Between the lines...

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I. WhatsApp's new privacy policy cleared by the Delhi High Court, but certain directions issued to protect user data

An interesting case of ***Karmanya Singh Sareen and Anr. vs. Union of India and Ors.,*** in which certain public interest litigants had moved the Hon'ble Delhi High Court amid concerns over the new privacy policy of a popular messaging application, came to be decided on September 23, 2016.

Certain alarmed users of the popular messaging application WhatsApp (provided by WhatsApp, Inc.) (**the "App"**), took the public interest litigation (PIL, as it is commonly referred to) route to raise concerns over the new privacy policy of the App, compromising the privacy of its users. Prime concern was sharing of user data with Facebook, Inc., the company that had acquired the App in 2014. Interestingly, one of the reliefs sought was a prayer to bring internet based messaging services like the App under appropriate regulatory regime.

Concerns erupted in August this year when users of the App were put to notice that their account information was going to be shared with social networking giant Facebook and its group companies. The purpose cited was improvement of Facebook advertisements and product experiences. Users of the App were given time till September 25, 2016 to agree to the changed terms and privacy policy in order to keep using the App.

It was contended before the Court by the Petitioners that there was infringement of fundamental right of users of the App under Article 21 of the Constitution of India as user data privacy came under threat. Further argument was that such data was to be used for commercial exploitation, catering to advertising and marketing needs. One other

contention put forth by the Petitioners was that majority of the user base of the App in India was not equipped with the ability to properly read and understand the consequences of the new privacy policy of the App. One of the directions sought from the Court by the Petitioners was, "A FULL OPT OUT option to Users from their information being shared with Facebook and its family of companies. This can be simply done by adding a button viz., DON'T SHARE".

The Division Bench of the Court was informed by the Learned Counsel for the Government that regulation of internet service providers was within the purview of the Telecom Regulatory Authority of India Act, 1997 and regulations thereunder. However, as the Court was informed, internet messaging applications were not regulated under any statutory framework. A move by India's telecom watchdog the Telecom Regulatory Authority of India in early 2015 had grabbed lot of attention when it issued a discussion paper related to Over-The-Top services. It was iterated before the Court that further process to bring such services under regulation net was underway.

Affidavit was filed by WhatsApp, Inc. to counter the apprehensions raised by the user community of the App over its new terms and privacy policy. The Court was of the view that users of the App were bound by terms as they chose to opt for the services of the App voluntarily. The Court also observed that the position regarding existence of fundamental right to privacy was not clear as the issue was pending disposal before the Supreme Court of India.

The Court held, *"Be that as it may, since the terms of service of "WhatsApp" are not traceable to any statute or statutory provisions, it appears to us that the issue sought to be espoused in the present petition is not amenable to the writ jurisdiction under Article 226 of the Constitution of India. XXXX We are, therefore, of the view that it is always open to the existing users of "WhatsApp" who do not want their information to be shared with "Facebook", to opt for deletion of their account."*

The Court issued certain directions to protect interest of the user community of the App including directing non-sharing of user information if user deletes account before September 25, 2016 and non-sharing of data upto September 25, 2016 of the continuing users. The Court also directed that such applications should be brought under regulatory net at the earliest.

VA View

This case again brings to the fore the vacuum in the regulatory regime when it comes to the myriad of internet based applications operating in the country. Though the country's telecom regulator took a step in the right direction by releasing a consultation paper on over-the-top (OTT) applications in 2015, further developments have not gathered pace. To cite from the said paper, the term OTT refers to applications and services which are accessible over the internet and ride on operators' networks offering internet access services, for example social networks, search engines, amateur video aggregation sites, etc. like WhatsApp, Skype, Snapchat, Instagram, Google Talk, Hike, Facebook messenger, etc.

Another space to watch out for in the future is the view of the Supreme Court on the ever contentious issue of fundamental right to privacy, as is noted by the Delhi High Court in this case, *"the legal position regarding the existence of the fundamental right to privacy is yet to be authoritatively decided {Vide: K.S. Puttaswamy (Retired) and Anr. v. Union of India &Ors., (2015) 8 SCC 735}. Having taken note of the inconsistency in the decisions on the issue as to whether there is any "right to privacy" guaranteed under our Constitution, a three-Judge Bench in K.S. Puttaswamy (supra) referred the matter to a larger Bench and the same is still pending."*

II. Supreme Court rules on prospective applicability of the 1997 amendment of the Indian Contract Act, 1872

The Supreme Court of India in the case of ***Union of India and Anr. vs. M/S IndusInd Bank Ltd. and Anr.,*** decided on September 15, 2016, has held that 1997 amendment to Section 28 of the Indian Contract Act, 1872 (the **"Act"**) is prospective in application.

In 1996, applications were invited by the Textile Commissioner for export of 10,000 bales of extra long staple cotton. Shipment period was also conveyed. Four sale contracts came to be executed between a Singapore company and four exporters, after which exporters made an application with bank guarantee as was the requirement. Permission to export was granted vide Allocation-cum-Registration Certificate dated February 6, 1996, with shipment validity upto July 31, 1996. Despite repeated extensions granted to the exporters, they failed to furnish some supporting documents for their allocated goods with the Textile Commissioner.

Due to default of exporters, the gradual recourse was resorted to by the Textile Commissioner by invoking the bank guarantees. Respondent IndusInd Bank (the **"Bank"**) denied payment under the bank guarantees on the ground that bank guarantees could only be invoked within the extended period of three months ending on April 30, 1997 whereas the Textile Commissioner had invoked the guarantees through letters dated May 15, 1997. The Textile Commissioner countered the Bank's denial by citing an amendment made to Section 28 of the Act with effect from January 8, 1997. Amended Section 28, which made certain agreements void, is reproduced below (underlined for emphasis):

"28. Agreements in restraint of legal proceeding, void.

Every Agreement,

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent;

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights by usual legal proceedings, is void to that extent."

The Bank maintained its stand and denied any payment under the guarantees. Consequently, matter reached the Bombay High Court. Single Judge of the Bombay High Court took the view that amended Section 28 of the Act applied to the facts of the case as bank guarantees were in force on January 8, 1997 (when the 1997 amendment came into effect). However, the Division Bench came to reverse the Single Judge judgment on the ground that bank guarantees were not invoked within prescribed time, although the Division Bench was also of the view that amended Section 28 of the Act will apply.

Counsel for the Union of India contended that condition in bank guarantees in this case which restricted the time for invocation of guarantees was void in the light of the 1997 amendment. The other side representing the Bank argued, inter alia, that the 1997 amendment would not apply in this case as the bank guarantees were dated January 31, 1996 while the amendment to Section 28 of the Act was brought almost a year later with effect from January 8, 1997. Thus, Counsels for the Bank contended that the clause restricting period to encash guarantees was perfectly valid as per position in law on January 31, 1996.

The Supreme Court referred to Law Commission Reports and Statement of Objects and Reasons for the 1997 amendment in addition to dealing with the bulk of case laws cited by both sides. It is important to refer to paragraph number 25 of the judgment, where we find the erudite observation of the Learned apex Court Bench. It is observed therein as under:

"25. On a conspectus of the aforesaid decisions, it becomes clear that Section 28, being substantive law, operates prospectively as retrospectivity is not clearly made out by its language. Being remedial in nature, and not clarificatory or declaratory of the law, by making certain agreements covered by Section 28(b) void for the first time, it is clear that rights and liabilities that have already accrued as a result of agreements entered into between parties are sought to be taken away. This being the case, we are of the view that both the Single Judge and Division Bench were in error in holding that the amended Section 28 would apply."

Appeals were dismissed.

VA View

The Learned Bench rightly decided in favour of the Bank as bank guarantees were dated much prior to the amendment and therefore the amendment (which came like a year later) could not have applied in such a case. Also clearly reflected is the principle that substantial changes in law always have prospective effect and not retrospective, unless there is a specific provision indicating otherwise.

It is pertinent to bring to the notice of readers that Section 28 of the Act was further amended in 2012 (effective January 18, 2013) which saves a provision in a guarantee for extinguishment of the rights or discharge of any party thereto from any liability under or in respect of such guarantee or agreement on the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability. As Supreme Court also noted in this case, *"Parliament has to a large extent redressed any grievance that may arise qua bank guarantees in particular, by adding an exception (iii) by an*

amendment made to Section 28 in 2012 with effect from 18.1.2013. Since we are not directly concerned with this amendment, suffice it to say that stipulations like the present would pass muster after 2013 if the specified period is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of a party from liability."

III. Mere allegation of fraud cannot make a dispute non-arbitrable: Supreme Court

The Supreme Court of India in the case of ***A. Ayyasamy vs. A. Paramasivam & Ors.,*** decided on October 4, 2016, has held that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration.

A partnership deed was entered into to carry on hotel business. Six partners (five brothers and their father who died in 2009) had 1/6th share each. Partnership deed contained an arbitration clause. Disputes arose between brothers after death of their father in relation to the administration of hotel run by them. The Appellant had taken over the administration of hotel. He failed to deposit day to day collection in a current account as was the understanding between brothers. Allegations were made against the Appellant that he had fraudulently issued a cheque from the hotel bank account in favour of his son and the amount was misappropriated. Some other allegations against the Appellant were in relation to his failure to allow examination of hotel account books, etc.

The Respondents filed a civil suit seeking, inter alia, declaration that they had the right to participate in hotel administration by virtue of the fact that they were partners. The Appellant raised the issue that the partnership deed contained an arbitration clause and noting the mandate under Section 8 of the Arbitration and Conciliation Act, 1996 (the **"Act")**, the Court was duty bound to refer the dispute to an arbitrator. To this objection raised by the Appellant, the Respondents got back contending that dispute could not be decided by Arbitral Tribunal in view of the serious allegations of fraud against the Appellant. The remedy according to the Respondents was to file a suit in a civil court. The trial court dismissed the Appellant's application. In a revision petition before the High Court, the High Court also rejected the Appellant's stance.

The Supreme Court noted that there was no provision in the Act which excluded any category of disputes and made them non-arbitrable. The Court while examining various provisions of the Act observed that judicial intervention should not thwart arbitration proceedings once such proceedings are initiated by any party by virtue of an arbitration agreement.

The Court took note of the fact that fraud was one category flowing from Court decisions where disputes were to be considered as non-arbitrable. The Court examined the definition of the term 'fraud', its ingredients, and relevant case laws. According to the Court, the moot question was whether mere allegation of fraud by one party against the other would be sufficient to exclude the subject matter of dispute from arbitration and decision thereof necessary by the civil court.

The Court took the view that mere allegation of fraud could not be a ground to conclude that a dispute was non-arbitrable. The Court observed, *"The allegations of fraud should be such that not only these allegations are serious that in normal course these may even constitute criminal offence, they are also complex in nature and the decision on these issues demand extensive evidence for which civil court should appear to be more appropriate forum than the Arbitral Tribunal. Otherwise, it may become a convenient mode of avoiding the process of arbitration by simply using the device of making allegations of fraud and pleading that issue of fraud needs to be decided by the civil court."*

The Court went on to examine the allegations levied against the Appellant in this case and opined that the issues involved in this case could be looked into by an arbitrator and that the matter did not involve a very serious or complex issue. The Court reversed the ruling of the High Court and allowed the appeal. Parties were relegated to arbitration and an arbitrator was appointed.

VA View

This is yet another case in recent times in which a Court has laid focus on minimal interference with arbitration proceedings to give full effect to the agreement regarding the forum chosen by the parties for resolution of disputes between them. In our August 2016 edition, we had brought to your notice a judgment rendered by the Delhi High Court (in the case of ***Mcdonald's India Private Limited vs. Vikram Bakshi and Ors.***) wherein it was observed that Courts should minimize interference with arbitration process, which is the policy discernible from the Arbitration and Conciliation Act, 1996.

Also noteworthy is the position as clarified by the Supreme Court in this case that a mere allegation of fraud cannot exclude arbitrability. The Court has rightly noted that the burden must lie heavily on a party which avoids compliance with the obligation assumed by it to submit disputes to arbitration and to establish that the dispute is not arbitrable under the law for the time being in force. A party should not raise an issue merely as a pretext to avoid arbitration.

The observations of Hon'ble Mr. Justice Dr. D.Y. Chandrachud in his concurring judgment sum it up the best, *"A fresh line must be drawn to ensure the fulfilment of the intent of Parliament in enacting the Act of 1996 and towards supporting commercial understandings grounded in the faith in arbitration."*

IV. Dishonour of cheque issued for discharge of future liability covered by Section 138 of the Negotiable Instruments Act: Supreme Court

The Supreme Court of India in the case of ***Sampelly Satyanarayana Rao vs. Indian Renewable Energy Development Agency Limited,*** decided on September 19, 2016, has held that dishonour of cheque issued for discharge of a later liability would be covered by Section 138 of the Negotiable Instruments Act, 1881 (the **"NI Act"**).

The Delhi High Court ruling came to be challenged in this appeal before the Apex Court. The question before the Apex Court was whether in the facts of the case, the dishonour of a post-dated cheque given for repayment of loan installment, which was also described as “security” in the loan agreement, was covered by Section 138 of the NI Act.

Section 138 of the NI Act reads as under:

“138. Dishonour of cheque for insufficiency, etc., of funds in the account. - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, ***of any debt or other liability,*** *is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank,such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment fora term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:*

Provided that nothing contained in this section shall apply unless –

the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. - For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.”

Cheques of a company (engaged in power generation) were dishonoured and the Appellant (director of company) was co-accused. The Respondent was a Government of India enterprise engaged in development of renewable energy. The Respondent had agreed to provide loan of INR 11.50 crores. The loan agreement between parties recorded that post-dated cheques towards payment of installment of loan were given by way of security. When cheques were dishonoured, complaints were filed by the Respondent in the concerned court in Delhi.

The Appellant sought quashing of complaints on the ground that dishonour of post-dated cheques given by way of security did not fall under Section 138 of the NI Act. The case of the Appellant was that cheques were not towards discharge of debt or liability in presenti but for amount payable in future. The Delhi High Court came to reject this contention of the Appellant.

The Supreme Court referred to relevant clauses in the loan agreement and case laws on the subject. The Court was of the view that when it is to be decided whether a post-dated cheque is for *"discharge of debt or liability"*, everything depends on the nature of the transaction. The Court observed that if on the date of the cheque liability or debt exists or the amount has become legally recoverable, Section 138 of the NI Act is attracted.

The Court ruled, *"Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. XXX Crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. Dishonour of cheque in the present case being for discharge of existing liability is covered by Section 138 of the Act, as rightly held by the High Court."*

Appeal was dismissed.

VA View

It is usual practice to provide post-dated cheques as security for repayment of loan. It is clear from this ruling by the Apex Court that Section 138 of the NI Act will be applicable in cases of dishonour of such cheques.

It is pertinent to take note of the fact that the Supreme Court referred to the case of ***Indus Airways Private Limited vs. Magnum Aviation Private Limited*** (Supreme Court of India; *1 (2014) 12 SCC 539*) in the instant case. In the Indus Airways case, there was cancellation of purchase order and the cheque issued towards advance payment for such order was dishonoured. It was ruled in that case that when a contract provides that the purchaser has to pay in advance and the cheque towards advance payment is dishonoured, it will not give rise to criminal liability under Section 138 of the NI Act, though the purchaser may be liable for breach of contract. The Supreme Court has distinguished the same by observing in the present case that there is difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.

V. SEBI imposes additional restrictions in case of compulsory delisting in the interest of investors

The Securities and Exchange Board of India (**"SEBI"**) has issued Circular dated September 7, 2016 (the **"Circular"**) with the subject *"Restrictions on Promoters and Whole-Time Directors of Compulsorily Delisted Companies Pending Fulfillment of Exit Offers to the Shareholders".* Under the current regulatory regime, equity shares of a company may be compulsorily delisted on certain grounds by a recognised stock exchange.

Regulation 24 of the SEBI (Delisting of Equity Shares) Regulations, 2009 (the **"Delisting Regulations"**) talks about the consequences of compulsory delisting. It is stated therein that where a company has been compulsorily delisted, the company, its whole time directors, its promoters and the companies which are promoted by any of them shall not directly or indirectly access the securities market or seek listing for any equity shares for a period of ten years from the date of such delisting.

Regulation 23 deals with the rights of public shareholders in case of a compulsory delisting. Sub- regulation (3) of said Regulation provides that, *“the promoter of the company shall acquire delisted equity shares from the public shareholders by paying them the value determined by the valuer, subject to their option of retaining their shares.”*

SEBI has felt the need to impose additional restrictions in case of compulsory delisting so as to ensure effective implementation of exit option to the public shareholders in investor interest. SEBI has directed the following in case of such companies whose fair value is positive:

Till the time the promoters of delisted company provide an exit option to the public shareholders in accordance with sub-regulation (3) of Regulation 23 of the Delisting Regulations as certified by concerned stock exchange, transfer of any equity shares by way of sale, pledge, etc. cannot be done by such delisted company and depositories. This restriction is also applicable on corporate benefits like dividend, rights, bonus shares, etc. and the same shall stand frozen till the exit option requirement is complied with. The other restriction imposed is that the promoters and whole-time directors of the compulsorily delisted company are barred from becoming directors of any listed company till the exit option is provided as covered hereinabove.

VA View

The notices served for delisting on several companies in recent times by the stock exchanges has captured wide attention. As per media reports, SEBI was planning to push for delisting of over 4,200 listed companies whose shares were not being traded. It is clear that SEBI has decided to impose such additional restrictions on promoters and whole-time directors of delisted companies in order to safeguard the interest of public shareholders of such delisted entities.

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