Between the lines...

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Key Highlights

I. Sexual harassment case: Delhi High Court directs reconstitution of Internal Complaints Committee as per law and sets aside inquiry report

A division bench of the Delhi High Court in the matter of [redacted] ***v. M/s. Air France India and Another*** (*decided on May 30, 2018*) made certain stern observations in an alleged sexual harassment case. The Court made certain important remarks and noted that the employer, courts and the society as a whole are duty bound to root out the wholly unwholesome behavior of sexual harassment at workplaces.

Facts

The appellant, former commercial assistant with the first respondent (**"Air France India"**) alleged sexual harassment by one employee currently serving as Managing Director of Air France India (**"Employee"**). The appellant averred that the Employee harassed her on various occasions, giving account of incidents alleging repeated sexual advances by the Employee despite express refusal by her. The appellant's case was that she was forced to resign from Air France India after she complained about the incidents. She complained that 3 male senior executives of Air France India molested her and threatened to withhold her service documents, gratuity and provident fund to get her to sign the resignation letter. She called the police who rescued her from office and thereafter she lodged a First Information Report (**"FIR"**) at a police station in Gurugram.

Along with the police complaint, the appellant lodged a formal sexual harassment complaint with the Internal Complaints Committee (**"ICC"**) of Air France India. ICC is a body constituted by an employer which looks into the complaints of sexual harassment at the workplace. Constitution of ICC is mandated under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (**"Act"**) for organizations having 10 or more

employees. The appellant also informed the Delhi Commission for Women (**"DCW"**) about the incident in order to ensure that proper ICC was constituted at Air France India to look into her complaint.

The appellant moved the Delhi High Court invoking its writ jurisdiction, raising concerns over the constitution of ICC at Air France India and the manner in which the procedure was conducted. Air France India had raised preliminary objection on the jurisdiction of the Court to entertain the matter, contending that no cause of action arose in Delhi. The single judge dismissed the petition for want of territorial jurisdiction and on the same day, ICC of Air France India gave clean chit to the Employee in its final inquiry report on the complaint of sexual harassment. The appellant filed an appeal before the division bench against the order of the single judge.

Issue

The primary issue for determination before the Court was that whether the single judge had erred in dismissing the case on the ground of absence of territorial jurisdiction.

The Court, to ensure effective and expeditious remedy to the parties, also considered the issues raised by the appellant in the writ petition pertaining to the composition and the proceedings of ICC constituted by Air France India which the appellant contended was biased, in contravention of law and against natural justice.

Arguments

It was the contention of the appellant that ICC at Air France India was not constituted as per the provisions of Section 4 of the Act as 1 member of ICC was not associated with any non-governmental organization and was from an employers' association with which Air France India was affiliated. Section 4(2)(c) of the Act requires that 1 member of ICC should be from amongst non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment. The appellant raised concerns regarding the independence and impartiality of such member of ICC. The appellant further alleged that proper procedure was not adopted by ICC of Air France India in line with the provisions of the Act and principles of natural justice, stating as under:

a) ICC failed to declare procedure which was to be adopted for the enquiry; and

b) The proceedings were conducted at the office of Air France India rather than a neutral venue to intimidate the appellant which was in violation of the guidelines laid by the Supreme Court of India in the landmark judgment delivered in the case of ***Vishaka and Others v. State of Rajasthan and Others*** *(decided on August 13, 1997)* (**"Vishaka Case"**) and the provisions of the Act.

The appellant also pointed out inaction on the part of DCW.

With regard to the issue of jurisdiction, it was submitted by the appellant that the Employee and herself were employed at Delhi office of Air France India and the initial complaint was raised by her at a meeting in Delhi. Further, she pointed out that a common ICC was in place for Gurugram and Delhi offices of Air France India.

On behalf of Air France India, it was argued that the Court did not have the jurisdiction to entertain the case, submitting that:

a) The appellant was working in the Gurugram office of Air France India and not Delhi;

b) No alleged sexual harassment incident was alleged to have taken place in Delhi;

c) All ICC meetings were held in Gurugram office of Air France India; and

d) Delhi office of Air France India was a communication address only and mere existence of place of business within the territorial limits of the State is not enough to confer jurisdiction on the Court. Reliance was placed on the Supreme Court decision in the matter of ***Eastern Coalfields Limited and Others v. Kalyan Banerjee*** *(decided on March 4, 2008)*.

It was further submitted on its behalf that the member of ICC whose nomination was in dispute had advised several employers in the past in framing of the anti-sexual harassment policies and was well qualified to be a member of ICC under Section 4(2)(c) of the Act.

The stand of DCW before the Court was that it has no power to issue any directions in such matters as ICC is the authority under the Act to undertake inquiry and issue directions. Further, DCW is also not the appellate forum for aggrieved party under the Act.

Observations of the Delhi High Court

Jurisdiction

The Court made note of Article 226(2) of the Constitution of India which provides for issue of writs by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for exercise of such power, notwithstanding that the seat of government or authority or the residence of person is not within those territories. The Court observed, "…. the legal position is that a writ can be issued by a High Court against a person, Government or authority residing within the jurisdiction of that High Court or within whose jurisdiction the cause of action in whole or in part arises."

The Court held that it had jurisdiction over the case as:

a) Common ICC was constituted by Air France India for both Delhi and Gurugram offices; and

b) Appointment letter of the appellant was issued by Air France India office at Delhi as well as the letter of resignation was allegedly forcefully taken from the appellant at Delhi.

With respect to the argument that FIR was lodged at Gurugram, the Court observed that lodging of FIR in one State could not confer exclusive jurisdiction on the court of that State.

Constitution of ICC

The Court noted that no record evidenced that the member of ICC of Air France India appointed under Section 4(2)(c) of the Act was a person familiar with issues relating to sexual harassment or was from a non-governmental organisation or association committed to the cause of women as required under the provision. The Court stressed upon the underlying importance of the member of ICC appointed under Section 4(2)(c) of the Act, noting that an independent and impartial member is a part of ICC to prevent the possibility of any undue pressure or influence from senior levels in inquiry in sexual harassment cases as observed in judgment in the Vishaka Case. The Court observed, *"It is imperative that a woman who is alleging sexual harassment feels safe during the course of the proceedings of the ICC and has faith that the proceedings are unbiased and fair."*

Procedure of ICC

The Court observed that ICC proceedings were not conducted according to principles of natural justice and noted the fact that allegedly no charges were framed by ICC of Air France India, etc. However, the Court did not give any definite findings on this issue.

General observations

The Court emphasized on the importance of the guidelines issued in the Vishaka Case and the object of the Act. The Court noted that employers had the primary duty to ensure a safe and secure workplace for female employees. The Court observed, *"This court wishes to emphasize here that the Vishaka Guidelines are to be taken seriously, and not followed in a ritualistic manner. The march of our society to an awareness and sensitivity to the issue of sexual harassment and its baneful effects, flagged in Vishaka (supra), culminated in the path breaking Workplace Harassment Prohibition Act over 17 years later. Even today, the world over is rocked by horrific tales of all forms of sexual harassment of female co-workers at varied workplaces. Decision makers, Parliament, courts and employers are to be ever vigilant in ensuring that effective policies are swiftly and impartially enforced to ensure justice and see that no one is subjected to unwelcome – and unacceptable behavior."*

Decision of the Delhi High Court

The appellant succeeded and the order of the single judge was set aside. The Court concluded that ICC of Air France India was not validly constituted and hence, all the proceedings and the ICC report were declared invalid and had to be set aside. Direction was issued for reconstitution of ICC as per the Act within 30 days and such reconstituted ICC was mandated to conduct a fresh inquiry.

VA View

In the instant case, the Court dissolved the entire ICC inquiry proceedings and rejected the inquiry report on the ground that ICC was not validly constituted. The Court has also emphasized on the principles of natural justice to be followed in conducting such inquiry.

This makes it amply clear that not only the procedure in the Act and the rules thereunder have to be followed during inquiry, but the principles of natural justice and fair play should also be kept in mind. It is also prudent in such cases to refer to the guidelines issued in the Vishaka Case. The Act has to be followed in letter and spirit, as emphasized from time to time by courts in the country.

It may be noted that a special leave petition was filed by Air France India in the Supreme Court on June 30, 2018 challenging the decision of the Court, which is pending consideration.

There are several organizations where it is seen that ICC is not constituted as required by the Act. Several sections of our workforce are not aware that India has a statute which specifically deals with sexual harassment incidents at workplace. Recently, the "Me Too" movement that initially started in the United States gathered momentum around the world with women coming out and narrating their experiences of sexual harassment and abuse. The movement also gained lot of traction in India, especially on social media platforms like Facebook and Twitter. The conversations amongst the youngsters on the social media and the discussion on this issue in the country's print and television media has led to more awareness about this sensitive subject and the law on workplace sexual harassment in India.

Such movements and the government's efforts to raise awareness on workplace sexual harassment will help in meeting the objective with which the Act was enacted. It may be noted here that the Act casts an obligation on the employer to organize workshops and awareness programmes at regular intervals for sensitizing the employees with the provisions of the Act.

II. Delhi High Court invalidates directions in an arbitral award, not forming part of the settlement between the parties

In case of ***Surinder Kumar Beri and others v. Deepak Beri and others*** (*decided on May 31, 2018*), Delhi High Court has set aside the directions passed in an arbitral award on the ground that such directions de hors the settlement between the parties.

Facts

Sh. Deepak Beri (**"Respondent"**) and Sh. Atul Beri (**"Petitioner 3"**), holding 25% shares each in the entities which are the subject matter of the arbitration proceedings, are two sons of Sh. Surinder Kumar Beri (**"Petitioner 1"**), who holds 50% share in the said entities. **"Petitioner 2"** is the wife of Petitioner 1. As some disputes arose between the Petitioner 3 and the Respondent, they entered into an arbitration agreement. The Petitioner 3 and the Respondent thereafter entered into a memorandum of understanding in order to separate their businesses amicably without affecting the running of the family business. A deed of arrangement was also executed by Petitioner 1, Petitioner 3 and Respondent.

An arbitrator was appointed and an award was passed noting down the terms of the settlement between the Petitioner 3 and the Respondent. Further, the arbitrator gave various directions to the parties including to the Petitioner 1 and the Petitioner 2 who were not a party to the arbitration agreement and arbitration proceedings. The directions included the appointment of a firm of chartered accountants to conduct a special audit for the examination of books of accounts including stocks and other records. The petitioners challenged the Award under Section 34 of the Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**) and the following question came up for determination:

Issue

Whether directions to the parties, in the arbitral award passed by the arbitrator, not forming part of the settlement between the parties, are valid?

Arguments

Petitioner 1 and Petitioner 2 submitted that without being party to the arbitration proceedings and arbitration agreement, directions were given to them whereby all the bank accounts of the family business were to be operated only by signatures of the three persons, namely, Petitioner 1 and his two sons. Earlier no such condition was in force. Hence, by virtue of the award, Petitioner 1 was made dependent on his sons for the purpose of utilizing any money from the business. Further, the arbitrator has taken into account evidence that was discussed in the course of conciliation proceedings. Such proceedings are forbidden to be relied upon by the parties under Section 81 of the Arbitration Act. Petitioners argued that Petitioner 2 was not a signatory to any of the documents. However, the directions affected the rights of Petitioner 2. Hence, the award was entirely erroneous and was contrary to the public policy of India.

Petitioner 3, supporting the arguments of Petitioner 1 and Petitioner 2, submitted that arbitrator while passing award in terms of the settlement under Section 30 of the Arbitration Act, cannot make additions or modifications to the settlement recorded between the parties. In the present case, the award unilaterally added directions to the settlement agreed between the parties and hence, was erroneous and was liable to be set aside. Further, as required under Section 23 of the Arbitration Act, parties were never asked to file pleadings and defend their case, and therefore, the award was against the public policy.

Respondent argued that petitioners were not a party to the Arbitration Agreement and hence, cannot challenge the arbitration award under Section 34 of the Arbitration Act. Further, Petitioner 1 actively participated in the division process and the arbitration proceedings. Petitioner 1 had also signed some of the agreements and was fully involved in the process and therefore cannot now claim that he was not consulted. Respondent stated that no rights, if any, of Petitioner 1 get affected by the award and also pleaded that the award is only in terms of the settlement between the parties. The direction that the parties shall operate the bank accounts or business jointly is only to protect the assets of the business entity.

Observations of the Delhi High Court

Delhi High Court examined Section 23 of the Arbitration Act, which requires the claimant to state the facts, the points at issue and the remedy sought and requires the respondent to state his defence, unless otherwise agreed by the parties. Delhi High Court observed that the respondent who is defending his case is entitled to know the contentions of the petitioner. Such contentions when spelt out in the statement of claim provides an opportunity to the respondent to put forth his defence. In the instant case, no such statement of claim/defence was sought for by the arbitrator. The documents filed before the arbitrator and the e-mails sent to him cannot be the basis for adjudication of the dispute between the parties and passing of directions, unless such a procedure is specifically agreed by the parties.

Delhi High Court also examined Section 18 of the Arbitration Act, which provides that each party shall be given a full opportunity to present his case. Delhi High Court observed that in the present case, the directions passed by the arbitrator were not contained in the agreement between the parties. Such directions could be passed only by the process of adjudication after having concluded the mediation proceedings. Delhi High Court further observed that the directions in the award had been passed contrary to the principles of natural justice without affording any reasonable opportunity to the Petitioner 1 to file his defence and make his submissions on the merits of the case. Moreover, the arbitrator cannot suo moto on his own de hors the procedure prescribed under the Arbitration Act, pass such directions.

Decision of the Delhi High Court

Delhi High Court held that the award passed by the arbitrator to the extent that it gives directions de hors the agreement between the parties is illegal and is therefore set aside. Such directions are contrary to the fundamental policy of Indian Law.

VA View

Relying on the principle of natural justice and giving effect to party autonomy in an arbitration proceeding, Delhi High Court in a welcome decision has held that arbitrator cannot suo moto add directions in an arbitral award based on the settlement between the parties. The court observed that even though the directions were an attempt to implement and put into effect the terms and conditions of the settlement more precisely, they cannot have said to be a part of the settlement agreement. This judgment will certainly impact the upcoming arbitration proceedings in a way that arbitrators do not act arbitrarily by modifying the already agreed settlement terms between the parties or by adding directions not forming part of the terms of settlement, while passing the award, without giving a reasonable opportunity of hearing to any party in the process of adjudication.

III. NCLT disposes admitted insolvency petition even in absence of committee of creditors on debtor's willingness to pay the unpaid debt

The National Company Law Tribunal, Mumbai Bench (**"NCLT"**) in ***HGS India Limited v. M/s Geo API Solutions Private Limited*** (*decided on June 26, 2018*) held that in the event no committee of creditors has been formed and the corporate debtor is willing to settle the disputed amount, the petition of insolvency can be disposed of as settled.

Facts

HGS India Ltd. (**"Operational Creditor"**) filed a petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**"Code"**) against M/s Geo API Solutions Private Limited (**"Corporate Debtor"**). This petition was admitted by the NCLT and a moratorium was declared as prescribed under Section 14 of the Code. This included a prohibition on transferring/encumbering any assets of the Corporate Debtor. On the commencement of the insolvency resolution process, the insolvency resolution professional called for claims from any financial and/or operational creditors to form a committee of creditors. However, the resolution professional did not receive any claims from any financial creditors and the claims received from the operational creditors were not accepted by him. Meanwhile, the Corporate Debtor approached the NCLT and declared its intention to settle the disputed amount and pay off the debt. Therefore, the issue before the NCLT was:

Issue

Whether the insolvency petition can be withdrawn in the absence of the committee of creditors?

Observations of the NCLT

The NCLT considered the proposal of the Corporate Debtor which stated that out of the total debt owed, a sum of ₹ 80,00,000 had already been paid and for the balance amount parties had agreed to settle the same for a sum of ₹ 2,05,00,000. The NCLT held that in a situation when on commencement of the insolvency proceedings, no committee of creditors has been formed and the Corporate Debtor is willing to settle the disputed amount, for which, the Operational Creditor has agreed, the petition for insolvency can be disposed of as settled.

Decision of the NCLT

The NCLT passed an order to de-freeze the bank account of the Corporate Debtor to facilitate the payment of the agreed sum as upfront payment and disposed of the petition.

VA View

Before the promulgation of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (**"IBC Ordinance"**) withdrawal of insolvency petition after its admission was possible only by making an application before the Supreme Court under Article 142 of the Constitution. However Section 12A of the IBC Ordinance now

empowers the NCLT to allow the withdrawal of the insolvency petition after its admission provided 90% of the committee of creditors approves such an action. This case, post the IBC Ordinance, dealt with an instance where no committee of creditors was formed. Herein the NCLT allowed the disposal of the petition as the Corporate Debtor and the Operational Creditor reached a settlement. Therefore, in such an instance when the Operational Creditor could not exercise the option of withdrawing the petition as there was no committee of creditors, the NCLT to expedite the dispute resolution judiciously allowed the lifting of the moratorium to facilitate the debt settlement and disposed of the petition.

IV. Maharashtra AAR: Liquidated damages taxable as a separate supply under GST

In a recent decision by the Maharashtra Authority for Advance Rulings (**"Authority"**), amount recovered as liquidated damages for delay in completion of a contract was held to be liable to Goods and Services Tax (**"GST"**) at the rate of 18%. The amount was construed as being a 'consideration' received against the service of "agreeing to tolerate an act or a situation" provided under entry 5(e) of Schedule II to the Central Goods and Services Tax Act, 2017 (**"CGST Act"**).

Background

Maharashtra State Power Generation Company Limited (**"Applicant"**), which is a State power utility engaged in the business of generating and supplying power, enters into various contracts inter alia for the construction, renovation and maintenance of power plants. The said contracts inter alia confer upon the Applicant the right to recover an amount, typically a set percentage of the contract price, as liquidated damages in case of delay in completion of the project by the contractor. The cumulative amount of liquidated damages is calculated upon final delivery of the project and a corresponding deduction is made by the Applicant in the total amount payable to the contractor.

The Applicant had approached the Authority to seek clarification regarding the taxability of such amount retained as liquidated damages, under GST laws.

Arguments

The Applicant relied heavily on sub-section (1) of section 15 of the CGST Act which states that the value of supply shall be the transaction value, that is, the 'price actually paid or payable for the supply of goods or services.' Contending that the retention of liquidated damages from the aggregate amount payable is a clear indicator of a lower price actually paid to the contractor, the Applicant urged the acceptance of the same for computing the levy of tax. The Applicant justified this by citing the precedent laid down in ***Commissioner of Customs and Central Excise v. Victory Electricals Limited*** *(decided on March 21, 2017)* (Tri - Chennai) affirming levy of tax on the revised price where there is subsequent variation in the declared contract price.

Moreover, the Applicant submitted that the intention of the contracting parties is to be taken into account. Where a contract envisages payment of compensation for a breach, it does not presume the primary intention to be tolerance of such breach. The damages recovered are to dissuade deficiency in the contractor's performance and such sum is not a desired income received against an intended supply.

By the very nature of such payment, liquidated damages necessarily succeed a delay in performance by the contractor and cannot be viewed separately from the original supply. Furthermore, sub-section (2) of section 15 of the CGST Act categorically includes *"interest or late fee or penalty for delayed payment of any consideration for any supply"* in the effective value of the supply. Although consideration for tolerance flowed in the opposite direction in present scenario, the Applicant averred that the statutory inclusion of such sum in the value of the primary supply for an analogous scenario under section 15(2) of the CGST Act precluded the existence of a second supply of tolerating an act or a situation.

Observations of the Authority

The Authority committed to an exhaustive analysis of the provisions of the contract entered into by the Applicant in order to ascertain the taxability of the liquidated damages. In the event that the effective date of handover of the project surpasses the date agreed upon by contract, the resulting delay is taken into account for calculation of liquidated damages by the Applicant. The Authority thus observed that construction of the plant and evaluation of the delay are two distinct events taking place one after the other and are therefore taxable as such. Where the supply is the construction of the plant, the consideration is the contract price, whereas where the supply is of tolerating the delay, the consideration is the amount retained as liquidated damages. The net payable amount reduced by liquidated damages was held to be merely for convenience of accounting and was deemed irrelevant for the purpose of determining taxability under GST laws.

Furthermore, the Authority observed that the contract stipulated a "Contract Price Variation" clause which did not include variation on account of liquidated damages. Neither the "Contract Price" nor the "Contract Value", as defined by the agreement, alluded to the amount retained by the Applicant. The Authority thus concluded that liquidated damages did not in any way alter the actual value of the service performed by the contractor. Accordingly, the term 'price actually paid or payable' under section 15(1) of the CGST Act would refer to the "Contract price" as stipulated in the contract and would not undergo a change brought about merely on account of internal settlement of accounts between the parties.

Further, the Authority held that since the GST laws contain a provision for taxing 'acts of tolerance', the said provision will be required to be followed irrespective of the intention of the person who commits such acts.

VA View

The taxability of liquidated damages has long been an issue of academic debate supported by limited judicial backing, yet persistently falling within the penumbra of 'Declared Services' under Section 66E(e) the Finance Act, 1994 which included a comparable provision for tolerating an act or situation.

While this ruling evidences an initial support for such amount being deemed as separate consideration for an independent supply, the reliance placed on the contractual provisions unique to the facts ought to hinder any generalized conclusions regarding the taxability of liquidated damages. The only ground offered by the Authority to distinguish the decision in Victory Electricals Limited (supra) is that the agreement in that case lowered the liability of the recipient under the contract itself- a stipulation not afforded by the Applicant in its contract.

For the sake of prospective interests, it may follow, thus, that a meticulously drafted contract must accommodate the amount of liquidated damages as a reduction in the value of the contract price in order that it may fall within the four corners of Section 15(1) of the CGST Act. However, such an approach may not be a conclusive bar to litigation on the subject. Industry practice for executing turnkey contracts such as the one above dictates the handover of the project in discharge of the contractor's primary obligation to be followed by an evaluation of delay and computation of liquidated damages. This timeline may incite the department into inferring that construction and tolerance of delay are distinct events under a common contract and must be taxed at each instance of the flow of consideration.

While the view adopted by the Authority is open to further judicial review, in order to avoid ambiguity, it is advisable that agreements including shareholders'/ share purchase agreements incorporating payment of liquidated damages should include a clause clarifying the party responsible for bearing levy of GST, if any, on such amount.

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