S&A Law Offices

INDIAN LEGAL IMPETUS

Newsletter

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Editorial

S & A Law Offices



Manoj K. Singh

Dear Friends,

We are pleased to present the January 2023 edition of our monthly newsletter "Indian Legal Impetus" which is filled with interesting articles analysing various disciplines of law such as Arbitration & Conciliation Act, 1996; Indian Contract Act, 1872; National Highway Act, 1956; and Goods & Services Tax Act, 2017 and law related to Evidence. In this edition an attempt has been made to examine the recent judgments passed by the Hon'ble Courts of India and their applicability. We hope that you will find this issue of Indian Legal Impetus interesting, enlightening, engaging and in line with the recent developments, case laws and issues relating to various disciplines of law.

To start with, the first article discusses the arbitrability of a party after undergoing deletion U/s. 9 application as discussed in **Deccan paper mills** case dealt with the issue whether deletion of the party leads to non-arbitrability against the party – The party and court has discretion to choose to interim measure but the right to initiate arbitration proceedings does not waive off.

Our next article analyses whether award in 3-G of National Highways Act, 1956 is required to be stamped in accordance to the Stamp Act. Article further discuss the case **Shailini v. NHAI,** observed that any party unwilling to accept the compensation amount - be determined by the arbitrator appointed by the Central Government. Further observes, no stamp duty to be paid on an award for compensation U/s. 3(g) of NHAI Act, making the land loser pay stamp duty from the compensation received would be unconscionable.

The third article discusses Legal Regime for Regulating ESG Framework in India, principle regulators for governance legislation in India are the Ministry of Corporate Affairs ("MCA") supervises the company laws and SEBI. The regulatory governing the ESG can be found in numerous laws not limited to the environmental laws, Sebi Regulations, Companies Laws, Prevention of Corruption Act, Prevention of Money Laundering Act, and other employment laws.

The Fourth article of the edition examines whether MCA's latest amendment to the Companies Incorporation Rules to provide additional physical verification of registered offices led to Crackdown on shell companies. MCA mandates companies incorporated on or before 31.12.2017 to file e-form INC-22A. Further, The amendment gives RoC power to eliminate shell companies from the corporate ecosystem, if in falls in default.

The Fifth article deals with the limitation U/s. 29A of the ACA does not apply to international commercial arbitration. Article discuss the case **Tata Sons Pvt. Ltd.** which directs the upper cap limitation of 12 months U/s. 29 and stipulated that it does not apply to international commercial arbitration. Further observes that the provisions of Section 29A have prospective effect in nature by virtue of Section 26 of the Amendment Act of 2015,

The next article discusses the impleadment of a party be sought as an interim award under Section 31 (6) of the ACA, 1996. Article mentions the court observation on ***Rites Ltd.*** observes that rejection of impleadment was not considered an interim award. Further, this article stipulates the arbitrator shall have the discretion for impleading third parties in arbitral proceedings under the Doctrine of Competence-Competence.

Our Seventh article discuss Initiating proceedings under Section 153C against 'other person'. After referring to catena of cases it was observed that before initiating proceedings u/s. 153C a satisfaction by the AO of the person searched is mandatory that certain seized assets/ documents belonged/pertained to "other person". Only the issues arising from the incriminating material can be considered U/s. 153C proceedings.

The last article provides an analysis on Mandatory Arbitration and Consumer Disputes – Clickbait to Exploitation.

We hope that our esteemed readers find this Edition useful, and also hope that it enables them to understand and interpret the recent legal developments. We welcome all kinds of suggestions, opinions, queries, or comments from all our readers. You can also send in your valuable insights and thoughts at **newsletter@sandalawoffices.com.**

Thank you

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Managing Editor
Manoj K. Singh

Editor
Adhip Kumar Ray
&
Shivika Anand

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ARBITRABILITY OF A PARTY AFTER UNDERGOING DELETION UNDER SECTION 9 APPLICATION

- *Sakshi Singh & Rajendra Sakarwar*

INTRODUCTION

Adjudging the arbitrability of a party based on the arbitration agreement is a scenario which is often encountered by our courts. Although, adjudging the arbitrability of an entity based on its status in an interim measure proceeding under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') is rare. The Bombay High Court in the recent case of ***Deccan Paper Mills Co. Ltd. through Rahul Nainesh Mehta versus M/s. Regency Mahavir Properties & Ors***[1] ,wherein, Ashray Premises Private Limited is Respondent no. 2 and Atul Ishwardas Chordia is Respondent no. 3, underwent to adjudge the arbitrability of a party whose name was deleted from a prior application for interim measures.

BACKGROUND

The contentious agreement in the present case deals with development rights which were at first granted to Respondent No. 2 to develop the property of the Petitioner. Thereafter, an agreement was executed between the Petitioner, Respondent No. 1, and Respondent No. 2, whereby development rights were granted to Respondent No.1 and possession of the property also stood handed over to Respondent No.1.

Dispute arose between the parties as it was alleged that the agreement was procured through the means of fraud with specific allegations made against Respondent no. 3 for fraud and collusion.

The Petitioner moved an application under Section 9 of the Act for an interim measure against the Respondents regarding carrying out development activities and specifically disallowing them from being able to create third party rights in the property of the Petitioner. The Petitioner however informed the Court that it does not wish to prosecute Respondent nos. 2 and 3 under the application. Accordingly, the said Respondents were deleted from the proceedings. When the Petitioner invoked arbitration between the parties, the same was objected to by Respondent no. 3 on the ground that there existed no dispute between the Petitioner and Respondent no. 3 as it was the Petitioner itself who deleted the said Respondent from its application seeking interim measure.

The issue before the Court was that whether deletion of a party under a Section 9 application is an admission on part of the other party that there was no arbitrable dispute, and in consequence the Petitioner has extinguished the right conferred as per the arbitration agreement.

[1] *Arbitration Petition No. 52 of 2021, High Court of Bombay.*

The basic argument in support of the Petitioner 's claim is that mere *"deletion of Respondent Nos.2 and 3 from the array of parties in the application filed under Section 9 of the said Act cannot accrue to the benefit of the said Respondents".*[2] The Petitioner in the instant case argued that the adjudication and finality of Section 9 application in the present matter dealt with the issues which did not necessitate the presence of Respondent no. 2 and 3, which led to the consequential deletion of the parties. Although, it was obvious that the said application was concerned only with interim measures and that it did not amount to admission on the part of the Petitioner that there was no dispute between the Petitioner and Respondent no. 3.

Respondent no. 3 objected Petitioner's contention stating that it was deleted from the Section 9 application by the Petitioner itself and in doing so had specifically stated that Respondent no. 3 was not concerned with the development activities pertaining to the property in question. Respondent no. 3 further argued that the arbitration stood invoked with filing of the application and the act of the Petitioner of consequently deleting Respondent no. 3 from the application for interim measure under Section 9 of the Act when read with Section 4 of the Act, i.e., waiver of Right to Object, essentially extinguishes the Petitioner's right from bringing forth the dispute in arbitration against Respondent no. 3.

JUDGMENT

The Bombay High Court interpreting the object behind Section 9 of the Act stated that the object behind the section is to grant power to competent courts to issue interim measures at any time before, during or after the arbitration proceedings. The High Court dwelling upon the consequence of deleting a party from the application of interim measure stated that the purpose of Section 9 of the Act is to provide an interim relief to the parties. Under the said Section, any party may choose to seek interim measures against all the parties or any specific party or parties if it is of the opinion that it requires such interim measures only against such party.

Further, the competent court can also, while granting such interim reliefs may do so against some parties and not all. The court stated that the act of a deleting a party from a section 9 application for interim measures does not translate to it losing its right of invoking arbitration against such party. If the contention of Respondent no. 3 that simply because it was deleted from the Section 9 application, it cannot at this instance be made a party to the arbitration is to be accepted, the same shall lead to "*incongruous results*" and would run against the very object and purpose of the Act.[3]

Therefore, the Bombay High Court answered the question that whether deletion of party from a Section 9 application extinguishes the right to initiate arbitration proceedings against such party in negative.

[2] *Id, para 13.*

[3] *Supra note 2, para 10.*

Irrespective of whether interim measures were sought against all or some parties the same does not absolve the party from being brought to arbitration. Parties to an arbitration agreement have the right to seek interim measures as they deem fit against any party or parties without hampering its right under arbitration against the other parties.

ANALYSIS

The end goal of an interim measure under Section 9 is different from the end goal of an arbitral award. The primary distinction that needs to be ascertained in the arbitration proceedings is the nature of interim measures and its application considering that a Section 9 application deals with pressing issues which are to be addressed to protect the rights of the parties.[4]

In the case of ***Vidya Drolia and Ors. v. Durga Trading Corporation***[5] it was held that even though Section 9 of the Act has the protection to affect the rights of the parties, it does not affect the conduct of arbitration, and the same is supported by the Supreme Court's order in the case of ***Pravin Electricals (P) Ltd. v. Galaxy Infra and Engg. (P) Ltd.*** where this assessment was confirmed.[6] In this backdrop the Respondent's contention that the deletion of its name from the interim measures proceeding would bar the Petitioner from invoking arbitration holds no ground.

The Supreme Court in the case of ***Firm Ashok Traders v. Gurumukh Das Saluja***[7] held that the commencement of arbitral proceedings is independent of the interim relief under Section 9 being allowed or denied. In the same breath it can be very well construed that filing for interim measures and the non-inclusion of a party has no bearing on the arbitrability of the matter or the parties' right to invoke arbitration against a specific party. In this case, the Bombay HC specifically highlighted that the very reason that interim measures can be sought even before issuing notice invoking arbitration under Section 21 of the Act supports this analysis.[8]

The Arbitration and Conciliation Act, 1996 provides for interim measures as a form of relief for the parties, the same can not be construed to narrow down the scope of arbitrability of the dispute.

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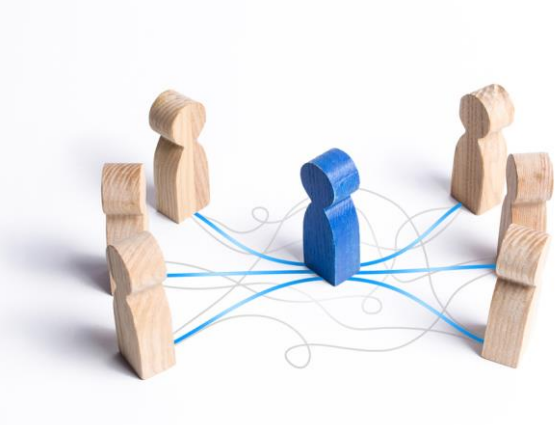

[4] *Suresh Dhanuka v. Sunital Mohapatra, (2012) 1 SCC 578.*
[5] *(2021) 2 SCC 1.*
[6] *(2021) 5 SCC 671*
[7] *(2004) 3 SCC 155.*
[8] *Sundaram Finance Ltd. Vs. NEPC India Ltd, (2004) 3 SCC 155.*

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STAMP DUTY PAYABLE ON AN AWARD PASSED UNDER THE NATIONAL HIGHWAYS ACT, 1956? – AN ANALYSIS OF SHALINI VS. NHAI

- *Widaphi Lyngdoh & Nagmani Kumar*

The National Highways Authority of India (NHAI) is responsible for the development and maintenance of national highways in India. In order to construct and expand these highways, it is often necessary for the Central Government to acquire private land from individuals and communities.

One of the challenges that can arise in this process is the payment of stamp duty on compensation paid to land owners. This can be a significant financial burden for the land owners, as well as a delay in the process of acquiring the land.

The question of whether an award rendered by an Arbitrator in terms of Section 3-G of the National Highways Act, 1956 (NH Act, 1956), would be considered an arbitral award in terms of the respective Stamp Acts requiring it to be stamped, has been a matter of debate in the Indian judicial system.

Stamp duty is a tax imposed on legal documents, such as awards, and it is meant to serve as a revenue source for the government. In the context of land acquisition, the stamp duty is imposed on the award passed by the acquiring authority, which determines the compensation to be paid to the landowner. The National Highway Act, 1956 is a Central legislation that lays down the procedure for the acquisition of land for the construction and maintenance of national highways.

The Act also provides for the determination of compensation to be paid to the landowner, through the appointment of an arbitrator in case of disputes. Therefore, the question of whether an award passed under the NH Act, 1956 is liable for stamp duty has been the subject of confusion.

IMPORTANCE OF STAMP DUTY ON ARBITRATION AWARD

It is not specifically stated in the Arbitration Act that parties to an arbitration agreement must pay stamp duties on an arbitral award. The Indian Stamp Act 1899 provides for stamping of deed/documents/instruments with specific stamp duties. Section 35 of the Stamp Act provides that an instrument which is unstamped or is insufficiently stamped is inadmissible for any purpose, which may be validated on payment of the deficiency and penalty.

Depending on where the award is made, the amount of stamp duty that must be paid will vary from State to State. The award is subject to stamp duty of 0.1% of the value of the property to which it relates, as stated in Article 12 of Schedule 1A to the Stamp (Delhi Amendment) Act 2001 as applicable to Delhi. The Registration Act of 1908 does not specifically define the term "award" or set forth a necessity for the registration of an arbitral judgement, which has caused confusion in the legal community regarding whether an arbitral award must be required to be registered.

However, if an arbitral judgement has an impact on immovable property, it must be compulsorily registered under Section 17 of the Registration Act (documents for which registration is required).

Judiciary interpretations of the consequences of not paying stamp duty at the time an arbitral award if enforced have differed. The dispute results from the fact that, unlike decrees in civil actions, an award issued by a panel is not necessarily produced before the courts. The issue of paying stamp duty only comes up in civil actions when a document is going to be admitted into evidence. At the time of enforcement under the Arbitration Act, concerns about the stamping and registration of an award or the related documents may be brought up.

By judicial decree, it had also been noted that Section 34 of the Arbitration Act does not apply to the necessity of stamping an award and registering it, which is addressed by Section 47 of the CPC. The issue of non-stamping of the award must be resolved at the stage of enforcement of the arbitral award and not at the stage of objections under Section 34 of the Arbitration Act, according to the Apex Court's ruling in ***M. Anasuya Devi v. M. Manik Reddy***[1]. Due to the Apex Court's ruling, it follows that an arbitral award that has been properly signed and is otherwise in compliance with Section 34 of the Arbitration Act, even if it is not stamped or registered is valid. The Stamp duty and registration fee are attracted to be paid just before when the parties would file the enforceable award in the court executing the decree under Section 47 of the CPC.

[1] *2003 (9) SCALE 12*

SHALINI VS NHAI

Section 3-G of the NH Act, 1956 provides for the appointment of an arbitrator in case of any dispute with respect to the compensation amount, arising between the landowner and the Competent Authority regarding the compensation to be paid for the acquisition of land. The award passed by the arbitrator is binding on both parties. It states that if the amount determined by the competent authority is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator appointed by the Central Government, and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.

On the other hand, Article 11 of the Karnataka Stamp Act, 1957, in particular, deals with the stamp duty to be paid on awards made in land acquisition cases. The Act requires that the award passed in such cases be stamped with a duty as specified in the Act before it is admitted as evidence in a court of law.

In the case of ***Shalini and Anr vs National Highways Authority of India (NHAI) and Ors***[2]***,*** the main issue for consideration was "Whether the award rendered by the Arbitrator in terms of Section 3-G of the National Highways Act, 1956, would be an arbitral award in terms of Article 11 of the Karnataka Stamp Act, 1957, requiring it to be stamped in terms of the said Article".

[2] *Writ petition no.100591/2021(in the high court of karnataka dharwad bench, 28th day of february, 2022)*

The case involved a land owner who had her land acquired for the construction of a national highway project by the NHAI. Being dissatisfied with the award of compensation under the NH Act, the Petitioner submitted a reference for arbitration in terms of Section 3G of the Act. The Arbitrator has thereafter passed an award, awarding compensation of ì4,186/- per sq.mtr along with interest at 9% p.a. The respondent had made payment of part of the award and the balance of amount of the compensation not having been paid, the claimants/Decree Holders have filed Execution Petition No.302/2015 before the Principal District Judge, Dharwad, which was objected to by the respondent – NHAI. In the said execution proceedings, an objection was raised that the award passed by the Arbitrator not having been stamped in terms of Article 11 of the Karnataka Stamps Act, 1957 (hereinafter for brevity referred to as the KSA), the same could not be considered for initiating and prosecuting execution proceedings. The executing Court held that the award required to be stamped and called for payment of stamp duty. This was challenged by the Petitioner, on the ground that the said award is not an award under Article 11 of the KSA.

The Hon'ble Court while dealing with the above question has held that "*I answer the point raised by holding that an award of compensation rendered by the Arbitrator in terms of Section 3-G of the National Highways Act, 1956, is not an arbitral award in terms of Article 11 of the Karnataka Stamp Act, 1957, requiring it to be stamped in terms of the said Article. It is hereby declared that no stamp duty is liable to be paid on an award for compensation made under Section 3 (G) of the NHAI Act*"

REASONING OF THE COURT

While traversing through the different sections of the respective acts, the Court discussed that the NH Act, 1956 is a Central legislation that lays down the procedure for the acquisition of land for the construction and maintenance of national highways. Section 3G of the NH Act provides for the appointment of an arbitrator in case of any dispute arising between the landowner and the Competent Authority regarding the compensation to be paid.

On the other hand, Article 11 of the Karnataka Stamp Act, 1957 deals with the stamp duty to be paid on awards. The Act requires that the award passed in such cases be stamped with a duty as specified in the Act before it is admitted as evidence in a Court of law.

The Court, holding the above, stated that although the Arbitration and Conciliation Act, 1996's procedures for arbitration are adopted by Section 3-G of the NHA Act, in the absence of either an agreement between the land owners and the NHAI (under Section 7 of the Arbitration Act) for arbitration, the Arbitration Proceedings between the Petitioner and NHAI was purely statutory on account of the NHAI Act. In such a circumstance, the question of land-loser consenting to the requirement of stamping of an arbitral award by being knowledgeable about requirement of stamping does not at all arise.



The Court then observed that in pursuance of Section 30(z)(e) of the KSA in the case of the award under Article 11 of the KSA, it is the awardee, who is required to make payment in the stamp duty. Thus under these circumstances, the Petitioner would have to pay a portion of the land compensation by way of Stamp Duty, if the argument of NHAI was accepted. This according to the Court was not acceptable. The Court stated in Para 22 that "*The State cannot take away the compensation awarded to the land-loser by imposing a duty to make payment of stamp duty on the said award, which is an additional burden on the land-loser to obtain just compensation on account of loss of his land,"* The land loser is only required to use the arbitration process because of the statute, the Court noted in making this conclusion.

The court in the same para also recorded that *"It is also clear from the fact that while calculating the compensation payable, there is no calculation of the value of the stamp duty payable on the award made. The requirement to make payment of stamp duty on the award would amount to reduction of just compensation, which is not permissible."* Accordingly, the Court held that stamp duty under Article 11 of the KSA would not be applicable to awards under Section 3G of the NH Act. The Court also supplemented its above conclusion on the ground that an Award under Section 3G of the NH Act, was an award for acquisition of land by exercise of the powers of the eminent domain of the state, which in turn is an exercise of sovereign powers.

Therefore, an award made under the NHAI Act cannot be equated with an award passed under Article 11 of the Karnataka Stamp Act, 1957 and is not liable for stamp duty.

ANALYSIS AND CONCLUSION

With reference to the above, it is to be seen that the main reasoning by the Court to hold that stamp duty is not applicable is on the basis that an award made under the NH Act cannot be equated with an award passed in terms of the respective Stamp Acts. This case establishes the said principle and the reasoning is based on the fact that an award under Section 3G of the NH Act, is made by the state exercising the sovereign functions under eminent domain. Accordingly, when compensation is paid to the land loser, making the land loser pay stamp duty from the compensation received would be unconscionable.

In conclusion, awards passed under Section 3-G of the National Highways Authority of India (NHAI) Act, 1956 are not considered as arbitral awards in terms of the applicable sections of the Stamp Acts and are not liable for stamp duty.

The NHAI Act is a Central legislation that aims to acquire land for public purpose and not to collect revenue and as such, awards passed under the Act are not subject to stamp duty.

This is a significant step towards simplifying and streamlining the process of land acquisition for national highway projects, and will provide much-needed relief to land owners who may have been facing financial difficulties as a result of the stamp duty. This policy change is expected to have a positive impact on the development of national highways in India, as it will make the process of land acquisition more efficient and less burdensome for all parties involved. It is also likely to encourage more land owners to participate in the process, as they will not have to bear the additional cost of stamp duty on the compensation they receive.

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LIMITATION UNDER SECTION 29A OF THE ARBITRATION AND CONCILIATION ACT DOES NOT APPLY TO INTERNATIONAL COMMERCIAL ARBITRATIONS

- *Divya Kashyap*

INTRODUCTION

Section 29A of the Arbitration and Conciliation Act, 1996 ("**Act**") was introduced through the Amendment Act of 2015. Under the Amendment Act of 2015, the Arbitral Tribunal was obligated to pass an award within a period of twelve months from the date the Arbitral Tribunal entered upon reference. The said time period could be extended for a further period of six months by mutual consent of parties. Furthermore, the Section provided that upon the completion of eighteen months, the mandate of the Arbitral Tribunal stood terminated unless the same was extended by the Court.

Section 29A of the Act was further amended by the Amendment Act of 2019. The amended Section 29A of the Act provides for completion of arbitral proceedings and passing of award within twelve months from the date of completion of pleadings under sub-section (4) of Section 23 of the Act. This period is extendable for another six months by mutual consent of parties. Furthermore, International Commercial Arbitrations ("**ICAs**") have been exempted from the applicability of stringent timeline provided under Section 29A. In case of ICAs, the award is to be made expeditiously with an endeavour to conclude the proceedings within twelve months.

Recently, the Hon'ble Supreme Court of India in its judgment titled ***Tata Sons Pvt. Ltd. Vs. Siva Industries and Holdings Ltd. & Ors.***[1] has clarified that the time limit of twelve months as prescribed under Section 29A is not applicable to ICAs. The judgment was passed by a division bench of Justice D.Y. Chandrachud, Chief Justice of India and Justice P.S. Narasimha, wherein the Hon'ble bench has restricted the applicability of the amended Section 29A of the Act to domestic arbitrations.

BRIEF FACTS

Tata Sons Private Limited ("**Applicant**"), Siva Industries and Holdings Ltd. ("**Respondent No. 1**") and Tata Tele Services Ltd. ("**TTSL**") executed a share subscription agreement on 24.02.2006 for allotment of shares of TTSL to the Respondent No. 1. The Respondent No. 2, C Sivasankaran, who was the promoter of the Respondent No. 1, was a resident of Seychelles.

The Applicant entered into another share subscription agreement dated 12.11.2008 with NTT Docomo Inc. ("Docomo") and TTSL, wherein Docomo sought to acquire equity shares of TTSL.

[1] *Miscellaneous Application No. 2680 of 2019 in Arbitration Case (Civil) No. 38 of 2017, decided on 05.01.2023*

Since Respondent No. 1 was an existing shareholder of TTSL and was invited to participate in the sale of secondary shares to Docomo, accordingly, Docomo and Respondent No. 1 executed a secondary share purchase agreement dated 03.03.2009 in terms of which Docomo acquired equity shares of TTSL from Respondent No. 1. The Applicant, TTSL and Docomo executed a Shareholders' Agreement dated 25.03.2009 to record the terms and conditions of the understanding between the parties regarding the rights, obligations and duties with respect to Docomo's ownership of shares of TTSL. Thereafter, the Applicant, TTSL and the Respondents executed an Inter Se Agreement. The Agreement, inter alia, obliged the Respondents to purchase the TTSL shares on a pro-rata basis in the event Docomo exercised its sale option under the Shareholder's Agreement.

Certain disputes arose with respect to the terms and conditions of the Shareholders' Agreement and Docomo invoked arbitration against the Applicant under the Rules of the London Council for International Arbitration. The Arbitral Tribunal passed an award on 22.06.2016, basis which the Applicant was called to make payment to Docomo and acquire shares of TTSL which were put by Docomo. Thereafter, basis the Inter Se Agreement, the Applicant called upon the Respondents to acquire Docomo's shareholding in TTSL.

Dispute arose between the Applicant and the Respondents and the Applicant invoked arbitration on 15.06.2017 under the *Inter Se* Agreement. Clause 10 of this Agreement stated that arbitration shall be at Mumbai and Mumbai courts have exclusive jurisdiction.

However, the Respondents failed to appoint their nominee arbitrator. Since Respondent No. 2 was a foreign party, the Applicant filed a petition before the Supreme Court of India under Section 11 (6) of the Act for constituting the Arbitral Tribunal in an ICA. The Supreme Court appointed a Sole Arbitrator on 17.01.2018. On 21.03.2018, a preliminary meeting was held where the parties agreed for extension of time period by six months (till 14.06.2019), if the proceedings could not be completed within twelve months commencing from the date the Arbitral Tribunal entered reference.

In the meantime, IDBI Bank Ltd. initiated insolvency proceedings against Respondent No. 1 and moratorium was imposed on all proceedings against Respondent No. 1, including arbitral proceedings. Therefore, on 14.12.2019, the Applicant filed a Miscellaneous Application seeking extension of the mandate of the Arbitral Tribunal for a period of six months after the date on which the moratorium imposed upon Respondent No. 1 would stand vacated.

Subsequently, an Interlocutory Application was filed on behalf of the Applicant in the Miscellaneous Application in view of the fact that the Respondent was freed from the rigours of the insolvency proceedings on 03.06.2022. Further, in view of the amendment of Section 29A of the Act, the Applicant submitted that the arbitration proceedings before the Sole Arbitrator should be allowed to automatically continue.

ARGUMENTS OF PARTIES

The counsel for the Applicant argued that as a result of the amendment of Section 29A of the Act by the Amendment Act of 2019, the period of twelve months prescribed for making an award from the date of completion of pleadings ceased to apply to ICAs. Since the amendment was procedural in nature, the amended provision would apply to the arbitral proceedings in the matter at hand following the appointment of Sole Arbitrator in 2018. Alternatively, it was argued that in the event the Court was of the opinion that the amended Section 29A was inapplicable to the present arbitration, a further extension of time should be granted to the Sole Arbitrator to complete the arbitral proceedings.

Per contra, the counsel for Respondent No. 2 submitted that the amendment of Section 29A in 2019 would not lead to the conclusion that an ICA lies outside the purview of the provision. He further submitted that reading the provisions of Section 29A in the manner in which the Applicant sought to read them would result in a situation where there would be no timeline under the statute for an ICA. It was further argued that where an ICA was governed by the Rules of an arbitral institution, such rules would structure the conduct of the arbitration and it was not the intention of the legislature that in a case which was not governed by an arbitral institution, the Court would have no control over the time taken in the course of the arbitral proceedings leaving the matter entirely within the discretion of the arbitral forum in a situation such as the present, where the arbitral proceeding was governed by Indian Law and had a seat within the country.

ISSUES IN QUESTION

1. Whether the time period for making an arbitral award under the amended Section 29A of the Act is applicable to ICAs?

2. Whether the amended Section 29A of the Act applies retrospectively?

OBSERVATIONS OF THE COURT

1. Whether the time period for making an arbitral award under the amended Section 29A of the Act is applicable to ICAs?

The Hon'ble Court examined the provisions under Section 29A in detail and observed that after the 2019 Amendment, Section 29A(1) stipulated that the award "in matters other than international commercial arbitration" shall be made by the Arbitral Tribunal within a period of twelve months from the date of the completion of the pleadings under Section 23(4). The Court further observed that "The expression "in matters other than an international commercial arbitration" makes it abundantly clear that the timeline of twelve months which is stipulated in the substantive part of Section 29A(1), as amended, does not apply to international commercial arbitrations. This is further reaffirmed in the proviso to Section 29A(1) which stipulates that the award in the matter of an international commercial arbitration "may be made as expeditiously as possible" and that an "endeavour may be made to dispose of the matter within a period of 12 months" from the date of the completion of pleadings.

The expression "as expeditiously as possible" coupled with the expression "endeavour may be made" demonstrate that the intent of Parliament is that the period of twelve months for making the award is not mandatory in the case of an international commercial arbitration."

The Court further opined that in an ICA, the Arbitr Tribunal was required to endeavor, that is, make a effort to render the arbitral award within twelv months or in a timely manner in contrast t domestic arbitrations, where Section 29 stipulated a mandatory period of twelve months fo the arbitrator to render the award. Therefore, th Court held that post the amendment of 2019, th time limit of twelve months as prescribed in Sectio 29A was applicable only to domestic arbitratior and the twelve month period was only directory i nature for an ICA.

The Court further observed that in the opinion of the High Level Committee Report dated 30.07.2017 of the committee chaired by Justice B N Srikrishna, the international arbitral institutions had been critical of setting up timelines for conducting ICAs. The intervention of the Court in the extension of timelines had been criticized by arbitral institutions and eventually led to the formulation of the amended provisions of Section 29A which expressly kept ICAs outside the purview of the mandatory timelines provided in Section 29A. Therefore, ICAs are only expected to make an endeavour to complete the proceedings within twelve months and are not bound to abide by the time limit prescribed for domestic arbitrations.

2. Whether the amended Section 29A of the Act applies retrospectively?

The Court observed that the provisions of Section 29A are prospective in nature by virtue of Section 26 of the Amendment Act of 2015, which states that Section 29A was introduced with effect from 23.10.2015 and applied to all arbitration proceedings that commenced on or after 23.10.2015. The Court further referred to the judgment of *Board of Control for Cricket in India Vs. Kochi Cricket Pvt. Ltd.*[2] to observe that Section 29A was procedural in nature, it created new obligations in respect of a proceeding which had already commenced since it laid down a strict timeline for rendering an arbitral award for the first time in the framework of the Act.

The Court further observed that the amended provisions of Section 29A were remedial in nature and it had excepted ICAs from the mandate of the timeline provided therein. The amendment was intended to meet the criticism over the timeline in its application to ICAs. Since the removal of the mandatory time limit for making an arbitral award in the case of an ICA did not confer any rights or obligations on any party, it ought to be applicable to all pending arbitral proceedings as on 30.08.2019.



[2] *(2018) 6 SCC 287*

CONCLUSION

Based on the aforementioned observations, the Court allowed the Miscellaneous Application and the Interlocutory Application and decided that the Sole Arbitrator in the present case would decide upon any further extension of time beyond what was originally stipulated in the preliminary meeting held in March 2018. The Court directed the Sole Arbitrator to issue appropriate procedural directions for extension of time while at the same time endeavouring an expeditious conclusion of the arbitration.

ANALYSIS

By way of this judgment, the Supreme Court has clarified that the stringent timelines under the amended Section 29A is applicable to domestic arbitrations only and ICAs have been kept out of its purview. This judgment further emphasizes upon the limited intervention of Indian courts in ICAs, especially with respect to timelines and extensions thereof. It is an encouraging step for the international arbitral institutions to monitor and control the timelines for conclusion of arbitral proceedings in ICAs without being bound by statutory timelines.

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S & A Law Offices

Mandatory Arbitration and Consumer Disputes – Clickbait to Exploitation

- *Aanchal Gupta*

1. INTRODUCTION AND CONCEPT OF MANDATORY ARBITRATION

Mandatory arbitration is a privately controlled shadow justice system that resolves hundreds of thousands of B2C disputes every year. Millions of consumers have contractually agreed to binding arbitration, often without knowing, and with just a click on a checkbox. Once, two parties have contractually agreed on a mandatory arbitration to resolve their dispute, these disputes between them can no longer be resolved in public courts. Rather, their only resolution comes through a private process in which an outside-neutral arbitrator hears from both sides and makes a final decision. Not surprisingly, more and more holders of arbitration agreements have ended up in court, asking the courts to enforce the terms of the agreement and challenging the arbitral decision.[1] Several forums recognized the contribution of mandatory arbitration to inherent vulnerability and injustice towards the consumer.



[1]*Chandrasekher, A.C. and Horton, D. (2019), "Arbitration nation: data from four providers," California Law Review, (107) pp. 1-65.*

2. RELATIONSHIP BETWEEN CONSUMER DISPUTES AND MANDATORY ARBITRATION

Mandatory Arbitration is a part and parcel of hundreds of thousands of consumer relationships. Studies undertaken in 2004[2], revealed that about 1/3rd of the consumer relationships in the market (on an average) have a mandatory arbitration clause for dispute resolution in the fine print. In the recent times, non-negotiable adhesion contracts are the most common examples of contracts that contain mandatory arbitration clause for dispute resolution leaving the consumer a binary choice to either take it or do without the service or good.

2.1 Why Mandatory Arbitration?

Studies have established that mandatory arbitration can be an economical alternative and a speedy process to court litigation.[3]

[2]Szalai, Imre S. (2019), "The prevalence of consumer arbitration agreements by America's top companies," UC Davis Law Revies Online, 52, 233-259.

[3]Ware, S. J. 2013, "Is adjudication a public good? "overcrowded courts' and the private sector alternative of arbitration," Cardozo Journal of Conflict Resolution, 14 899-999.

When traditional court litigation and arbitration have been adjudged and compared side by side on certain criteria such as relevant costs and incurred expenses, time taken to resolve the dispute and burden on the adjudicator in terms of pending disputes;[4] counsels have attested that a suit in a courtroom is billed five times as much as a parallel case in arbitration. Another astonishing advantage was the contrast in speed.[5] The time taken for a dispute to be resolved by arbitration and the declaration of the award is approximately 1 year whereas a similar suit in a courtroom can take well over 2 years.[6] While others have argued this increase in speed is largely a function of the smaller disputed dollar amounts involved, the temporal contrast remains impressive. Further, as a practical concern, the number of pending cases in the traditional court system makes it a less appealing option for dispute resolution making mandatory arbitration more practical and responsible choice.

2.2 Issues of Mandatory Arbitration

As evident from the above discussions, the presence of arbitration clause in agreements is very common especially by the insistence of corporations to insert the same.

At the time of contracting, most consumers do not object to dispute resolution clauses and sometimes they don't even pay attention to the same. Going to court is tedious, expensive as well as slow and carrying through a suit in the system is often intimidating. This does not mean that consumers enter into these contracts voluntarily or even negotiate these terms. These are often imposed on them by way of a click on the checkbox next to the "Terms and Conditions" clause. These clauses appear to be one thing and actually be another thing as they are part of the fine print[7]. These clauses appear in an easily missed "bill stuffer" or just inside the package with the product the consumer has already purchased. This results in a vicious circle of customer vulnerability, which often leads to exploitation.[8]

Although such clauses can be challenged in the court on the basis that they are unilateral and forced, these challenge petitions have limited scope by virtue of several decisions rendered by the courts on this concept. This in no way means that a decision cannot be overturned, but to pursue such an undertaking, the consumer is put through the test of the law where these awards can only be turned on the basis of "conflict with public policy".

[4]*Ware, S. J. 2013, "Is adjudication a public good? "overcrowded courts' and the private sector alternative of arbitration," Cardozo Journal of Conflict Resolution, 14 899-999.*

[5]*Colvin, A. J. S. (2011), "An empirical study of employment arbitration: Case outcomes and processes," available at: http://digitalcommons.ilr.cornell.edu/articles/577*

[6]Fellows, M. 2006, "The same result as in court, more efficiently: Comparing arbitration and court litigation outcomes," available at: https://ccbjournal.com/articles/sameresult-court-more-efficiently-comparing-arbitration-and-court-litigation-outcomes

[7]Reuben, R. C. (2003) "First options, consent to arbitration, and the demise of separability: restoring access to justice for contracts with arbitration provisions." SMU L. Rev. 56, 819-2355.

[8]Schmitz, A. (2009), "Regulation rash? questioning the AFA's approach for protecting arbitration fairness," Banking & Financial Services Pol'y Rep, 28 (10) 16-35.

This is an extremely difficult standard to meet as to set aside a decision, a party must show that the arbitration agreement was not followed by either of the parties; the award was in contravention of fundamental policy of India; it is in conflict with basic notions of morality or justice; it was affected by fraud or corruption; the decision provided a kind of relief that arbitrator was expressly precluded from awarding.[9]

2.3. Judiciary on the arbitrability of consumer disputes

The Indian judiciary per se does not prohibit arbitration of consumer disputes, however, this topic has gone through a series of discussions in the court. In A. Ayyasamy v. A. Paramasivam[11], the court established that in cases of serious public policy concerns, the matter cannot usually be referred to arbitration as these make for actions in rem. The Supreme Court, later in the case of Vidya Drolia vs. Durga Trading Corporation[10], set out a four-fold test where the subject matter of a dispute would not be considered arbitrable if – (1) it pertains to rights in rem and not rights in personam (that arise from rights in rem); (2) the dispute affects third party rights, has erga omnes effect, requires centralized adjudication and mutual adjudication; (3) the subject matter relates to sovereign and public interest functions of the State; (4) the dispute is expressly or by necessary implication non-arbitrable as per a mandatory statute.

The case of Emaar MGF v Aftab Singh[12] was a landmark case where the consumer filed a case in the National Consumer Disputes Redressal Commission when a dispute arose between them. Emaar MGF filed an application under section 8 of the Arbitration Act, 1996 requesting referral of matter to arbitration. The court held that the remedy provided under the Consumer Protection Act, 1986 is in addition to the provisions of any other law for the time being in force. Thus, if an individual chooses to file a complaint in the first instance before the competent consumer forum, then such individual cannot be denied relief by invoking section 8 of Arbitration Act.

The Indian judiciary has upheld the validity of arbitration in consumer dispute but has given the option to the consumer to sort of "opt out" of the mandatory arbitration process. This development can be equated with the approach adopted by the USA as it does not assume each arbitration clause as inherently unfair. Arbitration Fairness Act was enforced which gives the right to the parties of a consumer dispute to "opt out" of pre-existing arbitration agreements and bring the matter before conventional courts. This puts the autonomy aspect back in equation and ensures that if an arbitration proceeding takes place then the parties are consenting to it.



[9] *Section 34 of the Arbitration and Conciliation Act, 1996.*

[10] *(2016) 10 SCC 386.*

[11] *2019 SCC OnLine SC 358.*

[12] *2018 SCC OnLine SC 2945.*

3. CONCLUSION

In an agreement with mandatory arbitration clause, the parties are required to conform to a selected and binding approach of dispute resolution before the commercial transaction ensues between them. These contracts are binding and non-negotiable for consumers and requires surrender of certain legal rights in advance, frequently without understanding or choice. Mandatory arbitration contributes to the causes, experiences, and poor effects of consumer vulnerability. These clauses are prepared with language full of complicated legal jargon and are more often than not, hidden in the fine print which is not conducive to the understanding of non-expert audience i.e. the consumer. There is also a trend of little motivation for consumers to read the fine print earlier than agreeing to them. Mandatory arbitration clauses have tipped the scales far from the consumers and made this alternative method of dispute resolution into a bane. However, completely eliminating arbitration procedure from these kinds of consumer centric transactions can have a negative impact on the market. The regulators and policymakers would be in a better position to justify the use of such clauses if they are fashioned with a limited scope and by realignment of incentives in the market. Yet more in-depth studies and research is required to deal with the consequences of those coverage changes. Consumers might want the autonomy but to be forced with the choice of arbitration raises difficulties.

Arbitration is frequently used as the holy green approach of dispute resolution and consumers along with corporations would maintain the use without being pressured into it. The increasing use of consumer agreements especially online transactions, calls for a revision in terms of applicable laws. By setting the lid on the box, the advantages of arbitration that industrial events have come to cherish can stay intact.

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CAN IMPLEADMENT OF A PARTY BE SOUGHT AS AN INTERIM AWARD UNDER SECTION 31 (6) OF THE ARBITRATION AND CONCILIATION ACT?

- *Jagrati Maru and Shivika Anand*

INTRODUCTION

Section 31(6) of the Arbitration and Conciliation Act, 1996 (hereinafter, the Act) allows an arbitral tribunal to make an interim award during the arbitral proceedings on any matter with respect to which a final arbitral award may be made by it. The Hon'ble Supreme Court has explained in *McDermott International Inc. v. Burn Standard Co. Ltd. and Ors*[1] that Section 31(6) contemplates an interim award and the same is not one in respect of which a final award can be made but it may be a final award on the matters covered thereby, but made at an interim stage. As such, the apex Court has equated an interim award to a final award, but made at an interim stage. Section 2(c) of the Act provides that an arbitral award includes an interim award. Further, Section 17 of the Act which deals with interim measures ordered by arbitral tribunals, provides that a tribunal can provide "*such other interim measure of protection as may appear to be just and convenient to the tribunal*[2]". This article discusses the position of impleadment being sought as an interim award under the Act and the Indian jurisprudence on the same.

JURISPRUDENCE ON THE PROPOSITION

In *Goyal MG Gases Pvt. Ltd. v. Panama Infrastructure Developers Pvt. Ltd and Ors*[3], the impugned order of the tribunal dealt with dismissal of an application for impleadment of third parties who were concededly not the parties to the agreement and the order was in challenge under Section 34 of the Act before the Delhi High Court. The petitioner contended that the order of the tribunal resulted into an interim award and therefore, section 34 petition would lie as contemplated under section 16(6) of the Act. Dismissing the petition, the Bench noted that every order passed by an arbitral tribunal which may impact the final award does not result in an interim award. It was observed that "*An award is like a judicial decree which not only determines the rights of the parties with regard to matters in issue but also gives the reasons for reaching such a determination. Therefore, an interim order passed by an arbitral tribunal at an interim stage has to be tested on these parameters before it can be said that it is in nature of an interim award. The impugned order, in my view, tested on these parameters, cannot qualify as an interim award*[4]."

[1] *McDermott International Inc. v. Burn Standard Co. Ltd. and Ors (2006) 11 SCC 181, para 68.*

[2] *Section 17(1)(e) of the Arbitration and Conciliation Act, 1996.*

[3] *Goyal MG Gases Pvt. Ltd. v. Panama Infrastructure Developers Pvt. Ltd and Ors, 2019 SCC Online Del 9067.*

[4] *ibid, para 32.*

In *National Highways Authority of India v. Lucknow Sitapur Expressway Ltd*[1] a petition under section 34 of the Act was filed against an order of the arbitral tribunal rejecting the application of the petitioner seeking impleadment of the State of Uttar Pradesh as a party in the ongoing arbitral proceedings. It was the petitioner's stand that the order was an interim award. The Bench observed that for order to qualify as an arbitral award either as final or interim, it must settle a matter at which the parties are at an issue and is in the form as required under section 31 of the act. "*Any procedural order or an order that does not finally settle a matter at which the parties are at issue, would not qualify to be termed as arbitral award*[6]." Relying on *Russel on Arbitration*, Bench provided a contrast between an award, which in principle is a final determination of a particular issue or claim in arbitration and the orders and directions which address the procedural mechanisms to be adopted in the reference. The bench held that *"for an order of the Tribunal to be understood as an award, it is essential that it answer the attributes of a decision touching upon the merits of the dispute between the parties or conclusively settling an issue or answering a question which pertains to the heart of the dispute. An order of the Arbitral Tribunal, to put it differently, in order to constitute an award, interim or otherwise, would be one which decides a substantive dispute or question which exists between the parties. In order to qualify as an award, the decision must be with respect to an issue which constitutes a vital element of the dispute."*

The bench dismissed the petition holding that the impugned order of the tribunal rejecting application for impleadment did not constitute an award.

In *Rites Ltd. v. Apex Construction Company and Ors*[7]. the Delhi High Court dealt with the issue wherein the Petitioner (Rites) pleaded that the decision of the tribunal rejecting the application of Rites to separately implead the Respondent No. 2 is required to be treated as an interim award and as such, it will be amenable to challenge under Section 34 of the Act. The Bench held that the tribunal merely rejected the application of Rites seeking impleadment as the same was beyond the terms of reference and noted the instant petition as not maintainable. Thus, rejection of impleadment was not considered as an interim award.

In *Vistrat Real Estates Pvt. Ltd. v. Asian Hotels North Ltd*[8], petition under section 11(6) was preferred seeking appointment of an Arbitrator before the Delhi High Court. The Bench held that once a valid agreement exists between the parties, the arbitrator shall have the discretion for impleading third parties in arbitral proceedings under the Doctrine of Competence-Competence.

In *Delta Distilleries Ltd. v. Shaw Wallace and Co. Ltd*[9] the decision of the arbitrator allowing the application of the Respondents to implead the third Respondent in place of the second Respondent was challenged before the Bombay High Court.

[5] *National Highways Authority of India v. Lucknow Sitapur Expressway Ltd, 2022 SCC Online Del 4527.*

[6] *ibid, para 18.*

[7] *Rites Ltd. v. Apex Construction Company and Ors, 2022 SCC OnLine Del 86.*

[8] *Vistrat Real Estates Pvt. Ltd. v. Asian Hotels North Ltd, 2022 SCC OnLine Del 1139.*

[9] *Delta Distilleries Ltd. v. Shaw Wallace and Co. Ltd, 2007 SCC OnLine Bom 1049.*

Holding that the tribunal rightly allowed the application for bringing the third respondent on record, the bench noted that the interest of the second claimant to the arbitration proceedings was devolved upon the third respondent after the Court sanctioned the scheme of amalgamation under the Companies Act, 1956[10]. It was observed that after devolution of interest, the transferee upon whom the interest is devolved is entitled to be impleaded and the challenge therefore was dismissed by the bench.

CONCLUSION

The above decisions highlight that the judicial dicta favours the position that orders of impleadment do not constitute an interim award. Particularly, the decision of the Delhi High Court in Goyal MG (*supra*) has provided qualifications for an interim order of an arbitral tribunal to culminate into an interim award under the Act. The same is reflective in Lucknow Sitapur Expressway (*supra*) as well wherein final determination of a particular issue or claim in arbitration was distinguished from orders and directions which address the procedural mechanisms in the arbitral proceedings.

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[10] *ibid, para 14.*

ARTICLE ON TOPIC - WILL MCA'S LATEST AMENDMENT TO THE COMPANIES INCORPORATION RULES TO PROVIDE ADDITIONAL PHYSICAL VERIFICATION OF REGISTERED OFFICES LEADS TO FURTHER CRACKDOWN ON SHELL COMPANIES?

- *Mr. Jatin Kapoor*

The Ministry of Corporate Affairs (**MCA**) in its initiative to tackle 'mailbox companies' vide its notification dated 18.08.2022 has published the Companies (Incorporation) Third Amendment Rules, 2022 thereby amending the Companies (Incorporation) Rules, 2014 by introducing Rule 25B "Physical verification of Registered Office of Company" setting out the process to be followed by Registrar of Companies (**RoC**) to carry out physical verification of a registered office of a Company and report thereon, followed by requisite notice and name removal action, where the same is found incapable of receiving and acknowledging all communications.

The MCA has propelled a persistent campaign in the last four years against curbing the black money and crackdown on shell companies leading to several bold steps including the struck-off of around 2.26 lakh shell companies in the financial year 2018 that had failed to file their financial statements or annual returns over two or more successive financial years. Likewise, in another curb, the MCA identified around 2.25 lakh more companies for similar action. Further, more than 3 lakh directors were disqualified for non-filing of annual returns by their companies for three years.

Subsequently, MCA declared Director KYC norms compelling more than 33 Lakh active Director Identification Number (**DIN**) holders to provide details such as personal mobile number, E-Mail address, PAN, Aadhar, Passport, et al. Pursuant to the introduction of DIR-3 KYC norms, MCA made it mandatory to upload a 30-second video clip presenting themselves to obtain a Digital Signature Certificate (**DSC**), which is a requisite to file DIR-3 KYC on the MCA Portal. Furthermore, MCA made it mandatory for around 13 lakh companies incorporated on or before 31.12.2017 to file e-form INC-22A (ACTIVE – Active Company Tagging Identities and Verification) form on or before 25.04.2019 which required providing photographs of the registered office of the Company showing the external building, inside office showing at least One Director/KMP signing form including details of Longitude & Latitude of the address of the registered office of the Company.

Now, commensurate with its initiatives to curb and wipe out shell companies from the system, the MCA in accordance with provisions of Section 12 (9) of the Companies Act, 2013 has inserted Rule 25B under Companies (Incorporation) Rules, 2014.

The said Rule has been inserted to give power in the hands of the RoC to track down the shell companies who are incapable of receiving and acknowledging all communications sent to them at their registered office. The recent amendment also provides jurisdiction to the RoC under sub-rule (5) of Rule 25B to issue notice to such companies and their directors and eliminate them from the corporate ecosystem by removal of the name of such companies from the register, if they are in default.

The said amendment will facilitate the stakeholders, regulatory authorities, and other government authorities, etc. to timely send the communication/notice to the Company at the legitimate registered office or correspondence address of the Company and restraint the practice of giving fake addresses or non-operational office addresses and diminish the possibilities of excuses relating to non-receipt of notice or documents, etc. by the Companies.

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LEGAL REGIME FOR REGULATING ESG FRAMEWORK IN INDIA//LEGAL FRAMEWORK FOR ENSURING ESG IN INDIA

- *Ms. Yukta Garg*

INTRODUCTION

ESG has been gaining traction recently and the impact of financial and economic risks all across the world has caused the emergence of the need to address the concerns relating to ESG. In fact, investors these days are giving due importance to ESG as a metric for guidance related to financial decisions. The acronym **ESG** stands on three core pillars, i.e., **E**- Environmental**, S-** Social, and **G**- Governance.

The significance of ESG is evident from the emergence of ESG Investing in India. **ESG Investing** strategy is a culture wherein people invest funds in companies whose management is working towards the achievement of corporate governance causing favorable effects on society and its environment. A leading number of companies in India have been witnessed to include environmental, social, and governance targets as a part of their key result areas (KRAs) for top management when computing their goals and pay scale levels. ESG-compliant companies look forward to aligning financial returns with ethical and other non-financial considerations.

ESG: REGULATORY FRAMEWORK IN INDIA

The law of ESG compliance in India is evolving manifolds. The principal regulators for Governance legislations in India are the Ministry of Corporate Affairs (**"MCA**"), which supervises the laws of companies and Securities and Exchange Board of India ("**SEBI**"), which regulates the conduct of companies listed on any stock exchange of the country.

Numerous legislations were introduced in the country at different times for the protection of environment in which we operate, the equitable treatment to employees and labour, contributing to their overall well-being, and adoption of corporate governance practices.

SEBI, whilst updating the erstwhile Business Responsibility Report ("**BRR**") which was supposed to be voluntarily filed by Companies in 2021, issued new guidelines mandating **Business Responsibility and Sustainability Report** ("**BRSR**") to be filed by Top 1,000 listed companies in the country basis the market capitalization rate. This goes very far in promoting the ESG framework and promote the interest of investors and other stakeholders in drawing a better perception of the Company's overall growth and stability basis the ESG consciousness of the company.

A report was issued in July, 2022 by the 'Sustainable Finance Group' ("**SFG**") setup by the Reserve Bank of India ("**RBI**"), to help in shaping the regulatory and supervisory approach of the RBI to climate risk and sustainable finance SFG which suggested strategies and study evolving a regulatory framework to mitigate climate related risks in the Indian context, which can be adopted by banks and other financial institutions. The banks will move towards the development of a robust ESG strategy that is integrated into their overall business strategy to address the risks and tap the opportunities arising from climate change.

To address the need for greater attention to ESG concerns, the board of directors should discuss the climate and sustainability-related risks and opportunities at the decision-making level and oversee their climate and sustainability-related initiatives and scale them up, and further, contribute to raise awareness on climate-related financial risks within their banks.

The regulatory framework governing the ESG concerns in India is not imbibed in any specific legislation but can be found in fragments in numerous laws and statutes including but not limited to the environmental laws, Sebi Regulations, Companies Laws, Prevention of Corruption Act, Prevention of Money Laundering Act, and other employment laws.

Environmental legislations, under the name of Environment (Protection) Act, 1986, Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981, Wildlife (Protection) Act, 1972, the Forest (Conservation) Act, 1980 and the Biological Diversity Act, 2002, are in place to ensure that the entities work in harmony with the environment and imposes obligations on the entities for prevention, control and abatement of water and air pollution, thereby regulating the "E" under the acronym of ESG.

Social factors involve the employees and local communities which gets affected due to the operations of entities. India has a variety of labour legislations to promote the demands of workers for better working conditions, and to promote the dignity of labour.

The legislations that pertain to Industrial regulations are The Industrial Disputes Act, 1947, The Trade Union Act, 1926, The Minimum Wages Act, 1948, The Payment of Bonus Act, 1965, The Payment of Wages Act, 1936, The Maternity Benefit Act, 1961 and the Child Labour (Prohibition and Regulation) Act, 1986 are few legislations pertaining to women and children. Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act) has propelled organizations to comply with its mandate and make the workplace safer for its female employees.

The main substantive "G" or Governance-related regulations can be found in fragments as under -

- Section 134(3) (m) of the Companies Act, 2013 ("Companies Act") requires the board's report to contain details on the conservation of energy including any steps taken or impact on the conservation of energy, steps taken to utilize alternative sources of energy, capital investment in energy conservation equipment, efforts towards technology absorption, etc.

- Section 135 of the Companies Act read with CSR Rules, 2014 mandates that Companies falling under certain specified limits, to spend at least 2% of their average profits of the last three financial years on CSR activities and to constitute a committee known as CSR committee to oversee such spends. Further, the Directors have to disclose in their board Report the composition of the committee, the amount spent and on which activity, any explanations unspent amount etc.

- The Companies Act also casts a duty on the Directors of the company under Section 166 to promote the objects of the company and work for the benefits and best interest of the company, employees, stakeholders, etc.

- SEBI vide Regulation 17(1) (b) of SEBI (Listing Obligations and Disclosure Requirements), 2015 promoting the involvement of Independent Directors and Non- Executive Directors, mandating 1/3rd of the Board to be independent directors in case the chairman is Non- executive director and not a promoter, in case not, then half the composition of the board to be of independent directors.

- Section 149 (1) of the Companies Act provides for at least one woman director on its Board in certain class of companies.

- Several Committees are to be formulated by the Companies falling under specified limits namely - Nomination and Remuneration Committee (NRC), Stakeholders Relationship Committee (SRC), Corporate Social Responsibility (CSR) Committee.
  There is a need to provide for some interlinkages between these committees for effective governance practices.



CLOSING THOUGHTS

While India steadily progresses towards the inculcation of ESG regulatory framework, the present BRSR mandate applicable on the top 1000 entities has brought in standardization and benchmarking for ESG compliance and ESG Investing, further indicating that it will soon loop in more and more companies in the coming years in adopting ESG compliant business practices. The ESG landscape is witnessing the rise of global recognition and ESG compliance-driven companies are attracting huge numbers of foreign investments. The Indian entities should catch up with global trends by way of conducting ESG Due Diligence and ESG Audits to attract international investment. Listed entities should appoint a BRSR Qualified professional to coordinate such compliance reporting framework. Sustainability-related policies should be formulated by the Board in the terms of reference of their Corporate Social responsibility. The companies need to realize that the ESG norms will no longer be limited to discretionary conduct in the times ahead and it is advised for the top management of all the companies to take a proactive approach in contributing towards the rising ESG activism in India.

Disclaimer: *This article is only intended to provide general guidance on the captioned subject and should not be treated as a piece of legal advice in any manner whatsoever. Specialist advice is required to be sought concerning any specific circumstances.*

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INITIATING PROCEEDINGS UNDER SECTION 153C AGAINST 'OTHER PERSON'

- *Preeti Puri*

Section 153C of The Income Tax Act, 1961 provides that where search is conducted on a person and undisclosed assets/documents indicating undisclosed income are found as belonging to or pertains to "other person" other than, searched person", then in that case, proceedings u/s 153C would be undertaken against the "other person".

A bare reading of Section 153C says :-

Notwithstanding anything contained in section 139 section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,—

(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or

(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,

a person other than the person referred to in section 153A , then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years referred to in sub-section (1) of section 153A

Section 153C starts with non-obstante clause relating to normal assessment procedure covered by section 139, 147, 148, 149, 151 and once section 153C is triggered it is mandatory for the Assessing Officer ("AO") to issue notice calling upon the assessee to file returns for the six assessment years prior to the year in which the search on took place. If the interpretation as per the doctrine of harmonious construction is accepted, it will mean that during pendency of assessment proceedings under Section 153C, separate proceedings under Section 148 may be initiated for making assessment of escaped income, discovered otherwise, than during the course of search. However, the doctrine of harmonious construction cannot be made applicable in the case of assessment under section 153C. It is a settled position that once proceedings under Section 153C are initiated, then no parallel proceedings under Section 143(3)/147 can be made.

Thus, once the conditions as mentioned in the said section are satisfied, then the only route available with AO is to make assessment against other person in accordance with section 153C not as per provisions of section 147. Therefore, if the AO has reopened proceedings under section 147 instead of section 153C, in that case the assessment made under 147 will be annulled.

Various Judicial Rulings supporting this view :-

- [2015] 64 taxmann.com 15 G. KOTESWARA RAO AND OTHERS V. DCIT
- 2020 (4) TMI 289 – ITAT DELHI – M/S. SAURASHTRA COLOR TONES PVT. LTD. V. ITO
- [2015] 61 taxmann.com 50 (Pune – Trib.) ACIT V. SHRI RADHESHYAM B. AGRAWAL
- 2018 (11) TMI 1736 – ITAT DELHI – SH. GIRISH CHANDRA SHARMA V. ITO

RECORDING OF SATISFACTION

There is no separate requirement of recording of satisfaction for initiating proceedings u/s 153A, as no search u/s 132(1) can be initiated without a satisfaction note by "conducting officer" of the "searched person". **However, in the case of assessment of "other person" u/s 153C, the satisfaction is of supreme importance.** Therefore, one satisfaction is to be recorded by the AO of the "searched person" that the books of accounts/documents belongs to/relates to "other person" and the second satisfaction is to be recorded by the AO of "other person" that the books of accounts/assets have bearing on the total income of other person.

Whether a single satisfaction or a dual satisfaction is required to initiate proceedings under section 153C?

However, single satisfaction note will serve the purpose where the AO of "person searched" and "other person" is same.

The Central Board of Direct Taxes (CBDT) also issued a circular no. 24/2015 explaining the requirement of "recording of satisfaction" by the Assessing Officer before issuing notice under section 153BD/153C of the Act. It is observed that when proceedings are proposed to be initiated under section 153C of the Act against the "other person", a satisfaction note must precede it by the Assessing Officer of the "searched person". It is further observed that the AO of "searched person" will record satisfaction that the seized documents belong/relates to "other person."

Where seized documents did not belong to the assessee

Where seized documents which formed basis of proceedings u/s. 153C, did not belong to assessee, even though a satisfaction was recorded by the AO of person searched, condition precedent under that section would not be satisfied and, therefore, entire proceedings would be null and void.

- CIT v. Arpit Land (P.) Ltd. [2017] 78 taxmann.com 300/393 ITR 276 (Bom.)
- CIT v. Meghmani Organics Ltd. [2013] 40 taxmann.com 31/[2014] 221 Taxman 25(Mag.) (Guj.)

Six Assessment Years

As per proviso to section 153C, the period of six assessment years **would start from the date of the search** and not from date of handing over of documents by the AO of person searched to the AO of "other person". Pr. CIT v. Sarwar Agency (P.) Ltd. [2017] 85 taxmann.com 269/397 ITR 400 (Delhi)

Effect of section 292B

In the absence of satisfaction by the AO of the person searched, the AO of "other person" does not get any jurisdiction to issue notice u/s. 153C. Therefore, notice u/s. 153C issued by the Assessing Officer of the person searched lacked jurisdiction which is not curable by virtue of the provisions of section 292B. Parshwa Corpn. v. Dy. CIT [2017] 88 taxmann.com 43 (Ahd. - Trib.)

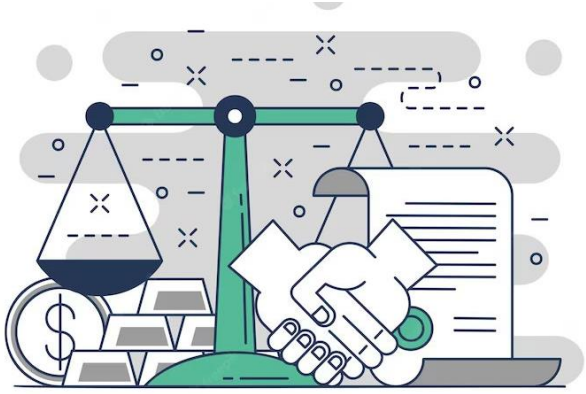
Whether approval granted u/s 153D mechanically to an order passed by AO u/s 153C would invalidate that order

There should be evidence on record that approval granting authority has examined the draft assessment order and assessment record and after application of mind approval was granted. Where approval is granted mechanically, it will be an empty formality and the assessment order so finally passed by the AO will not be sustainable. If draft order is placed before the Joint Commissioner of Income Tax (JCIT) on 31-12-2010 on which date there was no time with him to examine the record, the approval would be a mechanical approval leading to the order so passed as bad in law.

Where there is no evidence that Deputy Commissioner of Income tax (DCIT) who passed the order u/s 153A had taken prior approval of JCIT, as required u/s 153D, order u/s 153A would be null and void. Where assessment proceedings were going on 27.12.2010 before the AO and approval was allegedly granted on 24-12-2010 then entire assessment made by the AO u/s 153A/143(3) is not sustainable as there is no valid approval in the eyes of law.

Whether for making addition u/s 69C or u/s 69B read with section 153C, mere incriminating documents showing payments or receipts of cash is sufficient.

For making addition u/s 69C, it is necessary for the AO to prove that actual expenditure has been incurred by the assessee and for making addition u/s 69B, it is necessary for the AO to prove that assessee has made actual payment. So also, for making addition u/s 69B, it is necessary for the AO to prove that assessee has made actual investment. It has been held by *Hon'ble Gujarat High Court in Gayatri Enterprise v. ITO* 35 that *"Unless it is established on record by the department that as a matter of fact, the consideration as alleged by the department did pass to the seller from the purchaser, it cannot be said that the department had any right to make any additions u/s. 69B."*



Thus, in the search, if documents relating to disbursement of cash for purchase of land were found and the managing person stated u/s 132(4) that certain amount of cash has also been received by him to purchase the land, and the statement was retracted after two and half months from the date of search, addition made u/s 69C in the assessment made u/s 153C, were deleted on the grounds the documents seized in the search did not belong to the assessee and there was no material to conclusively show that huge amount as revealed from the seized documents were actually transferred from one side to another SLP against this order was dismissed.

Whether in the absence of any incriminating material found during search, additions made u/s 153C in the assessed income are unsustainable in law.

This issue has been covered in several judgement of different High Courts wherein it has been held that no addition can be made in a completed assessment if no incriminating material has been found in the search. But SLP against similar decision given by Hon'ble Bombay High court in *Pr. CIT v. Dhananjay International Ltd*. [2020 114 taxmann.com 351(SC) has been admitted by Hon'ble Supreme Court. It may be noted that Hon'ble Apex Court in *Pr. CIT v. Meeta Gutgutia* [2017] 82 taxmann.com 287 (Delhi) has held that for invocation of section 153A to re-open concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during search qua each such earlier assessment year.

It means that AO of "other person" has to satisfy whether there was any incriminating material qua each assessment year and therefore, if for certain assessment years out of six assessment years, there is no incriminating material, the AO should not issue notice u/s 153C. Therefore, where AO is not able to adduce any cogent material or evidence to prove that additions made in the assessment completed u/s 144/153C, was based on any incriminating material or document found during the course of the search, such addition are liable to be deleted.

CONCLUSION

Before initiating proceedings u/s. 153C a satisfaction by the AO of the person searched is mandatory that certain seized assets/ documents belonged/pertained to "other person". In absence of satisfaction by the AO of the person searched, proceedings u/s. 153C will be vitiated. Only the issues arising from the incriminating material can be considered under section 153C proceedings and in order to support or counter, the AO can bring the material on record. No external material either collected in post-search inquiries or through action u/s. 133A/133(6) giving rise to new issues of taxable income can be considered u/s. 153C. Proceedings u/s. 148 can be undertaken only after closure of proceedings u/s. 153C and not during their pendency.

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www.sandalawoffices.com | S&A Law Offices | mail@sandalawoffices.com

OUR OFFICES

GURUGRAM

Plot Number 5, 6, 7, Udyog Vihar
Phase IV, Sector 18
Gurugram, Haryana-122015, INDIA
Phone: 91-124-4666400
Fax: 91-124-4666401

NEW DELHI

E-337, East of Kailash
New Delhi-110065, INDIA
Phone: 91-11-46667000
Fax: 91-11-46667001

BANGALORE

Awfis, S&A Law Offices
Renaissance Centra, 27 & 27/1
Mission Road, Rama Nagar
Bengaluru, Karnataka-560027,
INDIA

MUMBAI

Unit No-101,10th Floor
Sakhar Bhawan, Plot No.230
Ram Nath Goenka Marg, Nariman
Point Mumbai-400021, INDIA
Phone:91-22-66025000
Fax:91-22-66025001

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