Dispute Resolution & Arbitration

Monthly Update

October 2022

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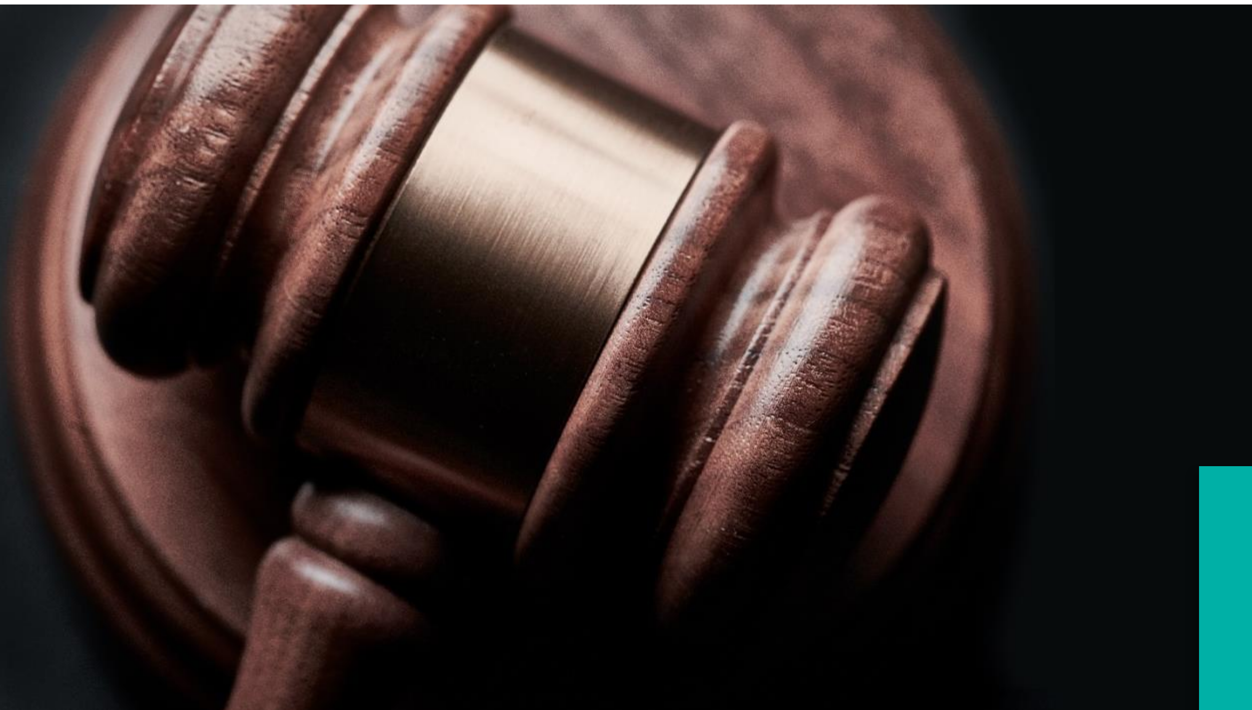
DISPUTE RESOLUTION AND ARBITRATION UPDATE



Contributors

Faranaaz Karbhari
Counsel

Kshitiz Khera
Associate Partner

Mahafrin Mehta
Senior Associate

Akriti Shikha
Associate

Nikhil Varma
Associate

Moreshar Yadaorao Mahajan v. Vyankatesh Sitaram Bhedi (D) Thr Lrs & Ors

Supreme Court of India | Civil Appeal Nos. 5755-5756 of 2011

Background facts

- The Appellant is a doctor who was working in a Government Hospital and also had his private practice. In order to start his private practice, he took on rent a part of the house of the Respondent.
- The Respondent was in financial need for his agricultural cultivation and household expenses and therefore, he suggested to the Appellant that he should purchase the aforesaid part of the house which the Appellant was occupying, together with an added portion.
- The Appellant accepted the said suggestion and an agreement to sell was entered into on July 24, 1984. As per the terms of the said agreement to sell, the Respondent agreed to sell and the Appellant agreed to purchase the suit property for INR 50,000. The Appellant paid an amount of INR 24,000 on the date of the agreement and the Respondent executed an earnest note in favor of the Appellant.
- As per the terms of the agreement to sell, the sale deed was to be executed before March 31, 1985. Respondent again requested for money and on such request, the Appellant paid him an amount of INR 6,000.
- The Appellant was always ready and willing to perform his part of the agreement and therefore, he informed the Respondent by registered letter that he was willing to complete his part of the transaction before March 31, 1985. However, the Respondent replied to the said notice by alleging that the transaction was of money lending and denied the execution of the sale deed.
- Hence the Appellant filed a suit for specific performance before the Trial Court.
- Trial Court, upon hearing the parties, decreed in favor of the Appellant by an order dated March 28, 1990. Respondent preferred an Appeal which was dismissed by an order dated June 13, 1996.
- Respondent preferred a Second Appeal which denied the specific performance and directed the Respondent to refund the amount of INR 30,000 at 9% per annum by an order dated July 3,

2008. The High Court observed that the suit property belonged to the joint family of the Respondent (wife and three sons), but they have not been made a party to the proceeding.

- The Appellant challenged the order passed in Second Appeal before the Supreme Court.

Issue at hand?

- Can an effective decree be passed in favor of the Appellant if the joint owners of the suit property are not made party to the proceeding?

Decision of the Court

- The Apex Court relied on the judgments of the Supreme Court in the matters of ***Mumbai International Airport Pvt Ltd v. Regency Convention Centre & Hotels Pvt Ltd & Ors***[1] and ***Poonam v. State of Uttar Pradesh & Ors***[2] in order to reach the conclusion
- The Court observed that the Appellant himself has admitted that the suit property was owned by the Respondent, his wife and three sons. In view of the aforesaid admission, the Appellant ought to have made all the owners of the suit property, as necessary parties for adjudicating the proceeding. It was also observed that a specific objection was also taken by the Respondent in his written statement with regard to nonjoinder of necessary parties.
- The Court observed that since the suit property was jointly owned by the Respondent along with his wife and three sons, an effective decree could not have been passed affecting the rights of the Respondent's wife and three sons without impleading them. In spite of the Respondent taking an objection in that regard, the Appellant has chosen not to implead the Respondent's wife and three sons.
- It was further observed that two tests are to be satisfied for determining the question who is a necessary party:
  - There must be a right to some relief against such party in respect of the controversies involved in the proceedings
  - No effective decree can be passed in the absence of such party
- The Appeal was dismissed with no costs.

HSA
Viewpoint

The decision of the Supreme Court is based on the established and sound principles of law. In the instant case, the Appellant was aware that beside the Respondent, there are other joint owners of the suit property. Therefore, in order to claim/secure his right in the suit property, all the owners of the property ought to have been impleaded. It can thus be observed that the matter was not decided on merits but on procedural aspects. Although it is said that '*Procedure is the handmaid of Justice*', which is true in most cases; however, not impleading a necessary party to the proceeding is inexcusable.

National Highway Authority of India v. MEP Chennai Bypass Toll Road Pvt Ltd & Anr

Delhi High Court | OMP (T) (COMM) 48/2022, IAs 6739/2022, 6740/2022, 6741/2022 and 6742/2022

Background facts

- The Petitioner National Highway Authority of India (**Petitioner/NHAI**) and the Respondent MEP Chennai Bypass Toll Road Pvt Ltd (**Respondent**) entered into a Concession Agreement dated January 14, 2013. After a dispute arose between the parties, an Arbitral Tribunal was constituted, and the dispute was referred for arbitration.
- The Arbitral Tribunal passed an order that it was not bound by ICADR Rules and thus determined the arbitral fees for the claims and the counterclaims separately, and passed an order suspending the claims and counter-claims of the respective parties on the ground that the parties had failed to clear arrears of arbitral fee.
- Thereafter, the Respondent paid arbitral fee and based on the same, the Tribunal restored the counterclaims. The Arbitral Tribunal, however, reiterated that NHAI's claims would remain suspended on account of its failure to clear the outstanding arbitral fee.
- NHAI filed an application before the Arbitral Tribunal to revise the arbitral fee in accordance with the Fourth Schedule of the Arbitration and Conciliation Act, 1996 (**Act**). The Arbitral Tribunal dismissed the application holding that it was not bound by the Fourth Schedule of the Act and that the arbitral fee was determined separately for the claims and the counterclaims keeping in mind the facts and complexity of the dispute between the parties. The Arbitral Tribunal held that the counterclaim(s) should be treated separately from the claims in view of Order 8 Rule 6A of the Code of Civil Procedure, 1908.
- Against the order passed by the Arbitral Tribunal, the Petitioner filed a petition under Section 14 and Section 15(2) of the Act to seek termination of the mandate of the Arbitral Tribunal on the ground that the Arbitral Tribunal had become de jure and de facto unable to perform its functions.

[1] (2010) 7 SCC 417
[2] (2016) 2 SCC 779

- **Submissions of the Petitioners**
  - The Arbitral Tribunal had fixed the arbitral fee contrary to the terms of the agreement between the parties.
  - As per the agreement entered into between the parties, the arbitral fee was payable to the Arbitral Tribunal as per the ICADR Rules. Thus, the arbitral fee was payable on the dispute, i.e., the claim and the counterclaim, cumulatively and not separately.
  - The Tribunal could not charge fees separately on claims and counterclaims or charge a fee higher than what was agreed upon between the parties, in light of the interpretations given by the Court to the expression 'amount in dispute', as found in the Fourth Schedule of the Act, which is *pari materia* to Schedule I of the ICADR Rules.
  - The Arbitral Tribunal by charging a higher fee than what was agreed between the parties, had not accepted the mandate, and was therefore de jure unable to perform its functions.
- **Submissions of the Respondent**
  - The entire petition is misconceived as the Arbitral tribunal is free to decide its own fees and it is clear that the Tribunal had agreed to charge fee on claims and counter claims separately and not commutatively at time of appointment of tribunal vide order dated May 14, 2019.

Issue at hand?

- Whether or not the Arbitral Tribunal is permitted to fix its fee if its appointment is made by way of an ad hoc agreement between the parties?

Decision of the Court

- The Court held that it is too late in the day for the Petitioner to now question the appointment of the Tribunal and argue that such appointment is contrary to the terms of the Agreement. Continuation of arbitral proceedings and periodical payments made by Petitioner, without any protest or reservation, signified that the Petitioner had agreed and accepted the fee decided to be charged by the Arbitral Tribunal.
- The Court ruled that the Arbitral Tribunal's observations that the arbitral fee was to be determined in terms of Fourth Schedule of the Act, does not mean that the fee has to be charged cumulatively on the claims and counterclaims.
- The Court held that continuation of the arbitral proceedings since 2019 indicated that Petitioner had explicitly accepted the terms of appointment of the Arbitral Tribunal and as there was substantial delay in approaching the Court, this was a good ground to refuse interference by the Court.
- The Court has ruled that the Arbitral Tribunal was permitted to fix its fee, since its appointment was made by way of an ad hoc agreement between the parties.

HSA
Viewpoint

The Court has clarified the applicability of the Fourth Schedule on proceedings arising out of arbitration agreement providing for appointment of ad hoc arbitrators where the Arbitral Tribunal has accepted its appointment outside the mandate of the institutional arbitration rules such as the International Centre for Alternative Dispute Resolution Rules (**ICADR Rules**) and its entitlement to determine its fee out of the scope of the ICADR Rules. Moreover, the legal position on the aspect of cumulative fee on claims and counterclaims in an arbitration proceeding has also been clarified. Further, the conduct of the party raising an objection on the mandate of an arbitral tribunal, being a factual facet, has also been clarified.

State of West Bengal v. Anindya Sundar Das & Ors

Supreme Court of India | Criminal Appeal No. 1497 of 2022

Background facts

- An order dated August 27, 2021 was passed by the Special Secretary to the Government of West Bengal re-appointing the incumbent Vice Chancellor (**VC**) of the Calcutta University in terms of the Section 8 of the Calcutta University Act, 1979 (Act) and invoking the Section 60 of the Act.
- The High Court of Calcutta allowed the Writ Petition seeking the issuance of a writ of quo warranto against the Vice Chancellor of Calcutta University and set aside the above-mentioned order stating that the VC had no authority to hold that office on the basis of the order of re-appointment by the State Government
- **Submissions of the Appellant before the Supreme Court**
  - The power of the Chancellor as per Section 8(5) to appoint a person to exercise the powers and perform the duties of the VC during the period of the temporary inability of an incumbent VC or pending the appointment of a VC applies only when the power of re-appointment has not been exercised under Section 8(2)(a).
  - Section 8(6) applies only when the power to re-appoint under Section 8(2)(a) of the Act has not been exercised.
  - Section 8(2)(a) of the Act clearly specifies that a VC shall be eligible for re-appointment for another term of four years subject to the satisfaction of the State Government and on the basis of their past academic excellence and administrative success during the term of office as a VC.

- The unamended Section 8(2)(a) of the Act stipulated that a VC would be eligible for re-appointment for a period not exceeding four years following the provisions of sub-Section (1) of Section 8. However, in the amended provisions of Section 8(2)(a), the expression following the provisions of sub-Section (1) was conspicuously deleted as a result of which the procedure prescribed in Section 8(1) for the appointment of a VC does not apply to a re-appointment.

- **Submissions of the Respondent before the Supreme Court**
  - Section 8(2)(a) does not take away the power of the Chancellor to appoint a VC under Section 8(1)(b) of the Act.
  - In effecting the re-appointment of a VC, the procedure which is prescribed by Section 8(1) of constituting a Search Committee needs to be followed.
  - The UGC Regulations clearly stipulate that the appointment of a VC has to be made by the Chancellor.
  - Section 8(2)(a) provides for the satisfaction of the State Government as well as for eligibility of a VC for re-appointment. But this does not take away the power of the Chancellor to make the appointment.

Issues at hand?

- Whether the writ of Quo warranto be exercised in the present case?
- Can the amendment to the Section 8 of the Act be interpreted to mean that the power of re-appointing the VC is vested in the State Government?

Decision of the Court

- The Court, while discussing the exercise of the Writ of Quo warranto in the cases of ***University of Mysore v. CD Govindra Rao***[3], ***High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat***[4], ***B Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Assn***[5], ***Central Electricity Supply Utility of Odisha v. Dhobei Sahoo***[6] and in the recent case of ***Bharati Reddy v. State of Karnataka***[7], stated that it is a settled position of law that the writ of quo warranto can be issued where an appointment has not been made in accordance with the law.
- It was held by the Court that Section 8(2)(a) of the Act stipulates the conditions subject to which the VC would be eligible for re-appointment. Further in the said Section, the use of language '*the eligibility of a VC for reappointment for another term of four years*'; here the expression '*another term'* signifies that the new term will be in addition to the earlier term of four years subject to a few conditions provided in the same Section.
- The Court held that as per the Section 8(1)(b) of the Act, the power of appointing the VC is vested in the Chancellor.
- The Court held that the interpretation of the Appellant of Section 8(2)(a) indicating that the power of re-appointment is taken away from the Chancellor and is entrusted to the State Government due to the language '*subject to the satisfaction of the State government*' is an incorrect reading of the statutory provision.
- The Court clarified that the amendment in the provisions of the Section 8(2)(a) of the Act shall not be interpreted to mean that the power of re-appointment has been taken away from the Chancellor and entrusted to the State government and only means that the procedure involved in the appointment of the VC shall not be same as that in re-appointment.
- The Court relied upon the findings in the case of ***Madeva Upendra Sinai v. Union of India***[8] and held that the government cannot misuse the removal of difficulty clause to remove all obstacles in its path which arise due to statutory restrictions and therefore the State Government erred in choosing the path under Section 60 and misused the said removal of difficulty clause
- The UGC Regulations provides for appointment of VC and as per the principles propounded in the case of ***Gambhirdan K Gandhvi v. State of Gujarat***[9], even if the provisions of the Act allowed the appointment of the Vice Chancellor by the State Government, it would be in violation of the UGC Regulations which, being a part of statute framed by the Parliament, will prevail.

HSA
Viewpoint

This judgement followed the principles laid down in the previous judgements related to the writ of quo warranto in cases where appointments have not been made as per the existing legal provisions. Further, emphasis has been laid on the importance of adopting a holistic approach while reading the statutes and interpreting it in a way that provides meaning to the statute while keeping the object of the statute in mind.

[3] (1964) 4 SCR 575
[4] (2003) 4 SCC 712
[5] (2006) 11 SCC 731
[6] (2014) 1 SCC 161
[7] (2018) 6 SCC 162
[8] (1975) 3 SCC 765
[9] (2022) 5 SCC 179

Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel & Anr

Supreme Court of India | Criminal Appeal No. 1497 of 2022

Background facts

- The Appellant issued a statutory notice under Section 138 of the Negotiable Instruments Act (Act) to the First Respondent (**Accused**) alleging that the First Respondent borrowed a sum of INR 20,00,000 from the Appellant and issued a cheque for discharging his liability; however, when the Appellant presented the said cheque, it was dishonored due to insufficient funds.
- The First Respondent in his reply to the Notice stated that the Appellant lent INR 40,00,000 to the First Respondent and the two cheques were given by him as a security which were to be returned as and when the sum lent was paid in full and despite this arrangement, the cheques were misused by the Appellant.

  Another reply was submitted by the First Respondent seeking to amend the first reply by replacing the acknowledgment of having received a loan of INR 40,00,000 to INR 20,00,000.
- The Trial Court acquitted the First Respondent on the ground that he paid a sum of INR 4,09,315 discharging his liability in part towards the debt and further held that the Appellant has failed to prove that he was owed a legally enforceable debt of INR 20,00,000.
- The Appellant filed an Appeal against the order of Trial Court in the High Court and the High Court upheld the judgement of the Trial Court thereby acquitting the First Respondent.
- **Submissions of the Appellant before the Supreme Court**
  - There is nothing on record to show that the payment of INR 4,09,315 was made towards the discharge of the debt of INR 20,00,000.
  - The payment of INR 4,09,315 was made before the issuance of the cheque.
  - The First Respondent did not make any payment of the sum that was due since the statutory notice that was served upon him on April 15, 2014.
- **Submissions of the First Respondent before the Supreme Court**
  - The term 'debt or other liability' as used in Section 138 of the Act has been defined to mean a 'legally enforceable debt or other liability', thus the demand made must be for a sum that is legally enforceable.
  - If the debtor has paid part of debt, then a statutory notice seeking the payment of entire sum in the cheque without any endorsement under Section 56 of the part-payment made would be legally unsustainable.
  - As the First Respondent has paid off a part of the debt, the Appellant could not initiate action if the cheque, which represented the principal amount without deducting or endorsing a part payment, has been dishonored.

Issues at hand?

- Whether there is a commission of an offence under Section 138 if the cheque that was dishonored does not represent a legally enforceable debt on the date of its presentation/maturity?
- If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is presented and the cheque is drawn, is the legally enforceable debt on the day of maturity of the cheque would be the sum represented on the cheque?

Decision of the Court

- The Court, while discussing the cases of ***Sampelly Satyanarayan Rao v. Indian Renewable Energy Development Agency Ltd***[10] and ***NEPC Micon Ltd v. Magna Leasing Ltd***[11], resonated with the findings of the two cases that there must be a legally enforceable debt on the date mentioned in the cheque that is the date of maturity.
- The Court held that a post-dated cheque might be drawn to represent a legally enforceable debt at the time of its drawing. However, the cheque must represent a legally enforceable debt at the time of encashment to attract the offence under Section 138 of the Act.
- The Court, while reiterating the principles laid down in ***Indus Airways Pvt Ltd v. Magnum Aviation Pvt Ltd***[12], ***Sampelly Satyanarayana Rao v. Indian Renewable Energy Development***

HSA
Viewpoint

This judgment upholds the majority view taken by the Apex Court in its previous judgements that the presence of a legally enforceable debt on the date of presentation/maturity of the cheque is a sine qua non for attracting the offence under the Section 138 of the Act. However, the law as laid down does not address the mischief of the Accused who may seek to part-pay his debt to avoid prosecution under the provisions of the Act. This needs to be addressed with clarity in terms of the legally enforceable debt being reduced only for the purpose of claim in the Notice issued and complaint filed under the applicable provisions of the Act.

[10] (2016) 10 SCC 458
[11] AIR 1995 SC 1952
[12] (2014)12 SCC 539

Agency Ltd[13] and ***Sripati Singh v. State of Jharkhand***[14], concluded that the principles in cases where the borrower agrees to repay the loan within a specified timeline and issues a cheque for security but defaults in repaying the loan within the said timeline, the cheque matures for presentation as and when the said cheque is sought to be encashed by the debtor. If the said cheque is dishonored, Section 138 of the Act is attracted. However, as a rule, it is to be seen that when a cheque issued for security, between the date of issuing the cheque and maturing of the cheque, the loan could be repaid through any other mode and only when the loan is not paid, the cheque would mature for presentation. And if the loan is discharged before the said due date, the cheque shall not be presented for encashment.

- It is held that offence under Section 138 arises only when a cheque that represents a part or whole of the legally enforceable debt at the time of encashment is returned by the bank unpaid. Further if the cheque did not represent the legally enforceable debt at the time of encashment, the offence under Section 138 is not made out.
- The Court discussed the cases of ***Joseph Sartho v. Gopinathan***[15], ***Alliance Infrastructure Project Ltd v. Vinay Mittal***[16] and ***Shree Corporation v. Anilbhai Puranbhai Bansal***[17], and the similar view as taken in these cases was reiterated by the Court that the notice of demand which requires the drawer of the cheque to make payment of the whole amount represented in the cheque despite receiving part repayment against the sum before the issuance of the notice, cannot be valid under Section 138(b) of the Act.

Sukhbiri Devi & Ors v. Union of India & Ors

Supreme Court of India | Civil Appeal No. 10834 of 2010

Background facts

- Shri Rama Nand, predecessor-in-interest of the Appellants, was the bhumidar of a certain part of an agricultural land situated in the village of Naraina in Delhi, which was acquired on January 09, 1976. As per the policy, whereunder the land was acquired, the bhumidar was entitled to allotment of alternative residential plot in lieu of the acquired land.
- Subsequently, Shri Rama Nand passed away, leaving behind his widow, two sons and four daughters. Pursuant to the demise of the widow as well, the alternative plot was allotted by the Respondents in the exclusive name of Dhan Singh, one of the sons, upon his production of a registered Relinquishment Deed, as per the letter dated March 08, 1991. The said letter to the Respondent for allotment of an alternate property in his name, based on the Relinquishment Deed issued by the other legal heirs in his favor, came to the notice of Nahar Singh, another son, who thereafter filed an objection before Respondents stating that alternative plot shall not be allotted in the exclusive name of Dhan Singh. It was further stated therein that the Relinquishment Deed produced before the Authorities was obtained fraudulently by Dhan Singh. Subsequently, Nahar Singh died on May 14, 1993, following which his widow and children stepped in his shoes.
- Thereafter, the Appellants filed a Suit before the Trial Court, Delhi which framed a preliminary question as to whether the Suit is within the limitation. Upon answering the same in the negative, in accordance with the said decision, the suit was dismissed vide judgment and decree dated May 13, 2005.
- Challenging the judgment and decree dated May 13, 2005, the Defendants filed an appeal before the First Appellate Court presided over by Shri Sukhdev Singh, Additional District Judge, Delhi, which dismissed the appeal and confirmed the judgment and decree of the Trial Court, as per judgment dated December 08, 2006.
- Pursuant thereto, the Defendants filed a second appeal before the High Court which vide judgment dated August 25, 2009 (**Impugned Judgment**) concurred with the findings and dismissed the appeal answering the question of law i.e., whether the suit is within limitation against the Appellants.
- Aggrieved by the Impugned Judgment, the Appellants preferred an appeal by way of special leave before the Supreme Court (**SC**).

[13] (2016) 10 SCC 458
[14] 2021 SCC OnLine SC 1002
[15] (2008) 3 KLJ 784
[16] ILR (2010) III Delhi 459
[17] 2018 (2) GLH 105

Issue at hand?

- Whether an issue of limitation can be framed and determined as a preliminary issue under Order XIV Rule 2(2) of the Code of Civil Procedure, 1908?

Decision of the Court

- SC observed that in a case where the issue of limitation can be decided on admitted facts, it can be framed and determined as a preliminary issue under Order XIV Rule 2(2)(b) CPC.
- The Court held that an admission made in pleadings by a party is admissible against him *proprio vigore*. The SC placed reliance on various cases including ***Nusli Neville Wadia v. Ivory Properties***[18], and observed that although the question of limitation generally constitutes questions of both law and facts, in cases where the fact integral and conclusive in determining the start date of limitation is already averred in the plaint, the question of limitation is only confined to a question of law which can essentially be framed as a preliminary issue by the Court thereby postponing the determination of the other issues and the same would be perfectly permissible under Order XIV Rule 2(2)(b) CPC in such cases that can be effectively decided on admitted facts.
- SC opined that the contention in this matter regarding the applicability of Article 136 of the Limitation Act, 1963 (Act) was crafty. A cursory reading of the law would reveal the indisputable position it applies only when an application for execution of any decree (other than a decree granting a mandatory injunction) or order of any Civil Court is to be filed, pointing towards the decisions in ***Bikoba Deora Gaikwad & Ors v. Hirabai Marutirao Ghorgare & Ors***[19] Hence, in the present instance, SC was of the opinion that Article 136 of the Act had not met, in its entirety, and the question involved is relevant only to the time restriction for initiating legal proceedings to seek alleged legal right.
- SC noted that it was held by the three-judge Bench in the decision in the ***Nusli Neville Wadia's*** case (supra), that the provisions under Order XIV Rule 2(1) and Rule 2(2)(b) allow to deal with and dispose of a suit in accordance with the decision on the preliminary issue. The present matter, in view of the nature of the findings on the preliminary issue and the consequential consideration of the suit in terms of Order XIV Rule 2(2)(b) and taking note of the fact that the suit, does not survive after such consideration. It was found that there was no reason to consider the contention of the appellants with reference to Order VII Rule 11 based on the decisions relied on by them and referred.
- Further, the contentions of the Appellants based on Articles 17 and 65 also would fade and warrant no consideration at all, in the present circumstances. The consequences would be that there were absolutely no perversity or illegality in the concurrent findings of the Courts below warranting interference in invocation of the power under Article 136 of the Constitution of India. In view of the above, the SC dismissed the appeal with costs.

HSA
Viewpoint

The present judgement upholds the maxim of *vigilantibus nondormientibus jura subveniunt* by giving due emphasis on the question of limitation and the significance of its determination in a suit. The judgement creates a distinction between suits regarding when the issue of limitation can be a preliminary issue. If the admitted facts in a case cannot conclusively shed light on the start of the limitation period, the issue of limitation indeed cannot be determined in exclusion of all others. However, a case where the limitation period is conclusively established from the admitted facts, there remains no bar in determining the question of limitation first and foremost which would consequently determine the fate of the suit.

Uttam Energy Ltd v. Shivratna Udyog Ltd

High Court of Bombay I Arbitration Petition No. 79 of 2022

Background facts

- In the instant case, the Petitioner has filed the present Petititon under Section 11 of the Arbitration and Conciliation Act, 1996 (**Act**) for appointment of an arbitral tribunal to adjudicate the disputes and differences between the parties, which have arisen under two Agreements entered by the Petitioner with the Respondent both dated June 30, 2012 for design, procurement, manufacture, supply and supervision of a multi-fuel fired boiler of 75 TPH MCR Capacity, 72.5 kg/cm2 (g) pressure, 515ºC ± 5ºC steam temperature with accessories for a 12.5 MW generation project being set up at Alegaon, Tal. Madha, Dist. Solapur, Maharashtra.
- Both the aforesaid Agreements contained an arbitration clause and there is no dispute regarding the same.
- As disputes and differences had arisen between the parties, the Petitioner by its advocate's notice dated December 3, 2020 invoked the arbitration agreement and called upon the Respondent to appoint a sole arbitrator to adjudicate the disputes. The name of the nominee arbitrator was also suggested in paragraph 5 of such notice. The Petitioner invoked arbitration in respect of both the agreements and claimed an amount INR 1,33,37,723 against the Respondent.

[18] (2020) 6 SCC 557
[19] 2009 (Supp) AIR(SC) 454

- As the notice invoking arbitration was not replied to, the present petition was required to be filed by the Petitioner.
- It is pertinent to note that the present Petition was initially filed on the Original Side of the High Court as a Commercial Arbitration Petition, on the assumption that the dispute was a commercial dispute and the same was required to be filed in such manner, even though no cause of action to invoke such jurisdiction had arisen within Mumbai. the Petition was permitted to be transferred to the Appellate Side by an order dated March 7, 2022 passed by the High Court.

Issues at hand?

- Whether High Court has the jurisdiction under Section 11(6) of the Act to appoint an arbitrator in case of commercial dispute in lieu of Section 10(3) of the Commercial Courts Act, 2015?
- Whether a valid arbitration agreement exists between the parties?

Decision of the Court

- At the outset, the High Court considered the purport and effect of the provisions of Section 11 of the Act, as also the provisions of Section 10 of the Commercial Courts Act, 2015. The High Court noted that as per Section 11(6) of the Act, only the Supreme Court or High Courts have the jurisdiction to appoint arbitrator with the exception of the Supreme Court and the High Court designating any person or institution to make such appointment, and even if such person or institution is so appointed, it shall not amount to conferring any judicial power by the Supreme Court or the High Court.
- The Court observed that by reading the provisions of Sub-Section (3) of Section 10 read with Section 3(1) and Section 6 of the Commercial Courts Act, it is quite clear that in no manner the jurisdiction of the High Court under Section 11 of the Act has been either been disturbed or divested in matters of appointment of an arbitral tribunal as provided under Section 11 of the Act.
- The Court, upon a perusal of Sub-Section (3) of Section 10 of the Commercial Courts Act, stated that the same takes within its ambit the jurisdiction and power in relation to the appointment of an arbitral tribunal, to be exercised by the Commercial Court exercising territorial jurisdiction over such arbitration, when the exclusive jurisdiction to make appointment of an arbitral tribunal within the meaning of Section 11 of the Act is conferred on the High Court or the Supreme Court as the case may be, it would amount to a complete misreading of Sub-Section (3) of Section 10 of the Commercial Courts Act, and in fact would lead to an absurdity. It further held that such an interpretation can never be accepted when Section 11 of the Act categorically provides powers to the High Court for appointment of an arbitral tribunal.
- The Court further observed that when Sub-Section (6) of Section 11 of the Act uses the word 'any person or institution' necessarily it would be a person or any institution which is not a Court and which would not have any judicial power and by virtue of such designation under Sub-Section (6B) of Section 11 of the said Act, it shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.
- With regards to the second issue, the Court observed that clause 15 and 14 of the agreements dated June 30, 2012, clear specify the arbitration clause and there is no dispute regarding the same. It was also noted that there is also no dispute on the invocation of the arbitration agreements. The Court further stated that it is a settled position in law that in exercising jurisdiction under Section 11(6) read with Sub-Section (6-A) of the Act, the Court is required to examine the existence of an arbitration agreement, and when the arbitration agreement subsists and other requirements as provided for under Section 11 of the Act being satisfied, it will be necessary for the High Court to exercise jurisdiction thereunder.
- Holding that all the requirements for the High Court to exercise jurisdiction under Section 11(6) of the Act are eminently present, the present Petition was allowed, and a sole arbitrator was appointed to adjudicate upon all the disputes which had arisen between the parties.

HSA
Viewpoint

The decision that High Courts have the power to appoint sole arbitrator under Section 11 of the Arbitration and Conciliation Act even in case of commercial disputes can be said to be a decision which removes all doubts with regards to appointment of arbitrators in respect of commercial disputes. This decision provides much-needed clarity to this issue since it cannot be the case that the Commercial Courts Act would divest powers of the High Court to appoint an arbitrator.

HSA
AT A GLANCE

FULL-SERVICE CAPABILITIES

BANKING & FINANCE

DEFENCE & AEROSPACE

INVESTIGATIONS

PROJECT FINANCE

RESTRUCTURING & INSOLVENCY

COMPETITION & ANTITRUST

DISPUTE RESOLUTION

LABOR & EMPLOYMENT

REAL ESTATE

TAXATION

CORPORATE & COMMERCIAL

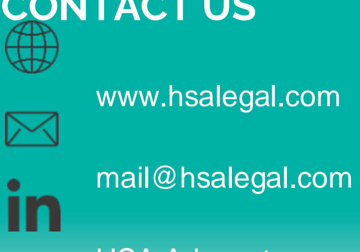
ENVIRONMENT, HEALTH & SAFETY

PROJECTS, ENERGY & INFRASTRUCTURE

REGULATORY & POLICY

TECHNOLOGY, MEDIA & TELECOMMUNICATIONS

GLOBAL RECOGNITION



CONTACT US

www.hsalegal.com

mail@hsalegal.com

HSA Advocates

PAN INDIA PRESENCE

New Delhi
Email: newdelhi@hsalegal.com

Mumbai
Email: mumbai@hsalegal.com

Bengaluru
Email: bengaluru@hsalegal.com

Kolkata
Email: kolkata@hsalegal.com

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