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Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST

KEY HIGHLIGHTS

* **Delhi High Court:** Arbitrator can award compensation on guesswork when loss is difficult to prove, subject to maximum amount payable under liquidated damages clause.
* **Karnataka High Court:** Special provisions related to international workers under EPF Scheme and Pension Scheme declared unconstitutional.
* **Delhi High Court:** Arbitration clause in the T&Cs on a website is binding on the parties if the digital agreement incorporates a hyperlink to such T&Cs.
* **Telangana High Court:** Dispute concerning partners' rights and obligations during insolvency and winding-up of partnership is arbitrable.

I. Delhi High Court: Arbitrator can award compensation on guesswork when loss is difficult to prove, subject to maximum amount payable under liquidated damages clause.

In the matter of ***Cobra Instalaciones Y Servicios, S.A. and Shyam Indus Power Solution Private Limited (J.V.) v. Haryana Vidyut Prasaran Nigam Limited [FAO(OS) (COMM) 195/2022 and CMAPPL 32865/2022]*** decided on April 10, 2024, the Division Bench of Delhi High Court ("**Delhi HC**") has held that an Arbitrator can award compensation on guesswork when loss is difficult to prove, subject to maximum amount payable under liquidated damages clause.

Facts

Cobra Instalaciones Y Servicios, S.A. and Shyam Indus Power Solution Private Limited (J.V.) ("**Appellant**") and Haryana Vidyut Prasaran Nigam Limited ("**Respondent**") had entered into five contracts and subsequently, disputes arose between the parties in respect of all the five contracts. The present dispute arose in relation to contract having project number G09. For Project G09, the Government of India had obtained a loan from the International Bank for Reconstruction and Development to improve the infrastructure and power situation in the State of Haryana and the project was named as Haryana Power System Improvement Project. For the aforesaid project, pursuant to invitation of bids on May 26, 2011, the Appellant participated in the bid tender process and submitted its bid on August 6, 2011 towards procurement of plant, design, supply and installation of sub-stations and bays. Accordingly, work on the project commenced on April 8, 2012, which had to be completed within 450 days from commencement of work.

However, there was delay on part of the Appellant in execution of the project and on June 20, 2013, the Appellant had addressed a communication to the Respondent seeking deferment on imposition of liquidated damages. The Respondent addressed a letter dated July 26, 2013 to the Appellant and stated that it would defer 80 percent of the imposable liquidated damages till December 31, 2013, however, without prejudice to its rights under the contract. Thereafter, the Appellant addressed a letter dated November 3, 2014 to the Respondent, whereby the Appellant stated that liquidated damages could not be invoked because the Respondent has not suffered any actual loss. Further, the Appellant also requested the Respondent to condone the delay and extend the time period for completion of the project.

Thereafter, request made by Appellant for extension of time was withdrawn by way of communication dated September 10, 2016 on the ground that a fresh request shall be made along with placing additional facts. However, no immediate request for extension was made by the Appellant.

On November 4, 2016, the Appellant invoked arbitration agreement in terms of Clause 46.5(b) of General Conditions of the Contract ("**GCC**") and Clause 26 of Particular Condition ("**PC**"). Upon lack of consensus between the parties on choice of arbitrator, the Appellant approached the Delhi HC seeking appointment of arbitrator under Section 11 (*Appointment of arbitrators*) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").

Another request was made for extension of time by the Appellant on April 24, 2018 in respect of two sub-stations namely Naneola and Sonta and concerning six bays. After June 27, 2023, the Respondent started to deduct liquidated damages from the running bills.

Accordingly, the Delhi HC passed an order dated October 25, 2018 in relation to application filed by Appellant for appointment of arbitrator, thereby appointing a sole arbitrator in respect of the project pertaining to the present case as well as in relation to the other four projects.

The Learned Arbitrator passed an arbitral award dated July 29, 2020, thereby directing a refund of 50% of the liquidated damages imposed by the Respondent. Considering that the Respondent had retained an amount of INR 7,25,01,510 towards liquidated damages, hence as per the arbitral award, the Appellant became entitled to a refund of INR 3,62,50,755. Additionally, the Learned Arbitrator also awarded interest to the tune of INR 2,27,49,710 as well as *pendente lite* and future interest at the rate of 9% per annum.

However, both the parties filed cross-petitions under Section 34 (*Application for setting aside arbitral awards*) of the Arbitration Act. Both the aforesaid petitions were disposed of by Single Bench of the Delhi HC by way of a common judgment dated April 25, 2022. The Single Bench of Delhi HC set aside the arbitral award to the extent that it related to the award of liquidated damages and interest payable thereon.

Aggrieved by the common judgment passed by the Single Bench of Delhi HC, the Appellant preferred an appeal under Section 37 (*Appealable orders*) of the Arbitration Act.

Issue

Whether an Arbitral Tribunal can award damages on the principles of "guesswork" and "rough and ready method" when it is not feasible to ascertain the exact quantum of damages, wherein the aggrieved party has suffered loss on account of breach of obligations by the other party in a project conceived in public interest.

Arguments

Contentions of the Appellant:

The Appellant submitted that the Respondent is not entitled to impose liquidated damages since it has not suffered any legal injury or loss. Further, it was argued that the relevant clause of the GCC dealing with liquidated damages did not provide for a genuine pre-estimate of damages.

It was further contended that liquidated damages, if calculated or quantifiable, must be proved. It was further submitted that even though the Respondent had claimed damages under various heads, it had failed to quantify the same. Further, it was not possible to quantify the losses claimed by the Respondent because other contractors were also involved in the project.

Further, the Appellant contended that the Single Bench of Delhi HC erred in holding that there was an inconsistency in the award passed by the Learned Arbitrator since on the one hand, it was observed that the Respondent failed to accurately ascertain damages and on the other hand, the Learned Arbitrator himself directed reduction in the quantum of liquidated damages to the extent of fifty percent. It was further contended that the Learned Arbitrator had concluded that the liquidated damages did not represent a genuine pre-estimate of damage or loss that the Respondent was likely to suffer in case of breach on part of the Appellant. Further, the Learned Arbitrator concluded that since a part of damages,

loss or injury suffered by the Respondent is quantifiable, only fifty percent of the same could be retained. However, the Single Bench of Delhi HC failed to notice the aforesaid aspect.

Contentions of the Respondent:

The Respondent submitted that Section 37 of the Arbitration Act does not empower the court to indulge into re-appreciation of evidence. Further, the impugned judgment pronounced by the Single Bench of Delhi HC is just and reasoned and need not be set aside. Further, the Respondent contended that the Appellant is claiming refund of liquidated damages in its entirety, whereas during the course of hearing on July 27, 2022, the Appellant had indicated that the purpose and purview of appeal is restricted to seeking refund of fifty percent of the liquidated damages. Further, it is an established position that courts may either uphold or set aside the arbitral award, but are not empowered to modify the arbitral award.

It was further argued that there was a delay of 450 days on part of the Appellant in completion of the project and time was the essence of the contract. Furthermore, the Respondent has raised the issue of delay in project completion by way of multiple correspondences. Additionally, the Appellant failed to seek extension for completion of the project as per the relevant clause of the GCC. Hence, the judgment rendered by Single Bench of the Delhi HC should not be interfered with. Besides, the Respondent is a public sector undertaking and the project was undertaken with the sole purpose of benefitting the public at large.

It was contended that it is evident from the pleadings that the Respondent suffered damages. Further, the relevant clauses of the GCC and PC dealing with liquidated damages envisaged that the liquidated damages were a genuine pre-estimate of the loss that the Respondent would suffer if the Appellant would breach its obligations under the contract.

It was further contended that in the facts and circumstances of the case, the Respondent is entitled to retain hundred percent of the liquidated damages.

Observations of the Delhi HC

The Delhi HC observed that it needs to ascertain as to whether the conclusion arrived by the Learned Arbitrator in respect of liquidated damages is based on the evidence produced before him. To ascertain the afore-mentioned, the Delhi HC analysed the issues framed by the Learned Arbitrator during the course of Arbitration proceeding.

In so far as the issue whether time was the essence of contract, the Learned Arbitrator had concluded that even though, in strict sense, time was not the essence of contract, however, the Respondent had reminded the Appellant to complete the project on time. Hence, the Appellant could not have presumed that the delay caused in completion of the project would not lead to any consequences whatsoever. Further, Learned Arbitrator had recorded in the arbitral award that since several parts of the project were awarded to two or more contractors, each of the contractors who had contributed to the loss should be made liable to pay compensation on a pro rata basis.

Further, the Delhi HC observed that the Appellant failed to complete the project within the stipulated time period of 450 days. Further, the Appellant failed to place on record any such evidence so as to prove that it had sought extension of time for completion of the project in the manner as stipulated under the relevant clause of GCC. Even though the Learned Arbitrator had held that the Respondent

had suffered loss because of delay attributable to the Appellant, however, did not conclude that the liquidated damages clause represented a genuine pre-estimate of damages that the Respondent would suffer in the event of breach of obligations on part of the Appellant. Further, the Delhi HC observed that the Learned Arbitrator had concluded that it is not possible to ascertain the exact amount of loss as attributable to each contractor, however, the burden of loss had to be shared on *pro rata* basis. After taking into account all relevant information, the Learned Arbitrator had concluded that the Respondent had not quantified the loss suffered by it due to delay attributable to the Appellant.

After analysing the observations made by the Learned Arbitrator, it was held that the Single Bench of Delhi HC erred in holding that there is inconsistency in the findings of the Learned Arbitrator. It is further observed that since it was not feasible to quantify losses pertaining to most of the categories, it is in such backdrop that the Learned Arbitrator adopted the methodology enunciated by the Supreme Court ("**SC**") in the matter of ***Construction and Design Services v. Delhi Development Authority [(2015) 14 SCC 263]*** ("**Construction and Design Services Case**"), whereby a "rough and ready method" could be applied by awarding liquidated damages to the Respondent. In the aforesaid judgment, SC held that damages should be borne by the disputants in equal measure since it was difficult, if not impossible, to quantify damages.

In view of the aforesaid, the Delhi HC observed that the Single Bench of Delhi HC had wrongly concluded that since Construction and Design Services case used the expression "guesswork", such methodology could not be adopted by courts other than the SC. In this regard, the SC had made no such observation and instead had concluded that once the Learned Arbitrator finds that liquidated damages did not represent a genuine pre-estimate of damages and the aggrieved party has suffered loss on account of breach of obligations by the other party in a project conceived in public interest, the aggrieved party would be entitled to a reasonable compensation, subject to maximum amount payable under liquidated damages clause. In such circumstances, it is the ideal approach to proceed on "guesswork" with regard to quantum of compensation to be allowed to the aggrieved party.

However, in the present case, the Learned Arbitrator did not conclude that the entire amount calculable as per the relevant clauses of the contract represented a genuine pre-estimate of damages which the Respondent could incur if the Appellant committed a breach. Therefore, it was observed by the Delhi HC that the Learned Arbitrator was entitled to apply "rough and ready method" for awarding a reasonable compensation towards losses suffered by the Respondent.

Further, the Single Bench of Delhi HC had observed that the Learned Arbitrator had not taken into account other similar contracts wherein the Respondent had not levied liquidated damages. However, it was observed by the Delhi HC that the aforesaid factor is not relevant since a project is executed based on the terms and conditions provided in the contract and in the facts and circumstances of the present case, rough and ready method / guesswork approach is available to the Learned Arbitrator.

The Delhi HC observed that the underlying rationale is that as long as there is material available that damages have been suffered by the aggrieved party, even though it is not possible to have insight into granular details, the Learned Arbitrator is entitled to employ the approach of honest guesswork and/or a rough and ready method for quantifying damages. Therefore, the Single Bench of Delhi HC erred in setting aside the arbitral award on the aforesaid ground. Further, the Delhi HC observed that upon a careful perusal, there is no inconsistency in the arbitral award. Furthermore, the Delhi HC observed that the Single Bench of Delhi HC could have either upheld or set aside the arbitral award, however, there

is no power under Section 34 of the Arbitration Act to relegate the parties to the Arbitral Tribunal to agitate the dispute afresh.

Decision of the Delhi HC

In view of the facts and contentions set out hereinabove, the Delhi HC was pleased to allow the appeal partly, set aside the impugned judgment and restore the position concerning liquidated damages as was provided in the arbitral award. Hence, it was held that disputants will share the burden of liquidated damages in equal measure. Accordingly, it was directed that the Appellant would be entitled to a refund of fifty percent of liquidated damages retained by the Respondent along with interest as provided in the arbitral award.

VA View: In the present judgment, the Delhi HC relied upon the Construction and Design Services Case decided by the SC and upheld the principle of quantification of loss done by the Arbitral Tribunal by following the principle of "honest guesswork". In other words, once the Learned Arbitrator finds that liquidated damages did not represent a genuine pre-estimate of damages and the aggrieved party has suffered loss on account of breach of obligations by the other party in a project conceived in public interest, the aggrieved party would be entitled to a reasonable compensation, subject to maximum amount payable under liquidated damages clause. In such circumstances, it is the ideal approach to proceed on "guesswork" with regard to quantum of compensation to be allowed to the aggrieved party.

Hence, the Delhi HC reiterated the well-established principle of honest guesswork decided by the SC in the Construction and Design Services Case, which is a practical and pragmatic method to calculate damages and render justice to the aggrieved party.

II. Karnataka High Court: Special provisions related to international workers under EPF Scheme and Pension Scheme declared unconstitutional.

The Karnataka High Court ("**Karnataka HC**"), *vide* its order dated April 25, 2024, in the case of ***Stone Hill Education Foundation v. Union of India and Others [W.P. No. 18486/2012]***, has struck down the provisions pertaining to contribution of the provident fund for international workers without any ceiling as to the wages, under paragraph 83 of Employees' Provident Fund Scheme, 1952 ("**EPF Scheme**") and paragraph 43A of Employees' Pension Scheme, 1995 ("**Pension Scheme**"), as unconstitutional and arbitrary.

Facts

Several writ petitions were filed by the employees as well as the employers ("**Petitioners**") in the Karnataka HC and other High Courts, wherein the Petitioners questioned the vires of paragraph 83 (*Special provision in respect of International Workers*) of the EPF Scheme and paragraph 43A (*Special provisions in respect of International Workers*) of the Pension Scheme which was introduced by the Union of India ("**Respondent No. 1**"), *vide* its notification dated October 10, 2008, thereby enacting special provisions for the international workers. The said paragraphs of the EPF Scheme and the Pension

Scheme were challenged on the grounds of being arbitrary, unconstitutional and opposed to the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("**EPF Act**") since the employees other than the international workers, who draw salary exceeding INR 15,000 per month, are outside the purview of the EPF Scheme.

The Petitioners also sought the orders passed by the Regional Provident Fund Commissioner-I, Bangalore ("**Respondent No. 2**"), seeking payment of contributions by the companies under the EPF Scheme and the Pension Scheme and in default to pay charges under the EPF Act, to be quashed. The Karnataka HC in the present case has taken into consideration all the writ petitions concerning the same issue.

Issue

Whether the introduction of paragraph 83 of EPF Scheme and paragraph 43A of Pension Scheme is unconstitutional and opposed by Article 14 (*Equality before law*) of the Constitution of India.

Arguments

Contentions of the Petitioners:

The Petitioners submitted that as per paragraph 83 of EPF Scheme, "international workers" are covered under the EPF Act and EPF Scheme, irrespective of the salary drawn by them. It was contended by the Petitioners that the insertion of paragraph 83 to EPF Scheme and paragraph 43A to Pension Scheme violates Article 14 of the Constitution of India.

The Petitioners also submitted that the said paragraphs are arbitrary, illegal and oppose the object and intent of the EPF Act since there is no ceiling limit on the wages of the international workers on which the contribution is payable by both the employer and the international worker, unlike INR 15,000 per month ceiling prescribed under the EPF Act for the excluded employee (that is, who are not international workers).

The Petitioners contended that the object of the legislature is to ensure compulsory institution of contributory provident funds for weaker sections of the workers working in industrial undertakings and at no point of time, was the EPF Act intended to cover high-ranking officials. The Petitioners also argued that the international workers work merely for a limited period and not till their retirement and the employer has to incur a huge financial burden as they have to make payment towards the provident fund contributions on the international workers' global salary.

The Petitioners also submitted that no intelligible differentia exists between an Indian employee and an international worker who is not covered under a Social Security Agreement ("**SSA**") or a Bilateral Comprehensive Economic Agreement ("**BCEA**"). Further, there is no nexus between the object sought to be achieved under the EPF Act and the EPF Scheme framed in relation to international workers and the classification made thereto. The Petitioners submitted that a separate statute should be enacted for an international worker who is not covered under a SSA or BCEA, containing a clause on social security prior to October 1, 2008.

Contentions of the Respondents:

The Respondents contended that Respondent No. 1 has effected several changes to the EPF Act by introducing special provisions for different types of workers from time to time, such as insertion of: (i) paragraph 80 (*Special provisions in the case of newspaper establishments and newspaper employees*) in the EPF Scheme with effect from December 31, 1956; (ii) paragraph 81 (*Special provisions in the case of cine-workers*) in the EPF Scheme in 1981; and (iii) paragraph 82 (*Special provisions in respect of certain employees*) in the EPF Scheme in 1999 to make special provisions in respect of an employee with a disability. Similarly, the EPF Act was amended in 2008, as a result of which paragraph 83 was inserted in the EPF Scheme to extend the coverage of international workers under the EPF Scheme and further introduced paragraph 43A under the Pension Scheme and the EPF Scheme was given effect from September 11, 2010, insofar as it relates to international workers.

According to the Respondents, bilateral SSAs were finalised by the Government of India with several countries and these SSAs were effective on several dates respectively. In order to honour the said bilateral agreements with the respective foreign countries, as a measure of reciprocity as well as for the welfare of the international workers, the provisions of the EPF Act and the EPF Scheme were amended and extended by Respondent No. 1 to the international workers.

The Respondents also contended that the intention of the Parliament behind amending the EPF Scheme was that no worker should be deprived of social security benefits and similarly no Indian workers who are posted to work in the foreign countries should not be deprived of the said social security benefits. Additionally, for the protection of the rights of the Indian workers, while they are deputed outside India for a limited period, they were required to make mandatory social security contributions in accordance with the laws of those countries.

As per the Respondents, the contributions which are deducted from the salaries of Indian workers deputed abroad were a loss for every worker as the benefits, according to the laws of the countries where the said workers were deputed, are generally payable on completion of the minimum qualifying period of contribution or residence (generally ten years or more) and an Indian worker deputed for a limited period of five years or so is generally less than the minimum qualifying period.

It was also contended by the Respondents that the EPF Scheme was amended as the Indian workers, after the remittance of social security contribution in the host countries, are not entitled to any social security benefits and according to said amendment, an international worker from an SSA country is entitled to withdraw his provident fund accumulation on ceasing to be an employee in an establishment covered under the EPF Act.

The Respondents submitted that the said amendment to the EPF Scheme is not violative of Article 14 of the Constitution of India as it only applies to Indian citizens and not for foreigners in general and by the process of classification, the State has the power to determine who should be regarded as a class for the purpose of legislation and in relation to law enacted on a particular subject. It was also submitted by the Respondents that the said amendment has resulted in creation of international workers as a special class which is distinct from other employees under the EPF Act. The said classification is rational and not arbitrary, and has been made on the basis of certain qualities and characteristics found in persons grouped together and not in others who are let out. Additionally, there is a nexus between the differentia which is the basis of classification and the object of the EPF Act.

Observations of the Karnataka HC

The Karnataka HC observed that the EPF Act is a social welfare legislation meant for the protection of industrial workers to enable them to have an alternative to the pension. EPF Act was enacted with a view to see that those in lower salary brackets get retirement benefits and by no stretch of imagination, could it be said that the employees who draw lakhs of rupees per month should be given the benefit under it. The Karnataka HC also highlighted the object of introducing paragraph 83 of the EPF Scheme which is to protect the Indian employees, going abroad to work, from being subjected to the social security and the retirement clause of their host-country which are prejudicial to their interest and to motivate these countries for entering into such agreements with India and to provide for reciprocal treatment to the nationals of these countries while they work in India.

The Karnataka HC noted that the EPF Scheme is a subordinate legislation which cannot run beyond the scope and object of the mother Act. Therefore, paragraph 83 of the EPF Scheme cannot transcend the parameters of the principal legislation, that is, EPF Act which sets forth the wage limit for the Indian employees to be INR 15,000 per month. Therefore paragraph 83 of the EPF Scheme ought not to have an unlimited threshold for international workers while denying the same benefit to Indian workers.

The Karnataka HC noted that an Indian employee working in a foreign country with a SSA who is a member of EPF Act continues to contribute on lower amount of money, that is, INR 15,000 and on the other hand, a foreign worker from SSA country, without having a certificate of coverage, is required to contribute provident fund on his entire salary although both are international workers as per the definition of international workers. Therefore, the distinction in the contribution amount between an employee going to a non-SSA country and an employee from a non-SSA country coming to India is clearly discriminatory and violative of Article 14 of the Constitution of India. The Karnataka HC also observed that the demand for contribution on global salary (that is, salary earned by an international worker or remuneration received by an international worker from some other country or in home country) to also be computed for the purpose of the contribution is on the face of it, arbitrary and hit by Article 14 of the Constitution of India.

The Karnataka HC observed that an international worker from a non-SSA country is not allowed to withdraw accumulation until he reaches the age of 58 years, that is, until he retires. Therefore, it is evident that paragraph 83 of the EPF Scheme even applies to international workers from countries with which the Government of India does not have SSA, and therefore, the claim that paragraph 83 of EPF Scheme was enacted by the Government of India as the obligation of reciprocity is unsustainable.

The Karnataka HC observed that as of the date of the present order, only 20 countries have entered into a SSA agreement with India and there exists no material which depicts what is the social security scheme which is available for such international workers whose country of origin has not entered into a bilateral agreement with the Government of India. It was also observed by the Karnataka HC that paragraph 83 of the EPF Scheme and paragraph 43A of the Pension Scheme has been enacted by the legislation arbitrarily and unreasonably and defeats the very intent of the EPF Act.

It was also observed by the Karnataka HC that there exists no commonality of interest of the aims and objectives of the EPF Act and paragraph 83 of the EPF Scheme. Further, in the absence of parity and reciprocity, there is no justification to demand a contribution on the entire pay of a foreign employee from a non-SSA country.

Decision of the Karnataka HC

In line of the abovementioned observations, the Karnataka HC allowed the writ petition and struck down the introduction of paragraph 83 of EPF Scheme and paragraph 43A of Pension Scheme on the grounds of being unconstitutional and arbitrary and consequently all the orders passed under the said provisions of the schemes would be unenforceable.

VA View: The present case is a landmark judgment wherein the High Court of a State has stuck down the provisions of a legislation enacted by the Central Government and removed the discrimination which existed between an Indian employee working in a foreign country and a foreign worker working in India. Additionally, the order of the Karnataka HC would have a retrospective effect as the Karnataka HC has held that all the orders passed under the impugned provisions of the EPF Scheme and the Pension Scheme would be unenforceable, as a result of which the international workers may now have a discretion to seek refund of the provident fund so contributed as per the provisions of the EPF Act. India presently has SSAs with multiple countries which ensures continued social security coverage for employees from different nations which are a party to the said SSA on a mutually reciprocal basis, so in a situation wherein the workers/employees from one of the countries with which India has an SSA take up employment in each other's territories, their social security coverage remains uninterrupted.

As per the Ministry of Labour & Employment, *vide* its press release dated May 7, 2024, the Employees' Provident Fund Organisation (EPFO), being the operational agency in India for SSAs, has acknowledged the present order of the Karnataka HC and it is actively evaluating the course of action in response to the present judgement which may include challenging the said judgement before the Supreme Court of India.

Further, since the order of one High Court is generally persuasive for the other High Courts, it would be interesting to witness the impact of the present case with the passage of time on the future implications of payment of provident funds to international workers and how the treatment of the international workers would unfold in India.

III. Delhi High Court: Arbitration clause in the T&Cs on a website is binding on the parties if the digital agreement incorporates a hyperlink to such T&Cs.

The Delhi High Court ("**Delhi HC**"), in its judgement dated April 23, 2024, in the matter of ***M/s. Oravel Stays Private Limited v. Nikhil Bhalla [FAO (COMM) 212/2023 & CM No.54229/2023]***, has held that an arbitration clause contained in the terms and conditions ("**T&Cs**") available on a website is binding on the parties if the digital agreement incorporates a hyperlink to such T&Cs.

Facts

M/s. Oravel Stays Private Limited ("**Appellant**") and Mr. Nikhil Bhalla ("**Respondent**") had entered into a marketing and operational consulting agreement dated July 27, 2018 ("**MOCA**") and had digitally accepted the same. By virtue of the MOCA, the Respondent was permitted to list his hotel, namely the Spruce Mansion ("**Hotel**"), on the Appellant's online platform, which enabled the Respondent's customers to book rooms at the Hotel through the Appellant's platform.

As a part of this arrangement, the Appellant was entitled to receive a commission on the bookings made for the Hotel and was also obligated to pay the Respondent a minimum guaranteed remuneration every month. The T&Cs published on the Appellant's website were incorporated (through a hyperlink) as a part of the MOCA, and Clause 15 ("**T&C Clause of MOCA**") of the MOCA expressly provided that a party entering into the MOCA also accepts the T&Cs published on the Appellant's website. Clause 14 ("**Arbitration Clause in the T&C**") of the said T&Cs provided for resolution of disputes by way of arbitration. Pertinently, the T&C Clause of MOCA provided that the MOCA along with the T&Cs available on the Appellant's website would constitute the entire agreement between the Appellant and the Respondent.

A dispute arose between the Appellant and the Respondent in relation to the Appellant's failure to pay the minimum guarantee amount and the other incentives payable by it to the Respondent under the MOCA. Consequently, the Respondent instituted a suit before the commercial court ("**Commercial Court**") seeking a recovery of arrears amounting to INR 9,65,656, along with future interest (at the rate of 24% p.a. till realization) and damages to the tune of INR 4,00,000, from the Appellant. In response to the same, the Appellant filed an application under Section 8 (*Power to refer parties to arbitration where there is an arbitration agreement*) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), with a prayer to the Commercial Court to refer the parties to arbitration.

While the Commercial Court accepted that an arbitration agreement existed between the parties in terms of the Arbitration Clause in the T&C incorporated as a part of the MOCA, it rejected the Appellant's application by passing an order dated September 11, 2023 ("**Impugned Order**"), on the grounds that the Arbitration Clause in the T&C was confined to cover only those disputes that related to the 'construction, interpretation and application' of the terms of the MOCA and did not extend to disputes relating to non-compliance of the terms thereof. Aggrieved by the Impugned Order, both the Appellant and the Respondent filed appeals under Section 37(1)(a) (*Appealable orders*) of the Arbitration Act, before the Delhi HC.

Issues

1. Whether the Commercial Court had erred in proceeding on the basis that an arbitration agreement existed between the Appellant and the Respondent.

2. Whether the dispute between the Appellant and the Respondent was an arbitrable dispute within the scope of the Arbitration Clause in the T&C.

Arguments

Contentions of the Appellant:

The Appellant contended that the Commercial Court had erred in concluding that the disputes between the parties were not covered within the scope of the Arbitration Clause in the T&C. The Appellant further submitted that the Commercial Court had failed to appreciate that the expression 'application of the terms and conditions of the agreement' in the MOCA, included within its ambit any dispute relating to the non-compliance of the terms thereof.

Hence, any dispute concerning the failure to discharge any obligation under any clause of the MOCA would necessarily be covered under the scope of 'application' of the clause imposing such an obligation.

The Appellant submitted that the Arbitration Clause in the T&C delineated 3 different expressions namely 'construction, interpretation and application', and contended that the Commercial Court had erred in interpreting the scope of the word 'application' as similar to the term 'interpretation'. The Appellant concluded its arguments by submitting that a dispute on whether a clause was applicable would also include a dispute regarding the performance of the obligations thereunder.

Contentions of the Respondent:

The Respondent submitted that it was aggrieved by the Impugned Order to the extent of the Commercial Court's finding that an arbitration agreement was contained in the MOCA digitally signed between the parties. The Respondent relied on the decision of the Hon'ble Supreme Court ("**SC**") in the case of ***M.R. Engineers and Contractors Private Limited v. Som Dutt Builders Limited [(2009) 7 SCC 696]*** ("**M.R. Engineers Case**") in order to submit that the incorporation of an arbitration clause in an agreement could not have been inferred by reference, unless the agreement specifically contained such arbitration clause therein. Therefore, since there was no specific reference to an arbitration clause contained in the T&Cs, the same could not have been considered as a part of the MOCA.

The Respondent submitted that merely clicking on the link provided in T&C Clause of MOCA did not direct a party to the T&Cs published on the website of the Appellant. The Respondent also submitted that the Arbitration Clause in the T&C related specifically to 'channel partners'. Thus, unless a party selected a 'channel partner' from the menu that opened upon clicking the link provided in T&C Clause of MOCA, such party would not be directed to the site containing the relevant T&Cs published on the Appellant's website.

Therefore, a party was not only required to click the hyperlink set out in T&C Clause of MOCA but also to take an additional step of selecting a 'channel partner' from the menu, which would then lead the party to the Arbitration Clause in the T&C.

The Respondent agreed with the Commercial Court's finding that the Arbitration Clause in the T&C did not extend to disputes concerning non-compliance of the terms of the MOCA, and submitted that there was no dispute as to the interpretation of the MOCA. Rather, the claims made by the Respondent before the Commercial Court, pertained to the recovery of amounts, which were due and payable to it under the MOCA. The Respondent submitted that non-payment of the amounts due to it under the MOCA, could not be considered as a dispute regarding application of any of the clauses of the MOCA.

Observations of the Delhi HC

While considering the issue on whether the Commercial Court had erred in its finding that an arbitration agreement existed between the parties, the Delhi HC observed that it was undisputed that the parties had digitally entered into the MOCA and that the T&C Clause of MOCA expressly provided that a party entering into the MOCA would also be accepting the T&Cs published on the Appellant's website. Thus, the MOCA expressly referred to the T&Cs published on the Appellant's website and also set out the link to access the same.

The Delhi HC observed that Section 7(5) (*Arbitration agreement*) of the Arbitration Act provides that a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that arbitration clause part of the contract. Hence, in Delhi HC's view, the T&Cs published on the Appellant's website was expressly incorporated as part of the MOCA, and therefore, the Arbitration Clause in the T&C would stand incorporated as part of the MOCA.

The Delhi HC observed that in the M.R. Engineers Case, relied upon by the Respondent, the SC while explaining the difference between reference made to another document in a contract and incorporation by reference of another document in a contract, had opined that while in the first instance the parties only adopt certain specific portions or parts of the referred documents for the purpose of the contract, in the second case the parties incorporate the referred document in entirety into their contract. The Delhi HC observed that in the present case it was clear that the T&Cs published on the Appellant's website, which included the Arbitration Clause in the T&C, stood incorporated as part of the MOCA.

The contention of the Respondent that the link mentioned in the T&C Clause of MOCA did not directly lead to the T&Cs published on the Appellant's website was not acceptable to the Delhi HC considering that the Respondent being a 'channel partner' of the Appellant was required to consider the T&Cs as applicable to channel partners as incorporated in the MOCA. By virtue of the T&C Clause of MOCA, the T&Cs (published on the Appellant's website) as applicable to channel partners stood incorporated in the MOCA, by reference.

While considering the issue on whether the dispute between the parties fell within the scope of the Arbitration Clause in the T&C, the Delhi HC observed that the Respondent had, in its plaint filed before the Commercial Court, sought recovery of arrears along with future interest and damages.

A contest to the said claims would involve the question whether the said amounts were payable in terms of the MOCA, and if so whether the Respondent had suffered any damages on such account which he was entitled to recover. The dispute whether the Appellant was obliged to pay the amount, would also involve the question as to ascertaining the rights and obligations of the parties under the MOCA. This too, would involve the question as to construction and interpretation of the MOCA.

The Delhi HC observed that once a court has come to the *prima facie* conclusion that an arbitration agreement existed between the parties, the question whether the disputes involved are arbitrable under the said agreement was required to be examined by the arbitral tribunal in the first instance. The Delhi HC placed reliance on the judgement of the SC in the case of ***Vidya Drolia and Others v. Durga Trading Corporation [(2021) 2 SCC 1]***, wherein the SC had opined the court's role at the pre-referral stage (including under Section 8 of the Arbitration Act), is a *prima facie* examination to determine the existence of an arbitration agreement and/or arbitrable disputes. Detailed examination is the arbitrator's role.

Reliance was also placed on the case of ***BSNL v. Nortel Networks (India) Private Limited [(2021) 5 SCC 738]***, wherein the SC had opined that it is only in cases where there is no doubt that disputes are not arbitrable, that courts would refrain from referring the parties to arbitration.

In Delhi HC's view, the disputes between the Appellant and the Respondent were arbitrable and did not fall outside the scope of the arbitration agreement (that is, the Arbitration Clause in the T&C).

Decision of the Delhi HC

In view of the above, the Delhi HC referred the parties to arbitration and terminated the suit filed by the Respondent before the Commercial Court.

VA View: Through this judgement, the Delhi HC has rightly held that the T&C Clause of MOCA clearly incorporated the T&Cs published on the Appellant's website, including the arbitration clause therein, into the MOCA, since the statutory position under Section 7(5) of the Arbitration Act is clear that a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that arbitration clause part of the contract.

The Delhi HC has correctly opined that the disputes raised by the Respondent in his suit before the Commercial Court, concerning the Appellant's failure to pay amounts due under the MOCA, involved interpreting and applying the terms of the MOCA, thereby falling within the scope of the arbitration agreement. By validating the incorporation of arbitration clauses through hyperlinks in the website of the concerned party, the court has set a clear precedent that upholds the enforceability of modern digital contracts.

IV. Telangana High Court: Dispute concerning partners' rights and obligations during insolvency and winding-up of partnership is arbitrable.

The Telangana High Court ("**Telangana HC**"), *vide* its order dated April 14, 2024, in the case of ***Shameem Sultana Khan v. Faizunnissa Begum and Others [Arbitration Application No. 164 of 2023]***, has allowed an application for appointment of arbitrator under Section 11(6) (*Appointment of arbitrators*) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), in a dispute regarding settlement of accounts during winding up of a partnership firm.

Facts

A partnership deed was executed on April 1, 1994 ("**Deed**"), between Ms. Shameem Sultana Khan ("**Applicant**") and Mrs. Faizunnissa Begum along with her family members ("**Respondents**"). Clause 19 of the Deed contained an arbitration clause which has been reproduced below:

"19. Should any dispute or doubt or question arise between the Partners in respect of the Partnership or its affairs in respect of any matter touching the construction or interpretation of any matter of this Deed, the same shall be referred to arbitration in accordance with the Law of Arbitration in force and applicable."

The Applicant sent legal notices to the Respondents, seeking information, clarification and documents in relation to the firm. However, the claim of Applicant was denied. The Applicant thereupon issued another notice, informing the Respondents that the Applicant has dissolved the partnership firm under Section 43 (*Dissolution by notice of partnership at will*) of the Indian Partnership Act, 1932 ("**Partnership Act**") and called upon the Respondents to settle their accounts.

Disputes arose between the parties regarding settlement of accounts. Subsequently, the Applicant invoked Clause 19 of the Deed and sent a notice to the Respondents, nominating a retired district judge as the sole arbitrator. The Applicant also published a notice in a daily newspaper stating that the partnership firm has been dissolved as required under Section 45 (*Liability for acts of partners done after dissolution*) of Partnership Act. Later, an application under Section 11(6) of the Arbitration Act was filed by the Applicant before the Telangana HC, seeking to appoint a sole arbitrator to adjudicate the dispute between the parties as per Clause 19 of the Deed.

Issue

Whether dispute related to insolvency and winding-up of partnership concerning partners' rights and obligations is arbitrable.

Arguments

Contentions of the Applicant:

The Applicant submitted that the Respondents have not disputed the execution of the Deed and had not denied the existence of the arbitration clause. Therefore, the dispute that has arisen between the parties is required to be resolved in the manner agreed by the parties.

Contentions of the Respondents:

The Respondents submitted that the arbitrator's power under the Deed is circumscribed and the relief to claim settlement of the accounts is outside Clause 19 of the Deed. The Respondents further argued that dispute relating to insolvency and winding up matters is a non-arbitrable dispute.

Observations of the Telangana HC

The Telangana HC observed that Section 16(1) (*Competence of arbitral tribunal to rule on its jurisdiction*) of the Arbitration Act provides that the arbitral tribunal may rule on its own jurisdiction. The Telangana HC also relied on Supreme Court's ("**SC**") judgment in ***Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited [(2020) 2 SCC 455]***, wherein it was held that the doctrine of competence-competence is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold when a preliminary objection is raised by one of the parties. It was further held that Section 16 of the Arbitration Act is an inclusive provision with a very wide ambit.

The Telangana HC also referred to a judgment by a seven-judge bench of SC in ***In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899 [2023 SCC OnLine SC 1666]***, where the SC held that, the scope of examination under Section 11(6A) of the Arbitration Act should be confined to the existence of an arbitration agreement on the basis of Section 7 (*Arbitration Agreement*) of the Arbitration Act. The SC noted that the validity of an arbitration agreement, in view of Section 7 of the Arbitration Act, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. The SC further observed that this interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by arbitral tribunal under Section 16 of the Arbitration Act.

The Telangana HC held that all the objections with regard to jurisdiction of the arbitrator to deal with the claim made on behalf of the Applicant can be raised and can be urged before the arbitral tribunal itself. The Telangana HC, while referring to the case of ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited [(2011) 5 SCC 532]***, held that the SC in this judgment, while referring to well recognized examples of non-arbitrable disputes, by way of illustration, referred to insolvency and winding-up of a company, whereas the instant dispute is between the partners under the Partnership Act.

Decision of the Telangana HC

The Telangana HC allowed the arbitration application and appointed a former judge of the SC as the sole arbitrator to adjudicate the disputes between the parties.

VA View: In the present case, the Telangana HC reemphasized on the powers of arbitral tribunal to rule on its own jurisdiction provided under Section 16 of the Arbitration Act. The Telangana HC allowed the arbitration application of the Applicant after observing the existence of a valid arbitration agreement and also allowed the parties to raise any objections regarding the jurisdiction of the arbitrator before the tribunal itself. By doing so, the court has upheld the principle enshrined in the doctrine of competence-competence which is intended to minimize intervention by courts and to ensure that the arbitral process is not obstructed at the stage when a preliminary objection is raised by any party.

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