

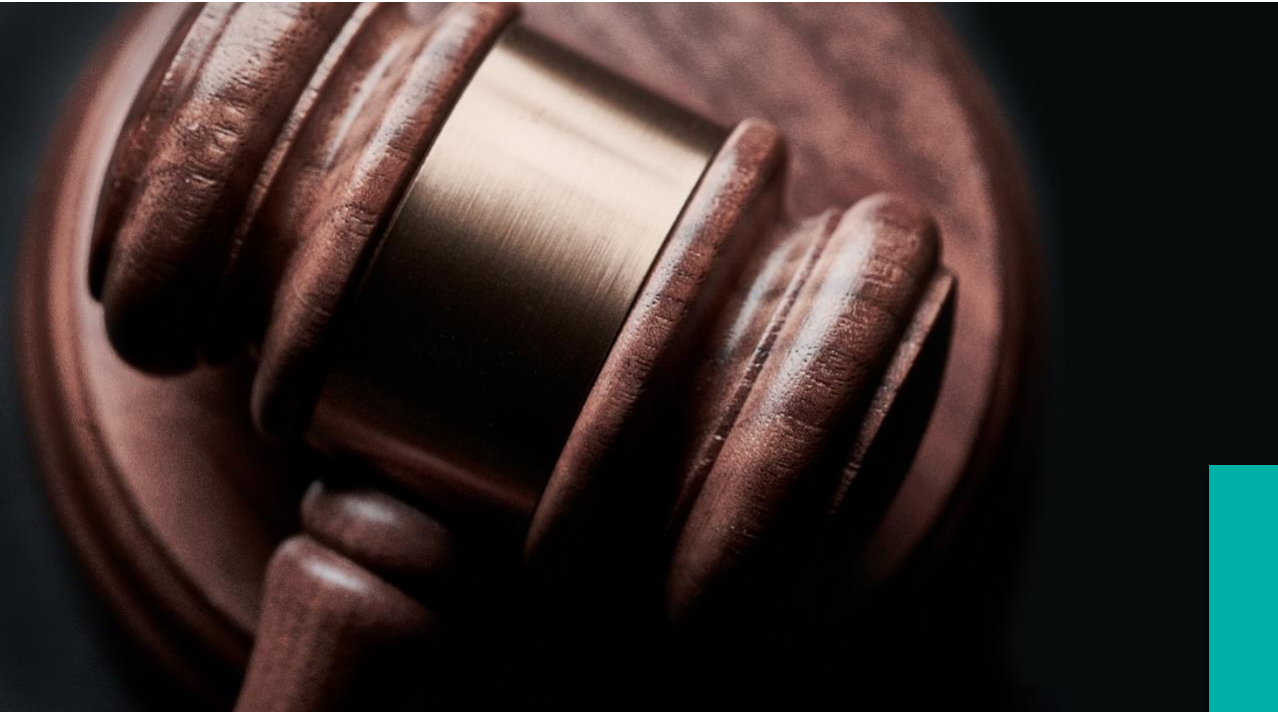


Dispute Resolution & Arbitration

Monthly Update
March 2023

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DISPUTE RESOLUTION AND ARBITRATION UPDATE



Executive Engineer (R&B) & Ors v. Gokul Chandra Kanungo (Dead) through his Lrs

Supreme Court of India | 2022 SCC OnLine SC 1336

Background facts

- The Respondent was awarded a contract dated December 16, 1971 for construction of a 3 km missing link on NH-6 from Kanjipani to Kuntala (**Project**). The Project was supposed to be completed within one year i.e., before December 15, 1972. The contract amount was INR 4,59,330 (**Contract Amount**).
- However, there was a delay in completing the Project and the Project was only completed on August 30, 1977. The Respondent was paid a sum of INR 3,36,465 upon completion of the Project in August 1977.
- On July 25, 1989 the Respondent issued a notice to the Appellant demanding the remaining balance of the Contract Amount due and payable to the Respondent. The Appellant responded to the notice and stated that the Respondent had been paid for his work. Evidently, there was a dispute between the parties regarding the amount payable to the Respondent.
- Accordingly, the Respondent filed a Suit under Section 20 of the Arbitration Act, 1940 (**1940 Act**) seeking reference of the dispute to arbitration before the Court of Civil Judge (Senior Division), Bhubaneswar (**Trial Court**).
- By order dated February 14, 1990, the Trial Court decreed the Suit in favor of the Respondent and directed the Respondent to file the original copy of the agreement executed between the parties. However, the Respondent did not to comply and in the meantime, the earlier act i.e., the 1940 Act, was repealed by the Arbitration and Conciliation Act, 1996 (**1996 Act**).
- Thereafter, the Respondent filed an application in the disposed of Suit before the Trial Court seeking appointment of an Arbitrator. The same was dismissed due to lack of jurisdiction.
- The Respondent, thereafter, moved an application under Section 11 of the 1996 Act before the High Court seeking appointment of the Arbitrator. The same was allowed and Shri SK Mohanty, former judge of the same High Court, was appointed as the arbitrator on October 15, 2001.
- On March 15, 2002, the Respondent filed his claim of INR 1,45,28,198 under 15 various heads and demanded 19.5% interest from April 01, 1976 to March 15, 2002.

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- The Arbitrator vide award dated August 24, 2004 awarded a sum of INR 9,20,650 under heads 1 to 14 along with pendente lite with effect from April 01, 1976 to the date of the award at the rate of 18% per annum which came out to a sum of INR 46,90,000 (**Award**). The Arbitrator also directed the future interest to be paid at the same rate of interest on the total of the aforesaid two amounts till actual payment.
- Aggrieved by the Award, the Appellant challenged the award under Sections 34 & 37 of the 1996 Act before the District Court and High Court, both of which were rejected/dismissed. Accordingly, the Appellant filed an Appeal before the Supreme Court.

Issue at hand?

- Can a High Court exercise its discretionary powers under Article 142 of the Constitution of India to reduce the rate of interest?

Decision of the Court

- The Supreme Court interpreted provisions of Section 31(7)(a) of the 1996 Act and emphasized on the wordings ‘...deems reasonable’. The Apex Court observed that there is no doubt that a discretion is vested in the Arbitral Tribunal to include interest in the sum for which the award is made, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. However, the Section requires the Arbitral Tribunal to determine the interest at such rate as the Arbitral Tribunal deems reasonable.
- The Supreme Court further observed that when a discretion is vested to the Tribunal to award interest at a rate which it ‘deems reasonable’, then a duty would be cast upon the Tribunal to give reasons as to how it deems the rate of interest to be reasonable.
- In this regard, the Supreme Court referred to and relied on the case of McDermott International Inc. which inter-alia laid down the propositions that the Arbitral Tribunal will have to exercise its discretion as regards the following:
 - At what rate interest should be awarded?
 - Whether interest should be awarded on the whole or part of the award money?
 - Whether interest should be awarded for the whole or any part of the pre-award period?
- After carrying out this analysis, the Supreme Court was of the view that the Arbitrator's decision in the present case to award both pendente lite and future interest at the rate of 18% per annum was not justified. It was further determined and observed by the Apex Court that because the Respondent failed to take any action to assert his claims for a period of 12 years, the Arbitrator should not have awarded interest for the time period following the completion of the work until the filing of the Suit by the Respondent. Hence, the conduct of the Respondent would preclude him to claim interest for the aforesaid period.
- The Supreme Court held that the Arbitrator erred in awarding interest for the period from 1990 to 2000. The Court observed that the Suit filed under Section 20 of 1940 Act was decreed in 1990. However, the Respondent was unable to comply with the directions i.e., filing the original agreement and that after a lapse of 10 years, the Respondent filed an application for appointment of arbitrator before the Trial Court.
- The Court held that had the Respondent filed the original agreement immediately, the arbitration proceedings would have already been concluded. Therefore, no interest could be given for the period where the Respondent itself was responsible for delays on his part.
- Regarding rate of interest, the Court invoked the provisions of Article 142 of the Indian Constitution to reduce the rate of interest from 18% per annum to 7.5% per annum. The Court held that there was a prolongation and numerous laches on part of the award holder that makes it a fit case for reduction of rate of interest by exercising its powers under Article 142 of the Indian Constitution.

HSA Viewpoint

This decision of the Supreme Court is in support of and affirms earlier judgments i.e., *Rajendra Construction Co. McDermott International Inc. Pure Helium India (P) Ltd.*, etc. which upheld that it is within the discretion of the Arbitral Tribunal to award interest at a rate that it deems reasonable, and that Court can exercise power under Article 142 of the Constitution of India to reduce the rate of interest. The Supreme Court in its decision has cast a duty on the Arbitral Tribunal to give cogent reasons as to how it deems the rate of interest to be reasonable, which acts as a check on the discretionary powers of the Tribunal. The most interesting aspect of the decision of the Supreme Court is the requirement on the Tribunal to apply its mind to the facts of each case and exercise its discretionary powers with cogent and logical reasoning. The Supreme Court has also come down heavily on parties and attempted to encourage parties to follow the procedure in a time bound manner by upholding that a party will not be allowed to claim interest for the period during which the proceedings were deliberately delayed by such party.

Debashis Sinha & Ors v. RNR Enterprises & Ors

Supreme Court of India | Civil Appeal No. 3343 of 2020

Background facts

- Mr. Debashis Sinha and several others (**Appellants**) are the owners of flats in different blocks of housing complex of which RNR Enterprises and others (**Respondents**) are developers.
- Despite paying full consideration amount as well as execution and registration of deeds of conveyance in the Appellants' favor, the Respondents failed to provide the Appellant with the Completion Certificate which is their statutory obligation as per the Kolkata Municipal

Corporation (**KMC**) Rules. The Respondents also failed to provide the Appellants with common amenities and facilities like playground, community hall and supply of water from KMC.

- Aggrieved by the above, the Appellants filed a complaint before the NCDRC seeking directions for the Respondents to provide them with the completion certificate, as well as other facilities and compensation of INR 1,80,00,000 together with litigation cost of INR 50,000.
- Vide Order dated August 21, 2020 (**Impugned Order**), the NCDRC dismissed the Appellants' complaint and observed that as per Section 403 of Kolkata Municipal Corporation Act, 1980, it was incumbent on both Respondents as well as Appellants to not occupy the premises in absence of Completion Certificate. Thus, it held that both the parties had violated the law and, therefore, no deficiency could be attributed to the Respondents on this account.
- Aggrieved by the Impugned Order, the present Appeal has been filed under Section 23 of the Consumer Protection Act, 1986 before the Supreme Court of India (SC).

Issue at hand?

- Whether the homebuyers forfeit their right to claim amenities as was promised by the developer upon taking possession of the premises?

Decision of the Court

- At the outset, SC observed that the approach of NCDRC was 'too casual', and the reasoning given by NCDRC that the flat buyers cannot complain after having knowingly purchased the flat with the deficiencies, is indefensible. SC observed that in most cases, the jurisdiction of NCDRC is invoked post purchase and it must appreciate the present-day realities.
- Further, the SC criticized the NCDRC's perfunctory approach in not considering the Appellants' grievance regarding the developers not obtaining Completion Certificate. SC held that it is the obligation of the person intending to erect a building or to execute works to apply for Completion Certificate as per the KMC Rules.
- The SC clarified that it is not opening the claim for INR 1,80,00,000 compensation raised by the Appellants, as they failed to give particulars and the basis for the claim and observed that the Appellants themselves are on the wrong side of law as they took the possession without Completion Certificate and hence, both the parties had acted in violation of the law.
- The Court held that the only purpose of the summons is to ensure that the defendants keep the promises they made in the pamphlet and/or marketing, as the case may be, and to do so in order to hide any service deficiencies and to ensure that the required legislative requirements are met.
- In view of the above, SC remanded the matter to NCDRC with a view to secure adherence to the promises that the Respondents had made in the brochure and/or advertisement, as the case may be, and thereby cover up deficiency in service, if any, as well as complying with the mandatory statutory provisions.

HSA Viewpoint

Through this judgment, the Supreme Court has clarified that homebuyers do not forfeit the right to claim amenities promised by the builder by taking possession of the flat and it is not part of the homebuyer's duty to apply for the Completion Certificate. This judgment is a welcome development and provides much-needed relief to aggrieved homebuyers.

Indiabulls Housing Finance Ltd v. Shipra Estate Ltd & Ors

Delhi High Court | 2023/DHC/001221

Background facts

- In the present case, the Respondents applied to the Arbitral Tribunal under Section 17 of the Arbitration and Conciliation Act, 1966, requesting the status quo to be maintained in connection with the security furnished by them against the loans obtained from their Secured Creditor Indiabulls Housing Finance (**Appellant No. 1**).
- Accordingly, the Arbitrator set aside the Sale Notice issued by Indiabulls to assert its security interest in Shipra Mall (the property of the claimant), in accordance with Section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**), read in conjunction with Section 8(6) of the Security Interest (Enforcement) Rules, 2002 by granting the application of Section 17.
- The present Appeal is filed by the Appellants against the aforesaid order of the Arbitrator wherein the Appellants contended that a Secured Creditor has a special right to enforce a security interest by issuing a Sale Notice under Section 13(4) of the SARFAESI Act and such specific right cannot be snatched by an Arbitral Tribunal.
- In the Appeal, the Appellant was successful in convincing the High Court that the Arbitrator had exceeded his authority and jurisdiction by preventing Indiabulls from confirming the sale of the Mall Asset via auction and had entered the sphere of the powers given only to the agencies under the SARFAESI Act.

- In the result, the High Court observed that the Debts Recovery Tribunal (DRT) has sole authority to adjudicate all cases pertaining to Section 13 and 17 of the SARFAESI Act, and the jurisdiction of a Civil Court to consider a challenge against the activities of a Secured Creditor is wholly precluded by Section 34 of the SARFAESI Act.
- Further, it was held by the High Court that the exercise of a Secured Creditor's power to enforce a security interest under the SARFAESI Act is not arbitrable at all and the learned Arbitrator had no discretion that he may have used. The granting of an interim remedy under Section 17 of the Arbitration and Conciliation Act, 1996 (**A&C Act**), which falls entirely beyond the purview of arbitration, is not permissible.

Issues at hand?

- Whether the exercise of the right of a Secured Creditor to enforce a security interest under the SARFAESI Act is arbitrable in nature?
- Whether the High Court, under the ambit of Section 37(2)(b), have the power to interfere and set aside the order/award passed by the Arbitral Tribunal?

Decision of the Court

- In order to arrive at its decision, the High Court relied on the findings of the following citations:
 - *Vidya Drolia & Ors v. Durga Trading Corporation*¹
 - *Manish Aggarwal v. RCI Industries and Technologies Ltd*²
 - *Anurag Kumar Singh v. State of Uttarakhand*³
- While relying on the judgment of Vidya Drolia, the High Court held that implicit non-arbitrability is established when the parties are precluded from contracting/waiving out the jurisdiction of the designated Court/public forum, as provided in the legislation. The individual who insists on the remedy must seek it only in the forum specified in the Act.
- The Court thus observed that the Respondents have a specific remedy under Section 17 of the SARFAESI Act before a specialized tribunal, namely the DRT, against the Sale Notice issued under Section 13(4).
- The Court stated that the doctrine of election, which allows a party to choose between the DRT and the Arbitral Tribunal as a forum to oppose enforcement of the security interest, is not available to the Respondents. The person seeking the remedy must seek it in the forum specified in the Act and in no other forum. It was further held that this is a case of implied non-arbitrability since Section 17(1) expressly allows a remedy against an action under Section 13(4) of the SARFAESI Act.
- The granting of an interim remedy under Section 17 of the A&C Act, which falls entirely beyond the purview of arbitration, is not permissible. As a result, the High Court is within its authority to intervene in the challenged decisions under Section 37(2)(b) of the A&C Act.
- Accordingly, the High Court allowed the appeal and struck aside the Arbitrator's order under Section 17 of the A&C Act, ruling that the Arbitrator had plainly exceeded his power in setting aside the sale notifications issued by the Secured Creditor.

HSA

Viewpoint

In the present judgment, the High Court took into account the primary objective of the SARFAESI Act, 2002, which is to allow the Secured Creditors to collect their debts without having to go to any Civil Court or any other forum like Arbitral Tribunal to get a decision and subsequent execution. It is pertinent to note that Section 34 provides a bar on any other forum considering actions in respect of the case in which the Secured Creditors have begun a procedure under SARFAESI Act, 2002, in conformity with the aim to provide a rapid route of recovery for banks in respect of secured loans. Further, it provides the jurisdiction of a special tribunal, namely Debts Recovery Tribunal (DRT), which has an exclusive jurisdiction over the subject matter to deal with and provide speedy disposal in such cases. Thus, in our view, the Court by setting aside the Order passed by the Arbitral Tribunal has rightly exercised its power under the ambit of Section 37(2)(b) of the A&C Act and affirmed the exercise of the right of a Secured Creditor to enforce a security interest under the SARFAESI Act.

BST Textile Mills Pvt Ltd v. The Cotton Corporation of India Ltd

Bombay High Court | Comm. Arbitration Petition No. 563 of 2017 with Interim Application (L) No. 7323 of 2021

Background facts

- BTS Textile (**Petitioner**) and the Cotton Corporation of India Ltd (**Respondent**) entered into nine contracts for the supply of cotton bales from three branches of the Respondent at Sirsa, Sriganaganagar and Bhilwara. It is pertinent to note that the nine contracts pertained to the period between January 24, 2011 and March 29, 2011.
- Each of the nine contracts contained an arbitration clause, which specified that in case of disputes arising between the parties, the same would be referred to an Arbitrator, other than an employee of the Respondent, to be appointed by the Director (Marketing) or a Director (Finance) of the Respondent.

¹ (2021) 2 SCC 1

² 2022 SCC OnLine Del 1285

³ (2016) 9 SCC 426

- According to the aforementioned contracts, the Petitioner was required to buy 26449 cotton bales from the Respondent during the specified period from its aforesaid three branches. However, the Petitioner lifted only 1300 cotton bales and failed to lift the remaining 25149 cotton bales, thereby committing a breach of the contracts.
- Due to the failure of the Petitioner to lift the remaining 25149 cotton bales as per the contracts, the Respondent exchanged various communications with the Petitioner and finally issued a notice to the Petitioner invoking the arbitration clause.
- In light of the allegations of the Respondent that the Petitioner had committed breach of the aforesaid contracts, the parties exchanged communications and after issuing notice to the petitioner invoking arbitration, the Director of the Respondent-Corporation, on December, 9 2011, appointed a retired Judge of the Bombay High Court as the Sole Arbitrator for resolution of disputes between the parties.
- After recording of evidence and hearing arguments in the matter, the Sole Arbitrator by the Impugned
- Award dated July 24, 2017 held in favor of the Respondent and directed the Petitioner to pay a sum of INR 25,59,88,023 to the Respondent. The Petitioner was further directed to pay interest @13.5% per annum from February 1, 2012 till the date of the award on a specific sum of INR 24,34,495.15. The Petitioner was further directed to pay interest @ 18% per annum from the date of award till realization on the sum of INR 24,34,495.15, apart from paying cost of INR 7,50,000 to the Respondent.
- Aggrieved by the Impugned Award dated July 24, 2017, the Petitioner filed the instant Petition before the Bombay High Court.

Issue at hand?

- Whether the Impugned Award is liable to be set aside on the ground that disputes arising out of nine contracts were consolidated and single statement of claim filed on behalf of the Respondent (original claimant) was entertained and allowed in favor of the Respondent?

Decision of the Court

- At the outset, the Court examined the scope and extent of jurisdiction available to it while exercising power under Section 34 post amendment in 2015 of the Arbitration and Conciliation Act, 196 (Act). The High Court also placed reliance on the judgment of the Supreme Court in the case of ***SSangyong Engineering and Construction Co Ltd v. National Highways Authority of India***⁴ for determining the scope of Section 34 of the Act and held that Court cannot reappraise evidence and findings since the same is within the scope of the Arbitrator. It was further held that scope of interfering with the Arbitral Award is limited and unless the specific grounds provided in Section 34 of the Act were satisfied, the Court cannot interfere with an Arbitral Award.
- The Court held that the judgement in the case of ***Duro Felguera, S.A. v. Gangavaram Port Ltd***⁵ as relied by the Petitioner is not applicable to the present case and stated that the contention of the Petitioner i.e. the causes of action pertaining to each independent contract were separate and distinct and hence claims pertaining to each such dispute or cause of action ought to have been separate and distinct is inaccurate. The Supreme Court held that the nine contracts in question were executed between the same parties, consisting of identical arbitration clauses and the only difference was with regard to the actual figures of sale and purchase.
- Additionally, the Court placed reliance on the judgement of the Supreme Court in the case ***PR Shah Shares & Stock Brokers Pvt Ltd v. BHH Securities Pvt Ltd***⁶ and held that specific claims pertaining to each of the nine contracts were placed distinctly in the statement of claim filed on behalf of the Respondent, to which the Petitioner had ample opportunity to respond and the fact that the Petitioner also chose to file a consolidated counter claim pertaining to all the nine contracts cannot be overseen. Hence it cannot be said that the Sole Arbitrator committed a jurisdictional error in proceeding with the arbitration and observing that the Petitioner had also raised a composite counter claim.
- In view of the above, the High Court arrived at the conclusion that the Sole Arbitrator was correct in proceeding with the arbitration and there was no need for separate arbitration in respect of each of the nine contracts. The Court rejected the Appeal file by the Petitioner.

HSA Viewpoint

This judgement provides clarity on the scope and applicability of consolidation of disputes arising out of multiple contracts. The judgment makes it clear that consolidation of disputes is valid, given the identical terms of the contract and interlinked nature of the disputes arising out of these contracts and also highlights the importance of consolidation of disputes, which can avoid unnecessary duplication of efforts and resources. Overall, the judgement is a welcome development in the field of commercial litigation and is likely to have far-reaching implication for parties involved in multi-contractual disputes, in addition to providing greater certainty and predictability in the resolution of such disputes.

⁴ 2019) 15 SCC 131

⁵ (2017) 9 SCC 729

⁶ (2012) 1 SCC 594

Mita India Pvt Ltd v. Mahendra Jain

Supreme Court of India | 2023 SCC Online SC 163

Background facts

- The issue started when the Respondent, upon agreeing to refund the excess amount which the Appellant Company had mistakenly paid to the Respondent, furnished two cheques to the Appellant. However, the cheques went dishonored.
- The Appellant Company subsequently filed a non-cognizable complaint with the Court of CJM, under Sections 138, 141 & 142 of the Negotiable Instruments Act, 1881 (**NI Act**).
 - The Respondent made the following two applications in response:
 - The complaint has not been filed by an authorized person.
 - The director of the Appellant Company, Kavinder Singh Anand, cannot depose before the Court as the complaint nowhere states that he has knowledge about the facts and the transactions.
- Upon the Trial Court rejecting both these applications, the Respondent filed A Criminal Revision Petition before the Revisional Court, which too was dismissed. The aggrieved Respondent then filed a Petition under Section 482 of the Criminal Procedure Code, 1973 before the High Court, which allowed the Petition and set aside the orders passed by the Trial and the Revisional Court.
- The present case pertains to a Criminal Appeal arising out of a Special Leave Petition challenging the judgement passed by the High Court dated April 04, 2019 whereby the Appellants have challenged the order passed by the High Court which set aside the orders passed by the Trial and the Revisional Court.

Issues at hand?

- Is the Appellant Company's complaint maintainable?
- Whether the director of the company, Kavinder Singh Anand, could depose on behalf of the Appellant Company?

Decision of the Court

- While dealing with maintainability of the complaint, the Apex Court observed that upon perusing the complaint filed by the Appellant Company, it becomes apparent that the concerned complaint had been filed in the name of the Appellant Company through its authorized representative, Ripanit Singh Kohli. It is perfectly within the ambit of the law for the Appellant Company to file the complaint under its own name through its Power of Attorney holder.
- The Apex Court placed immense reliance on its judgment in **AC Narayanan v. State of Maharashtra & Anr**⁷, wherein the Court laid down certain key principles:
 - It is perfectly within the ambit of the law for a complaint under Section 138 of NI Act to be filed by a Power of Attorney holder, provided he has due knowledge about the transaction(s) in question.
 - Provided the transaction has been witnessed by a Power of Attorney holder, the Power of Attorney holder can depose and verify on oath to prove the contents of the complaint.
 - The complaint filed through Power of Attorney holder must contain an assertion that he/she has knowledge about transactions in question.
 - In the absence of a specific clause permitting functions under General Power of Attorney to be delegated to another person, the same cannot be done.
 - For taking cognizance of the complaint the affidavits of the complainant, his witnesses or his Power of Attorney holder are permissible and sufficient.
 - Although a Power of Attorney holder cannot file a complaint under his own name, the complaint filed by a Power of Attorney holder on behalf of the original complainant is maintainable.
- The Court observed that in the present case there exists a General Power of Attorney of the Appellant Company in favor of one of its directors, Kavinder Singh Anand. Furthermore, the Court observed that the same was executed after it was duly approved by the Appellant Company's board of directors in a meeting. Therefore, the Court held that the Power of Attorney held by Kavinder Singh Anand, one of the directors of the Appellant Company, is true and lawful.
- In Court observed that in the present case the Power of Attorney in explicit terms authorized Kavinder Singh Anand to appoint counsel or special attorneys for the conduct of all cases or

⁷ (2014) 11 SCC 790

otherwise to do all other acts and things for due prosecution or defense of legal or quasi legal proceedings anywhere in the world. Therefore, the Court concluded that Kavinder Singh Anand, on the ground of the aforementioned Power of Attorney, authorized Ripanjit Singh Kohli to file the aforementioned complaints.

- The Court observed that the law is settled that although the General Power of Attorney holder cannot delegate his powers to another person, however, the same can be delegated in the event there is a specific clause in the Power of Attorney that permits such sub-delegation and as in the present case, the Power of Attorney duly approved by the Appellant Company's board of directors in a meeting, in explicit terms authorized Kavinder Singh Anand to appoint counsel or special attorneys, in paragraph 2 of the Power of Attorney.
- The Court observed that the language utilized in the concerned Power of Attorney is not bereft of clarity as it authorizes the Power of Attorney holder to appoint special attorneys in addition to the counsel for conducting cases and for doing other relevant and material acts in connection thereto. The Court then concluded that the Power of Attorney concerned does indeed provide for the sub-delegation of the functions of the General Power of Attorney holder, and therefore the filing of the complaint on behalf of the Appellant Company through its authorized representative, i.e., Ripanjit Singh Kohli, is maintainable and not at all ultra vires to the law.
- While dealing with the issue as to whether the director of the company, Kavinder Singh Anand, could depose on behalf of the Appellant Company, the Court made the observation that Kavinder Singh was one of the directors of the Appellant Company who had been specifically authorized to file the complaint as well as to pursue it. The Court made the observation that it had come on record that Kavinder Singh had filed his personal affidavit, bearing the date March 26, 2018, stating therein that he holds a General Power of Attorney of the Appellant Company and that since he also happens to be the Appellant Company's director, he is fully knowledgeable about the facts pursuant to the present case and is, therefore, not lacking in competency to pursue the litigation on the Appellant Company's behalf.
- The Apex Court finally held that the High Court had committed an error by interfering with the orders passed by the Trial Court by passing the Impugned Order. Accordingly, the Apex Court set aside the order of the High Court, thereby restoring those of the Trial Court and the Revisional Court.

HSA Viewpoint

The Apex Court in the present case has reemphasized the essential principles that it has laid down in the case of *AC Narayanan v. State of Maharashtra & Anr* in relation to the status of a Power of Attorney holder in legal proceedings involving Section 138, 141 and 142 of NI Act. Therefore, in our view, this judgment reinforces as well as increases the precedential value of the aforesaid judgment.

Panasonic India Pvt Ltd v. Shah Aircon through its Proprietor Shadab Raza

Delhi High Court | Arb P No. 621/2021

Background facts

- Panasonic India Pvt Ltd (Petitioner) filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (Act) seeking appointment of an arbitrator to adjudicate upon the disputes which arose under the Distribution Agreement dated 05 September 2016 (Distribution Agreement) between the Petitioner and Respondent.
- The Petitioner had sold electronic goods to the Respondent under the Distribution Agreement. The Petitioner's claims arose out of alleged unpaid invoices by the Respondent. After a series of correspondences exchanged between the parties, the Petitioner invoked arbitration on September 07, 2020.
- While the parties exchanged further correspondences to reconcile their disputes, the Petitioner once again invoked arbitration on January 29, 2021. The Respondent, thereafter, filed a Civil Suit inter alia seeking rendition of accounts of the Petitioner and permanent injunction against the Petitioner, which continues to be pending before the Court of Civil Judge, Gurugram, Haryana. It is in these circumstances that the Petitioner filed a Section 11 application for appointment of Arbitrator before the Delhi High Court.
- The Respondent opposed the Section 11 application on the following grounds:
 - The arbitration clause in the Distribution Agreement is not a valid arbitration clause as the reference of disputes to arbitration is not mandatory. It was submitted that the clause uses the word can, as opposed to shall, which, signifies an option in the hands of a party as to whether to refer a dispute to arbitration or not.
 - The Petitioner's claims are barred by limitation. Attention was invited to Term in the Distribution Agreement to show that the columns for the Effective Date and End Date of the Distribution Agreement were not indicated. Therefore, the Petitioner entered into the Distribution Agreement for a period of one year at a time, and under Clause II (ix) of the General Terms & Conditions of the Agreement, read with Schedule II and III thereof,

invoices were to be paid within a maximum credit period of 14 days from the date of billing.

- Attention was also drawn to certain invoices raised by the Petitioner dated August 30, 2018 and November 15, 2018 which also contain a jurisdiction and a dispute resolution clause. Therefore, it was argued that the Delhi High Court lacked jurisdiction to entertain the petition which ought to have been filed before the appropriate Court having jurisdiction over the designated venue of the arbitration.

Issues at hand?

- The core issues pertained to the following aspects:
 - Jurisdiction
 - Interpretation of the arbitration clause in the Distribution Agreement
 - Limitation

Decision of the Court

- **Re jurisdiction:**
 - The disputes of which the Petitioner seeks reference to arbitration are under the Distribution Agreement. The Distribution Agreement provides for exclusive jurisdiction of the Courts in New Delhi, and specifically for the parties to have recourse to this Court, for appointment of an Arbitrator.
 - As against this, the arbitration clause in the invoices only provides for the venue of the arbitration i.e., Gurgaon, and the language in which arbitration should be conducted i.e., English. Even in the invoices, exclusive jurisdiction is vested in Courts in Delhi. The Court held that even if it is assumed that the venue of the arbitration is as provided in the invoices, the arbitration clause of the Distribution Agreement confers jurisdiction upon the Courts in New Delhi.
 - The Court relied on the judgments in *Cravants Media Pvt Ltd*⁸ and *Stella Industries Ltd*⁹.
- **Re interpretation of the arbitration clause:**
 - The requirements for existence of a valid arbitration clause are encapsulated in Section 7 of the Act, which inter alia states that the parties must contemplate a mandatory reference to arbitration.
 - The interpretation of an arbitration clause must be predicated upon a construction of the contract as a whole, and no particular word or phrase should be unduly emphasized to negate the clause of its true meaning.
 - The use of the word can, which normally signifies an option, as opposed to the word shall, which is mandatory in nature, is not determinative of the present case. The Court held that this is because the word can is juxtaposed with the words either party, signifying the option of either the Petitioner, or the Respondent, to refer disputes to arbitration.
 - The Court held that if either of the parties can exercise such an option by referring the disputes under the Distribution Agreement to arbitration, it is, for all practical purposes, binding upon the other party as well. The remainder of the clause, insofar as it refers to the venue of arbitration, the language of arbitration, the applicability of the Act, the requirement to give reasons, and the procedure for appointment of an arbitrator by reference to Court, also supports the view that the parties intended a mandatory reference to arbitration and incorporated the ancillary provisions into the Distribution Agreement for this purpose only.
- **Re limitation:**
 - The recent judgment of the Supreme Court in *Bharat Sanchar Nigam Ltd v. Nortel Networks India Pvt Ltd*¹⁰, relying upon the judgment of a three Judge Bench in *Vidya Drolia v. Durga Trading Corporation*¹¹, has clearly held that limitation is in general a mixed question of fact and law, which is in the realm of the Arbitrator to resolve. It is only in an exceptional case where the claims are ex face time barred that the Court would decline reference to arbitration under Section 11 of the Act.

HSA Viewpoint

The Delhi High Court's decision has reinforced the fact a clause must be interpreted in its entirety and must be read as a whole instead of focusing only on certain words and phrases which may or may not suit a party to the dispute. The Court has also dealt with the aspect of what falls within the ambit of the Arbitrator re limitation. The Court has once again reinforced the settled principle of law that under a Section 11 application, the Court is only required to ascertain the existence of a valid arbitration clause and should not go into the merits of the matter. Any dispute between the parties re limitation, as in the present case, falls within the ambit of the Arbitrator to decide.

⁸ ARBP 915/2021

⁹ ARB P. 504/2021

¹⁰ (2021) 5 SCC 738

¹¹ (2021) 2 SCC 1

HSA AT A GLANCE

FULL-SERVICE CAPABILITIES

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