar Versus The State of Maharashtra & Ors., Supreme Court of India⁶**

~ Deepika Kumari, Associate

Background of the Case:

A police complaint had been filed against the Respondents in the present matter as on 18.11.2018, wherein, the Respondents were accused of forgery and preparing false documents on the basis of which a

⁵ CP (IB) -3622/I&BP/MB/2018

⁶ Criminal Appeal No. 255 of 2019 (Arising out of SLP (Crl.) No. 7513 of 2014)

development agreement came into existence. On the basis of above facts, it has been submitted in the said complaint that the Respondents have made themselves liable for being prosecuted under sections 420, 465, 467, 468, 471 read with section 34 of the Indian Penal Code, 1860. The said complaint was sent for investigation under section 156(3) of Criminal Procedure Code, 1973, wherein, the police has submitted a report stating that the matter appeared to be of a civil nature.

The trial court recorded the statement of the husband of the Appellant and directed issuance of process to the Respondents. The Respondents filed a revision challenging the issuance of process against them which was dismissed. Later, the Hon'ble High Court allowed the writ petition⁷ filed by the Respondents by considering the submissions made by the Respondents that the matter is entirely of a civil nature and further held that criminal proceedings against the Respondents would be an abuse of process of law. Thus, aggrieved by the Order of Hon'ble High Court, the present appeal has been filed by the Appellant.

Issues Involved: Whether the Hon'ble High Court was right in setting aside the order by which the process was issued.

Order: The Supreme Court of India examined the material on record and held that the High Court ought not to have set aside the order passed by the Trial Court issuing summons to the Respondents. A perusal of the complaint discloses that prima facie, offences that are alleged against the Respondents, the correctness or otherwise of the said allegations has to be decided only in the Trial. At the initial stage of issuance of process, it is not open to the Courts to stifle the proceedings by entering into the merits of the contentions made on behalf of the accused. Criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be of a civil nature. If the ingredients of the offence alleged against the accused are prima facie made out in the complaint, the criminal proceedings shall not be interdicted.

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⁷ SLP (Crl.) No. 7513 of 2014)