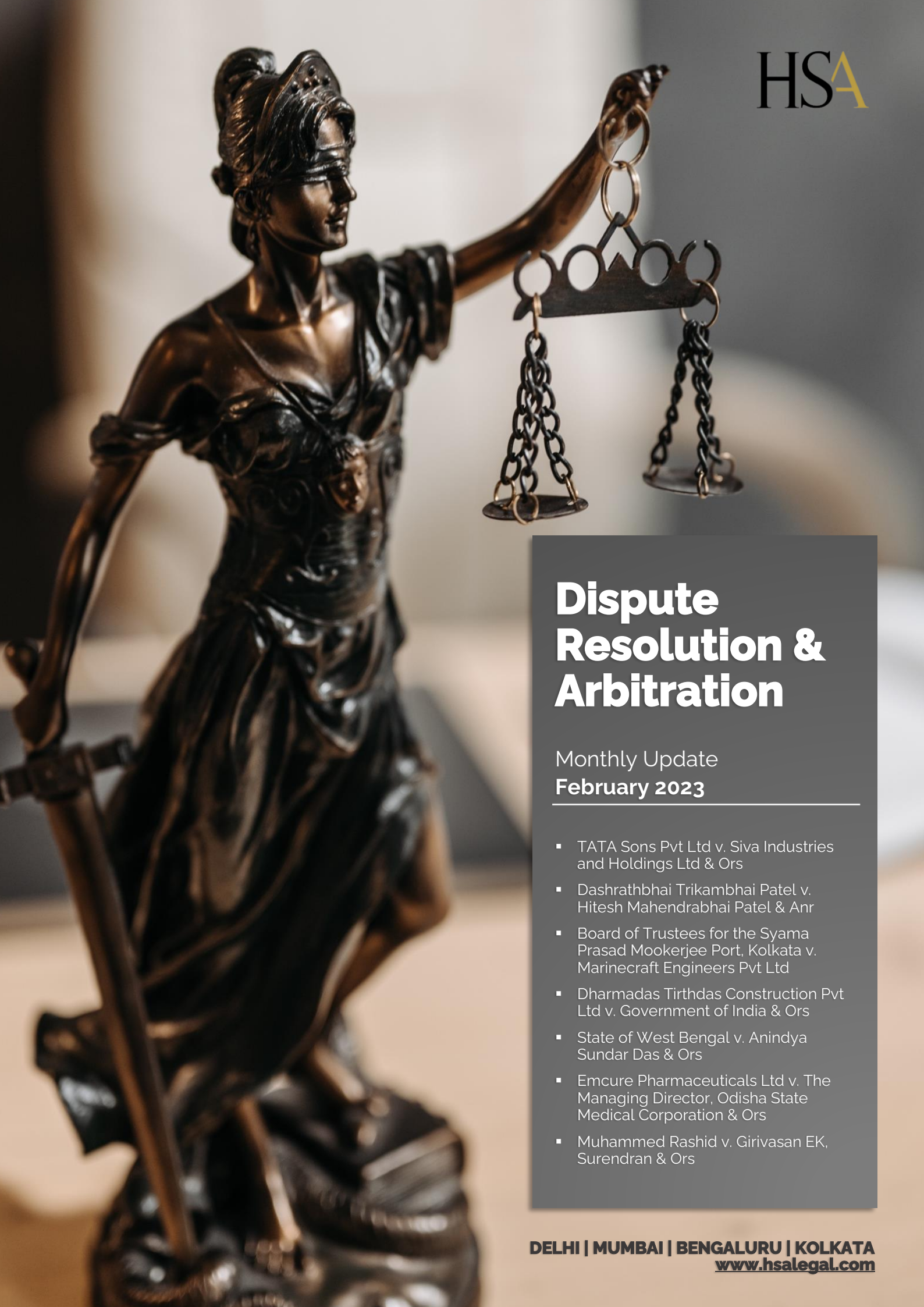

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Dispute Resolution & Arbitration

Monthly Update

February 2023

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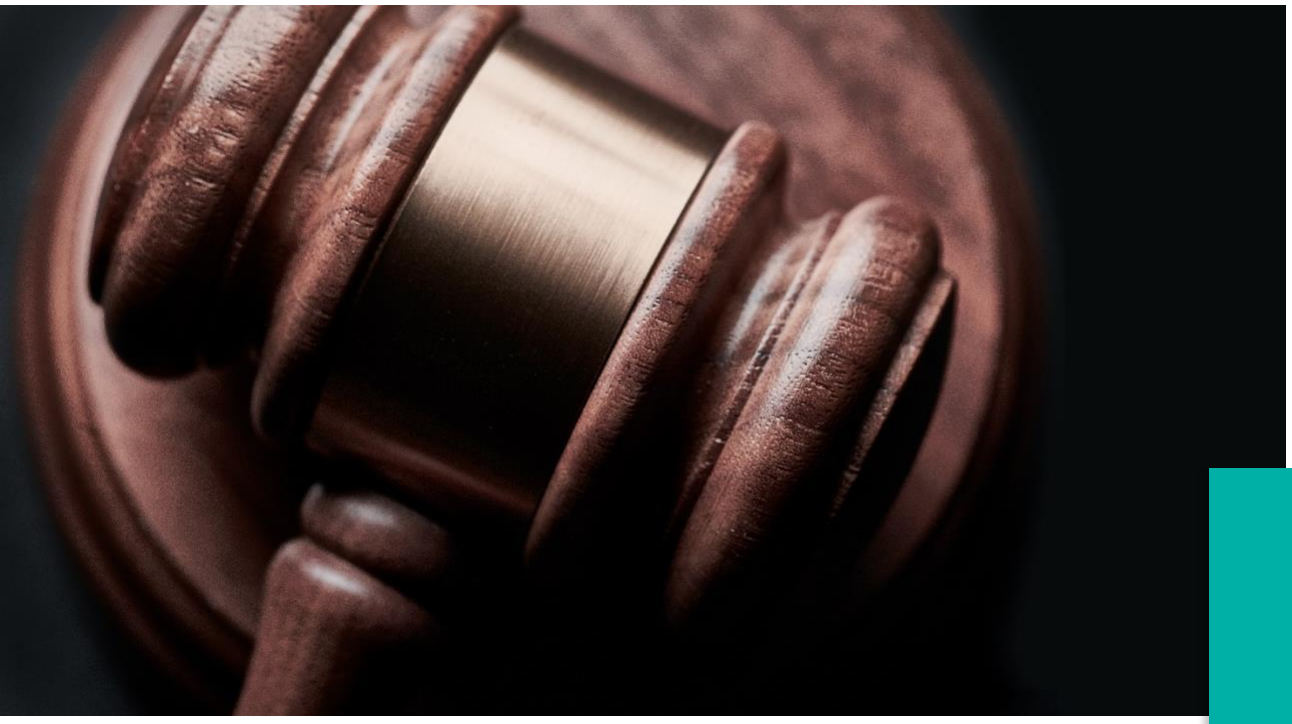
DISPUTE RESOLUTION AND ARBITRATION UPDATE



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TATA Sons Pvt Ltd v. Siva Industries and Holdings Ltd & Ors

Supreme Court of India | MA No. 2680/2019 in Arbitration Case (Civil) No. 38/2017

Background facts

- In 2006, TATA Sons Pvt Ltd (**Applicant**), Siva Industries and Holdings Ltd (**Respondent No. 1**) and Tata Tele Services Ltd (**TTSL**) executed a Share Subscription Agreement for the issuance and allotment of shares of TTSL to the First Respondent.
- Subsequently, the Applicant, TTSL and NTT Docomo Inc (**Docomo**) executed a share purchase agreement, whereby Docomo acquired certain equity shares of TTSL from Respondent No. 1. The rights, obligations, and duties of Docomo's ownership of TTSL's shares were recorded in a Shareholders' Agreement (**SHA**) executed between the three parties.
- The Respondents then entered into an Inter se Agreement with the Applicant and TTSL, which placed an obligation over the Respondents to purchase the TTSL shares on a pro-rata basis if Docomo exercises its sale option under the SHA.
- Thereafter, arbitration proceedings were initiated by Docomo to resolve the dispute between the parties. Pursuant to the decision of the Arbitrator, the Applicant was directed to acquire Docomo's shareholding in TTSL and make the necessary payments for the same to Docomo.
- As per the Inter se Agreement, a foreign resident, Mr. C. Sivasankaran (**Respondent No. 2**) being the promoter of Respondent No. 1, was liable to the Applicant in the instances where Respondent No. 1 failed to fulfil its obligation and pertaining to the said Agreement, the Respondents were asked to acquire back its shareholdings in TTSL and proportionately pay Docomo.
- Disputes arose between the Applicant and Respondents and the notice of arbitration was issued by the Applicant in 2017. The Respondents failed to appoint their nominee arbitrator. As Respondent No. 2 was a foreign citizen, the Applicant filed a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (Act) before the Supreme Court (SC) seeking constitution of an arbitral tribunal.
- Vide Order dated January 17, 2018, SC appointed a Sole Arbitrator i.e., (Retd.) Mr. Justice S.N. Variava, who granted extension of six months for delivering the arbitral award, till August 14, 2019, on mutual consent.

- During the pendency of the arbitration proceedings, insolvency proceedings were initiated by the IDBI Bank Ltd against Respondent No. 1. Vide Order dated July 05, 2019, NCLT initiated CIRP under the IBC and a moratorium was placed on all the proceedings, including the arbitral proceedings against Respondent No. 1.
- Vide Order dated June 03, 2022 passed by the SC, Respondent No. 1 was freed from the CIRP, and the moratorium was lifted. In the meantime, Section 29A was amended by the Arbitration and Conciliation (Amendment) Act, 2019, w.e.f August 30, 2019.
- In view of the above, the Applicant filed the present Application before the SC seeking to allow the Sole Arbitrator to continue the proceedings without the need of extension of time, on the grounds that the time limit stated in Section 29A (1) of Act would not be applicable to international commercial arbitrations.

Issues at hand?

- Whether the time limit for passing an award as per the amended Section 29A of Arbitration Act is applicable to 'international commercial arbitration'?
- Whether the amended Section 29A of Arbitration Act applies retrospectively?

Decision of the Court

- At the outset, the SC extensively analyzed the difference in the wording of Section 29A in the 2015 and 2019 Amendment Act, relying upon the intent of the legislature in making the said change. The SC held that the expressions 'as expeditiously as possible' and '*endeavour may be made*' indicate that the legislature intends to exclude international commercial arbitrations from the mandatory nature of the Section. The Section implies that the arbitral tribunal shall make an effort to render the arbitral award within a period of 12 months in international commercial arbitration, whereas for domestic commercial arbitration, it is mandatory to render arbitral award within 12 months.
- The SC observed that the need for the relaxation of the said time period for international commercial arbitration stems from the report of the High-Level Committee dated July 30, 2017, chaired by Justice B N Srikrishna, which stated that Section 29A of the 2015 Act was heavily criticized by international arbitral institutions for setting timelines for completion of the international arbitration proceedings, which contended that the conduct of the arbitral proceedings should be monitored by the arbitral institutions and the Courts' intervention is not required as these institutions have their own machinery for case management.
- With regards to sub-Sections 3 and 4 of the Section 29A, SC observed that the rationale behind the extension for 6 months is envisaged for domestic arbitrations where it is mandatory that award shall be granted within 12 months. SC thus held that as the mandate is already absent for international arbitrations, the sub-Sections become inapplicable.
- While dealing with the issue relating to retrospective application of the 2019 Act, the SC applied the parameters set out by previous decisions of the SC and other High Courts. In ***Thirumalai Chemicals Ltd v Union of India***[1], ***Jose Da Costa & Anr v. Bascora Sadasiva Sinai Narcomim***[2] and ***Hintendra Vishnu Thakur v. State of Maharashtra***[3], it was held that the procedural laws are generally retrospective, provided there is a clear indication that the legislature did not intend the same, or if the procedural law creates new rights, liabilities or obligations.
- The SC was of the view that the amended Section of 29A does not create any new rights or liabilities on the parties, and on the contrary, the amendment was remedial in nature, as the international commercial arbitration was brought outside the purview of judicial intervention and within the domain of the arbitrator. Further, regarding the intention of legislature for retrospective application, the SC observed that the 2019 Amendment Act does not contain any provision equivalent to Section 26 of the 2016 Act which explicitly indicated the prospective nature of the said Amendment of 2016.
- The decision of the Delhi High Court in the case ***ONGC Petro Additions Ltd v. Ferns Construction Co Inc***[4], was highlighted, wherein it was held that Section 29A of 2019 Act was applicable to all the pending arbitrations in India as of August 30, 2019.
- Hence, the said Section being remedial in nature and having no express bar in retrospective application by the legislature, the SC held that Section 29A (1) of the Arbitration Act, 2019 is applicable retrospectively.

HSA
Viewpoint

The SC's decision limits the application of the time restriction under the amended Section 29A of the Arbitration Act to domestic arbitrations and excludes foreign commercial arbitrations from its ambit. The verdict essentially segregates between the two parts of Section 29A (1) and clarified that the intent of legislation is to clearly exclude the international arbitrations from the strict time limit that is applicable to domestic arbitrations only. In the amended Section, the wordings 'may be', 'as expeditiously as possible', and 'endeavour may be made' clearly held that the international commercial arbitrations are not bound to follow the time limit as mentioned in the provision. The SC further clarified that the use of the word 'shall' laid down the mandatory nature of the provisions of Section 29A(1) and its application to all arbitrations conducted under the Act, domestic or international commercial and as such, international commercial arbitrations are usually governed by the relevant rules of the governing law in consonance with the contract. The effect of this decision is that it limits the Courts' engagement in international commercial arbitration in respect to any extension of timelines. Further, rather than being limited by statutorily established time restrictions, this ruling permits international arbitral institutions to use their autonomous machinery to monitor timelines in order to rapidly finish arbitral processes without any judicial involvement.

[1] (2011) 6 SCC 917
[2] (1976) 2 SCC 917
[3] (1994) 4 SCC 602
[4] OMP (Misc) (Comm) 256/2019

- On the basis of the abovementioned observations, the SC allowed the present application and held that the Sole Arbitrator, acting within his domain and jurisdiction, was to decide upon whether further extension was to be given to the parties and the arbitrator is expected to endeavor expeditious conclusion of the arbitration.

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, 1881 (**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, the same was dishonoured 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 rupees forty lakhs to rupees twenty lakhs.
- 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 Rs.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:**
  - There is nothing on record to show that the payment of INR 4,09,315 was made towards the discharge of the debt of Rs.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:**
  - 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 the 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***[5] and ***NEPC Micon Ltd v. Magna Leasing Ltd***[6], resonated with

[5] (2016) 10 SCC 458
[6] AIR 1995 SC 1952

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***[7], Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Ltd (*supra*) and ***Sripati Singh v. State of Jharkhand***[8] 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 dishonoured, 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***[9], ***Alliance Infrastructure Project Ltd v. Vinay Mittal ILR***[10] and ***Shree Corporation v. Anilbhai Puranbhai Bansal***[11] and a 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.

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 files under the applicable provisions of the Act.

Board of Trustees for the Syama Prasad Mookerjee Port, Kolkata v. Marinecraft Engineers Pvt Ltd

Kolkata High Court | 2022 SCC OnLine Cal 1405

Background facts

- Work order dated November 22, 2011 for four yearly survey and dry dock repair of Tug Bijoy Singha situated at Marine Operation Division at the Haldia Dock Complex was issued by the Petitioner to the Respondent.
- A dispute arose between the parties on deduction in payments made by the Petitioner.
- The Respondent being a unit entitled to benefits of Micro Small and Medium Enterprises Development Act, 2006 (**MSMED Act**), filed the reference before the MSME Council. The conciliation proceedings failed and the Council commenced the arbitration proceedings
- The Petitioner objected to the jurisdiction of the Council on the ground that it had already invoked the contractual arbitration, therefore, the Council has no jurisdiction.
- The Council vide an order dated May 12, 2021, which has been described as an interim award, dismissed the objection of the Petitioner.
- Aggrieved by the order, the Petitioner challenged the order under Section 34 of the Arbitration and Conciliation Act, 1996 (**Act**) on the ground that the order was an interim award and, therefore, it can be directly challenged notwithstanding adjudication on the other issues and the Petitioner need not await the final award.
- **Submissions of the Petitioners:**
  - The Council does not have the jurisdiction to adjudicate upon the disputes as the Petitioner had already invoked the arbitration clause as per the contract between the parties.
  - The order of the tribunal is an interim award that can be directly challenged under Section 34 of the Act and the Petitioner need not await the passing of the final award.

[7] (2014)12 SCC 539
[8] 2021 SCC OnLine SC 1002
[9] (2008) 3 KLJ 784
[10] (2010) III Delhi 459
[11] 2018 (2) GLH 105

- **Submissions of the Respondents:**
  - The Respondent objected to the maintainability of the petition on the ground that the provisions of the MSMED Act have an overriding effect on the arbitration clause between the parties and the Council has exclusive jurisdiction to adjudicate upon the disputes.
  - They also contended that the order of the Council pertains to its jurisdiction, therefore, the procedure of Sections 16(5) & (6) of the Act has to be followed and the Petitioner must await the passing of the final award.

Issue at hand?

- Whether the Council had the jurisdiction to commence arbitral proceedings even if the Petitioner had already invoked the contractual arbitration?

Decision of the Court

- The Court held that the order passed by the Council wherein it held that 'it does have jurisdiction to adjudicate the instant matter' certainly pertained to its jurisdiction as it had interpreted the provisions of the MSMED Act and adjudicated upon whether the contractual arbitration clause gets overridden by the provisions of the MSMED Act and has further dismissed the objection raised by the Petitioner.
- The Court also held that since the order is on the jurisdiction of the Council, it does not pass the test of an interim award and permitting an application under Section 34 of the Act at this stage of the proceedings would be illegal. The whole object and scheme of the Act is to secure an expeditious resolution of disputes; therefore, the drill of Section 16 prevents the parties from filing multiple litigations.

HSA
Viewpoint

The Court held that the finding of the MSME Council on its jurisdiction is not an interim award and thus an application under Section 34 of the Act cannot be filed, thereby providing clarity on the issue of the interplay between the Micro Small and Medium Enterprises Development Act, 2006 and the Arbitration and Conciliation Act, 1996.

Dharmadas Tirthdas Construction Pvt Ltd v. Government of India & Ors

Madhya Pradesh High Court I Misc. Civil Case No. 1043 of 2003

Background facts

- The parties entered into an agreement dated December 16, 1996 (**Agreement**) for the construction of 60 T 3 quarters for GPRA at Bilore Compound, Indore. Clause 25 of the Agreement provided for the resolution of disputes by Arbitration clause.
- The Petitioner contended that the work was completed on April 01, 2000 to the tune of INR 1,97,57,325 against which the Respondents paid only Rs.1,72,71,145.
- Hence vide letter dated December 18, 2000, the Petitioner invoked Clause 25 of the Agreement and requested the Respondent to appoint the arbitrator to resolve the dispute.
- The Respondent rejected the request of the Petitioner for appointment of an arbitrator due to non-fulfilling the condition precedent seeking arbitration and delay beyond 120 days in raising the dispute. Accordingly, the Petitioner approached the Court for the appointment of an arbitrator.
- **Submissions of the Petitioners:**
  - It was mandatory on part of Respondents to refer the dispute for adjudication by way of arbitration.
  - The issue of limitation is a matter of evidence and same liable to be decided by the arbitrator. The work was completed on April 01, 2000.
  - The bill was settled by the Respondent on September 28, 2000 and the Petitioner submitted the claim on December 18, 2000, which cannot be said to be time-barred. Therefore, the request of the Petitioner for an appointment of arbitrator has wrongly been rejected as time barred.
- **Submissions of the Respondents:**
  - In terms of Clause 25 of the Agreement, the Petitioner was bound to raise the dispute firstly before the Superintending Engineer and then file an appeal before the Chief Engineer. It is only when it was not satisfied with the decision of the Chief Engineer, that the Petitioner could request for the appointment of the arbitrator.
  - However, the Petitioner directly requested the appointment of the arbitrator without complying with the pre-arbitral conditions.
  - The Petitioner also failed to raise the dispute within 120 days from the date of the final bill, therefore, the claim of the contractor shall be deemed to have been waived and treated as time barred.

Issue at hand?

- Whether the non-compliance of pre-arbitral steps will result in the rejection of the application for the appointment of the arbitrator?

Decision of the Court

- The Court observed that in terms of Clause 25 of the Agreement, it was incumbent upon the Petitioner to claim within 15 days before the Superintending Engineer and if it is dissatisfied with the decision, it may file an appeal before the Chief Engineer. It is only when the Petitioner is not satisfied with the decision of the Chief Engineer that it may give notice to the Chief Engineer for the appointment of an arbitrator.
- The Court held that a party cannot directly seek the appointment of the arbitrator when the Agreement provides for pre-arbitration reference to some authority which has not been complied with by a party seeking reference of the dispute to arbitration.
- The Court observed that it is clear that the Petitioner directly invoked the arbitration clause without submitting a claim before the Superintending Engineer within 15 days from the settlement of the bill whereafter it could have filed an appeal before the Chief Engineer. Therefore, the Respondent was correct in rejecting the request of the Petitioner for the appointment of the arbitrator.

HSA
Viewpoint

The Court re-affirmed the legal position on the mandatory compliance of parties to an arbitration agreement which lays down a pre-arbitration mechanism or procedure for resolution of disputes arising out of the agreement.

State of West Bengal v. Anindya Sundar Das & Ors

Supreme Court of India I Civil Appeal No. 6706 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 also 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:**
  - 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:**
  - 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***[12], ***High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat***[13], ***B Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Assn***[14], ***Central Electricity Supply Utility of Odisha v. Dhobei Sahoo***[15] and in the recent case of ***Bharati Reddy v. State of Karnataka***[16], 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***[17] 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***[18], 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.

Emcure Pharmaceuticals Ltd v. The Managing Director, Odisha State Medical Corporation & Ors

High Court of Orissa | ARBP No. 69 of 2021

Background facts

- OSMC floated a tender for supply of medical drugs, injections etc. Emcure Pharmaceuticals Ltd. (Petitioner) submitted a bid pursuant to the tender floated by Odisha State Medical Corporation (OSMC/Respondent). The case of the Petitioner is that its bid was not accepted, and the tender was awarded to another party. Thereafter, a representation was made by the Petitioner to OSMC that the bid of the other party (L1) was wrongly accepted by OSMC in violation of the tender conditions and that the tender ought to have been awarded to the Petitioner (L2).
- OSMC issued a letter to the Petitioner seeking the Petitioner's consent to supply an item as per the L-1 approved rate, which was accepted by the Petitioner on the condition that it was awarded a contract to supply the entire quantity covered by the tender.

[12] (1964) 4 SCR 575
[13] (2003) 4 SCC 712
[14] (2006) 11 SCC 731
[15] (2014) 1 SCC 161
[16] (2018) 6 SCC 162
[17] (1975) 3 SCC 765
[18] (2022) 5 SCC 179

- OSMC accepted the offer of the Petitioner and stated that the purchase order would be issued in its favor as per the terms and conditions of the tender, without specifying whether the Petitioner would be given a purchase order for the entire quantity covered by the tender.
- However, no purchase order was placed by OSMC with the Petitioner. The Petitioner invoked the arbitration clause contained in the tender document and issued a notice to OSMC seeking the appointment of an Arbitrator, on the ground that it was not awarded the tender for bulk supply. After OSMC failed to reply to the notice, the Petitioner filed a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act') before the Orissa High Court seeking appointment of an Arbitrator to adjudicate the disputes between the parties.
- **Submissions of the Petitioner:**
  - The Petitioner contended that as per the tender document, disputes between the parties arising out of the bid documents were to be referred to arbitration in terms of the Act. Therefore, the Petitioner submitted that the petition for appointment of the Arbitrator was maintainable before the Court.
  - The Petitioner averred that the limited or conditional offer made by the Petitioner was accepted by the opposite party, which constituted a completed contract. The Petitioner added that the question whether an Arbitrator should be appointed was required to be referred to the Arbitral Tribunal and it ought not to be considered by the Court.
- **Submissions of the Respondent:**
  - The Respondent disputed the maintainability of the arbitration petition before the Orissa High Court contending that as per the tender document, only a dispute between the tender inviting authority and the successful bidder, in connection with or relating to the contract, could be referred to arbitration. It was further averred that since the Petitioner was not the successful bidder, it could not invoke the arbitration clause.
  - Further that no contract or agreement had been executed by Respondent with the Petitioner and that the dispute had not arisen in relation to the contract but in relation to the bidding process.
  - Since no purchase order was placed with the Petitioner, there was no concluded contract between the parties, and thus no dispute could be said to have arisen which could be referred to arbitration.

Issue at hand?

- Whether the Arbitration clause can be invoked in such situation where no purchase orders have been placed?

Decision of the Court

- The Court discussed the case of ***Bharat Sanchar Nigam Ltd v. Telephone Cables Ltd***[19] (wherein the Apex Court further relied on ***Dresser Rand S.A. v. Bindal Agro Chem Ltd***[20], ***PSA Mumbai Investments PTE Ltd v. Board of Trustees of the Jawaharlal Nehru Port Trust***[21] and ***Vision Spring v. Odisha State Medical Corporation Ltd***[22]) and held that the facts in the two cases are much similar and as per the findings of the said case which also resonates with the settled position of law, it is clear that till such time the purchase order was issued pursuant to such acceptance of the offer made by the Petitioner, there was no completed 'contract'.
- The Clause 6.35.2 of the General Conditions of Contract state that dispute arising out of the bid would be subject to jurisdiction of the courts of law which would include a Civil Court therefore the Petitioner is not without a remedy.

HSA
Viewpoint

The Court has reiterated the already settled legal position that the arbitration clause in the main contract is to be duly supported by issuance of a purchase order by the tenderee pursuant to the acceptance of an offer to supply and till such time the purchase order is issued, no completed 'contract' arises between the parties and thus the Arbitration Clause contained in the tender document is not attracted. The judgment is relevant in respect of this very crucial aspect of commercial disputes arising out of a tender process.

Muhammed Rashid v. Girivasan EK, Surendran & Ors

High Court of Kerala at Ernakulam | MACA No. 616 of 2018

Background facts

- In the present case, the Appellant (*being the victim*) met with a road accident while travelling in an auto rickshaw. The car causing the accident was driven by Respondent No. 1 (*being the driver*). Respondent No. 1 drove the car in a rash and negligent manner and was found to be under the influence of alcohol.

[19] (2010) 5 SCC 213
[20] (2006) 1 SCC 751
[21] (2018) 10 SCC 525
[22] Arbitration Petition No. 31 of 2021

- Appellant was also a driver by profession and was earning monthly income of INR 12,000. He approached the Motor Accident Claims Tribunal (**MACT**), claiming compensation of INR 4,00,000; however, the MACT awarded only INR 2,40,000, against which the Appellant preferred this Appeal.
- In the present Appeal, the Appellant relied upon the hospital's discharge summary which revealed that he did suffer fracture on both the bones of left leg and fracture of shaft of right femur and not to mention the loss of earning during the time he was hospitalized and also for the number of days that he needed to recover.
- In the Appeal, the Appellant was successful in convincing the High Court by showing that the compensation that was granted by the Tribunal was grossly inadequate in relation to the pain and hardships that he suffered and the expenses that he had to bear.
- In the result, the High Court observed that the Appellant is entitled to get an additional compensation of INR 39,000, being the enhanced compensation, from the Respondent No. 3, i.e. the insurance company.
- However, Respondent No. 3 maintained a stand that they are not liable to indemnify the insured as at the time of accident Respondent No. 1 was driving the vehicle under the influence of alcohol, which was in violation of the terms and conditions of the insurance policy.

Issue at hand?

- Whether Respondent No. 3, (insurance company) is liable to compensate the third party even if there is a violation of terms and conditions of the insurance policy?

Decision of the Court

- In order to arrive at a conclusion, the High Court relied on the findings of ***New India Assurance Co v. Kamala & Ors***[23], ***Oriental Insurance Company Ltd v. Nanjappan***[24], and ***Bajaj Allianz General Insurance Co Ltd, rep by its Deputy Manager (Legal) v. Manju Devi & Ors***[25].
- In all of the above judgments, it was commonly observed that even in those cases where there is any violation of the terms and conditions of the Insurance Policy, the insurance company is under an obligation to satisfy the claims of the third parties. This is because the liability of the Insurance Company during the subsistence of the liability period is statutory in nature, however, the insurance company has to satisfy the compensation and recover same from the insured.
- The Court thus observed that even if there is any condition in the policy certificate stating that 'driving the vehicle in an intoxicated condition, violates the terms and condition of the Policy', still the insurance company is liable to make the compensation to the third person who is a victim of an accident.
- In the present case, Respondent No. 2 (owner of the vehicle) permitted Respondent No. 1 to drive his car in a drunken state. Therefore, even Respondent No. 2 is vicariously liable for the act of Respondent No. 1. While ultimately the liability is of Respondent No. 1 and 2 but still Respondent No. 3, being the insurer, must compensate the Appellant.
- Therefore, the High Court allowed the Appeal and directed Respondent No. 3 to pay a sum of INR 39,000 as an additional compensation to the Appellant.

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Viewpoint

An insurance company is under a statutory obligation towards third person when risks involve motor vehicles. Therefore, an individual A, who is under no fault, cannot be denied relief in the form of compensation for the misdoings of the driver D and vicariously owner O that to by citing a reason that the terms and conditions of the insurance company has been breached. Secondly, the Motor Vehicles Act is a law based on law of torts which is founded on the concept that every wrong has a remedy. The very purpose for compulsorily having the vehicles insured is to ascertain that in cases similar to the present, the person who is wronged is not deprived of the remedy. Thus, in our view, the Court by awarding additional compensation to the Appellant, has ensured that the justice was finally delivered. Further this judgement has also settled the law and statutory responsibility of the insurance company with respect to the claim of third parties involving motor vehicle accidents.

[23] (2001) 4 SCC 342
[24] (2004) 13 SCC 224
[25] 2004 SCC Online AP 232

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AT A GLANCE

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