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NEWSLETTER – DECEMBER 2023

1. Arbitrator won't become ineligible by unilaterally revising fee; mandate can't be terminated on grounds not mentioned in the Schedule [Chennai Metro Rail Limited Administrative Building Vs. M/s Transtonnelstory Afcons (JV) and Others; 2023 SCC ONLINE SC 1370, decided on 19.10.2023].

Chennai Metro ("Applicant") had, pursuant to a public tender, awarded the contract to Afcons ("Respondent") for a project with a total value of Rs. 1566 crores. It was agreed that two dispute heads (claim 2(b) to 2(d)) and the Chennai Metro's counter claim would be referred to a three-member Tribunal under the Arbitration and Conciliation Act, 1996 ("the Act"). The Tribunal was then constituted.

The Tribunal by meeting, dated 14.05.2021, recorded the agreement of parties, that the hearing fee for each arbitrator (there were three members of the Tribunal) was fixed at Rs.1,00,000/- per session of hearing date. During the course of the proceedings, one member of the Tribunal passed away and had to be substituted, which was done on 12.08.2021. The parties proceeded with the conduct of arbitration. In the mean-while, another Tribunal had dealt with two claims of Afcons. The award passed in those proceedings became the subject matter of challenge (by Afcons) under Section 34 which was declined by an order of the Madras High Court. The appeal against that order was thereafter pending.

The Tribunal in the present case on 13.04.2022 decided that suspension of its proceedings due to the pendency of the appeal, to await the outcome of the Division Bench was not in the larger interest of justice and proceeded with other part of the claim which was pending before it. The 10th meeting/hearing was held on 28.06.2022 and its minutes were issued on 01.07.2022. The Tribunal sought to revise the fee payable from Rs.1,00,000/- to Rs.2,00,000/- for each session of three hours. Chennai Metro objected to this revision on 08.07.2022 through an affidavit. Expressing its disagreement with the enhancement, Afcons by its affidavit, dated 10.07.2022 submitted that the applicability of Schedule IV of the Act, and the issue of increase of Tribunal's fee, after initial fixation, was sub- judice before this court and the arguments were concluded on 11.05.2022. Afcons therefore requested the Tribunal to keep its direction for modification of fee, in abeyance till the decision of this court. In these circumstances, the proceedings continued and cross-examination of Afcons witnesses was taken up by Chennai Metro on three later dates of hearing. According to Chennai Metro, the issue of fees was not taken up; yet in the minutes of these proceedings issued on 24.07.2022, the Tribunal reiterated its stand about entitlement of revised fee. The Tribunal also stated that the session would be considered one complete session for four and a half hours i.e., between 3.30 p.m. to 8 PM. The parties were directed to pay the revised fee from the 10th Virtual Meeting onwards i.e., in effect for the past hearings too. The Tribunal further stated that it was not known when this court would deliver its judgment and also raised doubts about the applicability of the said decision on the present Tribunal.

Afcons, by its e-mail, dated 28.07.2022, informed Chennai Metro that it had paid the revised fee for five hearings (i.e., for 10thto 14thvirtual hearings). Chennai Metro therefore filed an application before the Madras High Court on 10.08.2022. In this proceeding under Section 14, the relief sought was a declaration that the mandate of the Tribunal (whose members were impleaded as second to the fourth respondents, hereafter collectively referred to as "the Tribunal") was terminated in respect of the disputes referred to them. It was highlighted in these proceedings, that the payment of the disputed increased amount by one party, placed Chennai Metro "in an

embarrassing situation and cause the petitioner to be prejudiced and not be treated in an impartial manner by the Ld. Arbitral Tribunal, resulting in the Ld. Arbitral Tribunal to become de jure unable to perform its functions as required."

On 15.09.2022, all three members of the Tribunal filed affidavits, in response to the Section 14 petition acknowledging that this court's judgment in ONGC v. AFCONS Gunasa JV2(hereafter "ONGC") delivered on 30.08.2022 had decided the issue and thus members of the Tribunal decided to revert back to the originally agreed fee i.e., Rs.1,00,000. In identically worded affidavits, members of the Tribunal stated that orders would not create any prejudice to any party and they were in agreement that they would continue to discharge their duty in an independent and impartial manner in deciding the dispute and that parties need not have any apprehensions. Afcons too resisted the application. Initially, the High Court granted an interim order, staying the proceedings. However, after hearing counsel for the parties, and considering the materials on the record, the court dismissed the application, filed by Chennai Metro through the impugned judgment.

Issues involved:

(i) Whether there is a reasonable apprehension of bias on the part of the Tribunal?
(ii) Whether the application under Section 14 is maintainable?
(iii) Whether the arbitrator is entitled to any fees?
(iv) Whether the arbitrator's decision can be challenged after the award is made?
(v) Whether the appointment of the arbitrator is barred due to disqualification or ineligibility?
(vi) Whether there is a duty of disclosure for arbitrators under the English law?

Held:

In this case, the Hon'ble Apex court held that Chennai Metro's application cannot succeed. The Arbitrators are directed to resume the proceedings and decide the case in accordance with law. The impugned order is upheld. The application is accordingly dismissed and the appeal is disposed of in above terms. Hon'ble Supreme court has thus held:

> *"18. Bias (an expression that the Act has deliberately avoided; instead, the term used is justifiable doubts about the… impartiality of an arbitrator) is an expression with many facets: subject matter bias; pecuniary bias and personal bias (G. Sarana v University of Lucknow & Ors., 1977 (1) SCR 64) It is also described as a "predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension of that predisposition.*
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> *25. Section 14 deals with the contingency of failure or impossibility of the arbitrator or Tribunal to act and stipulates that the mandate of an arbitrator shall terminate and he shall be substituted by another "if he becomes de jure or de facto unable to perform its functions or for other reasons fails to act without undue delay or withdraws from his office or parties agrees to the termination of his mandate". By Section 14(2) if a controversy remains, concerning the grounds referred to in Section 14 (1), the Court may be approached by the parties to decide upon the issue of termination on mandate.*
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> *26. Having regard to the above statutory position it would be necessary to consider the judgments cited. The first in this series would be Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Limited. Ltd.,19 where taking note of the amendment made to the Act in 2015, the Court underlined that it was with the objective to induce neutrality of arbitrators especially their independence and impartiality that the amendment act of 2015 was introduced. The amended provision was enacted to identify the circumstances that gave rise to justifiable doubts about the independence or impartiality of the arbitrator and in the event, any of those circumstances exist, the remedy provided is under Section 12. The court particularly underlined Section 12(5) which nullified prior agreements to the contrary. In the facts of that case, it was held that if an advisor had any past or present*

business relationship with a party, he was ineligible to act as arbitrator.

38. Our enactment is in a sense, an improvement. Parliament's conscious effort in amending the Act, because of the inclusion of the fifth schedule, as a disclosure requirement, as an eligibility condition [Section 12 (1)] and a continuing eligibility condition, for functioning [Section 12 (2)] and later, through Section 12 (5), the absolute ineligibility conditions that render the appointment, and participation illegal, going to the root of the jurisdiction, divesting the authority of the Tribunal, thus terminating the mandate of the arbitrator, as a consequence of the existence of any condition enumerated in the seventh schedule, are to clear outlined as statutory ineligibility conditions in terms of Sections 12 (5)], therefore cannot be sustained. We can hardly conceive of grounds other than those mentioned in the said schedule, occasioning an application in terms of Section 12 (3). In case, this court were in fact make an exception to uphold Chennai Metro's plea, the consequences could well be an explosion in the court docket and other unforeseen results. Skipping the statutory route carefully devised by Parliament can cast yet more spells of uncertainty upon the arbitration process. In other words, the de jure condition is not the key which unlocks the doors that bar challenges, mid-stream, and should "not to unlock the gates which shuts the court out"23from what could potentially become causes of arbitrator challenge, during the course of arbitration proceedings, other than what the Act specifically provides for."

For the foregoing reasons, this court holds that Chennai Metro's application cannot succeed. The Arbitrators are directed to resume the proceedings and decide the case in accordance with law.

Analysis and Conclusion:

The Apex Court delved into the provisions of Section 12 of the Act, which deals with the appointment of arbitrators and mandates disclosure requirements. It highlights the types of influence that may lead to justifiable doubts about independence and impartiality, as well as the grounds for challenging an arbitrator under Section 12(3). The insertion of Section 12(5) is emphasized, addressing specific relationships that render a person ineligible for appointment as an arbitrator, with the possibility of waiver by written agreement.

The Court also discussed the challenge procedure under Section 13, detailing the timeline for challenging an arbitrator's appointment and the subsequent steps in case of unsuccessful challenges. Sections 14 and 14(2) are discussed in the context of the termination of an arbitrator's mandate due to inability to perform functions.

2. Purchase in certain situations for 'commercial purposes' would not take the Complainant out of the definition of 'Consumer' - Supreme Court in the matter of "Rohit Chaudhary Versus Vipul Limited" reported as AIR 2023 SC 4229, decided on 06.09.2023.

FACTS:

The appellants bought a commercial space in the "Vipul World Commercial" i.e., the project of the Respondent from the original allottees (Mrs. Bindu Rawlley and Mr. Talwinder Singh) with the intention of earning their livelihood through self-employment.

The Respondent (the project developer) acknowledged the transfer and issued an allotment letter in favour of the Appellants. The Respondent at a later stage unilaterally changed the allotted unit from 3rd to the 8th floor and forced the Appellants to sign a new agreement, which was thereafter executed under pressure.

Despite paying all the installments, the Respondent failed to offer possession of the allotted space. The Appellants filed a Consumer Complaint before the Hon'ble National Consumer Redressal Commission seeking refund, interest, and compensation for mental agony. The Hon'ble Commission dismissed the Consumer Complaint on the ground that the Appellants are not "consumers" as defined under the Consumer

Protection Act since they were already engaged in business activities.

In view of the same, the present Appeal was filed by the Appellants against the Order, dated 11.05.2015, passed by Hon'ble Commission, thereby seeking refund of the amount alongwith interest @18%.

FINDINGS OF HON'BLE COMMISSION:

The Hon'ble Commission vide Order dated 11.05.2015, dismissed the complaint on the ground of maintainability holding that appellants are not 'consumers' as defined under Section 2(1) (d) of the Act.

The Hon'ble Commission held that the Appellants were already carrying on business for the purposes of their livelihood and therefore, it cannot be said that the property which was the subject matter of the complaint was being purchased by them exclusively for the purposes of earning livelihood by way of self-employment.

The Commission also held that Commercial space booked by the Appellants was for earning profit and not for the purpose of earning livelihood by way of self-employment by relying upon the statement of Appellant No.1 recorded by the Commission.

ANALYSIS BY SUPREME COURT:

The controversy revolves around the meaning of the expression ''commercial purpose'', which is not defined in the Act. The National Commission has consistently held that purchasing goods for the purpose of carrying on any activity on a large scale for the purpose of earning profit excludes the buyer from being a consumer.

However, if the buyer uses the goods for self-employment and earning livelihood, it would not be treated as a "commercial purpose" and the buyer would still be considered a consumer under the Act.

If the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self-employment, such purchaser of goods would continue to be a 'consumer'. The Hon'ble Supreme Court relied upon the Judgement in Lilavati Kirtilal Mehta Medical Trust v. Unique Shanti Developers (supra), wherein it was held that a straight jacket formula cannot be adopted in every case and the broad principles which can be curled out for determining whether an activity or transaction is for a commercial purpose would depend on facts and circumstances of each case.

Thus, if the dominant purpose of purchasing the goods or services is for a profit motive and this fact is evident from record, such purchaser would not fall within the four corners of the definition of 'consumer'.

On the other hand, if the answer is in the negative, namely if such person purchases the goods or services is not for any commercial purpose and for one's own use, it cannot be gain said even in such circumstances the transaction would be for a commercial purpose attributing profit motive and thereby excluding such person from the definition of 'consumer'.

Evidence tendered by parties will have to be evaluated on the basis of pleadings and thereafter conclusion be arrived at. Primarily it has to be seen as to whether the averments made in the complaint would suffice to examine the same on merits and in the event of answer being in the affirmative, it ought to proceed further.

On the contrary, if the answer is the negative, such complaint can be dismissed at the threshold. Thus, it would depend on facts and circumstances of each case. There cannot be any defined formula with mathematical precision to examine the claims for non-suiting the complainant on account of such complaint not falling within the definition of the expression 'consumer' as defined under Section 2(1)(d).

CONCLUSION:

Based on the facts of the case, the Appellants have pleaded that they were in search of office space for their self-employment and to run their business and earn their livelihood. In other words, if the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self-employment, such purchaser of goods would continue to be a 'consumer'. The respondent has agreed to sell the office space to the appellants.

In view of the same, the Hon'ble Supreme Court directed the Respondent to refund the amount received from the Appellants with interest @ 12% per annum.

3. CIRP cannot be initiated for Defaults during the Excluded Timeline under Section 10A of IBC [Vikram Kumar, Proprietor, Sourya Containers Leasing Company vs. Aranca (Mumbai) Private Limited Case Company Appeal (AT) (Insolvency) No. 836 of 2023 in C.P. (IB)/143(MB)/2021, decided on 14.09.2023]

Vikram Kumar (Financial Creditor), the proprietor of Sourya Containers Leasing Company, filed an appeal against the order of the National Company Law Tribunal ("NCLT") in Mumbai against Aranca (Mumbai) Private Limited, but the appeal was denied by the Principal Bench of the National Company Law Appellate Tribunal ("NCLAT") in New Delhi.

The Appellate Tribunal arrived at the conclusion that the CIRP cannot be initiated due to the fact that the default occurred within a period of twelve months beginning on March 25, 2020, and also due to the fact that the invocation of the bank guarantee for default occurred during the excluded period that is specified in Section 10-A of the Code. Both of these factors contributed to the Appellate Tribunal's decision. This conclusion was arrived at as a result of the fact that the default occurred within a time frame of one year beginning on March 25, 2020.

Facts in brief:

Meher Miracles Pvt. Ltd., which is also known as the "Debtor," is the entity that has obtained financing in the form of a loan. An irrevocable Deed of Guarantee was given to the Financial Creditor by the Corporate Guarantor on behalf of the debtor. The Debtor had taken out a loan in order to finance the staging of a "Celebrity Football Match" in Dubai; however, he failed to make the required repayments when the loans were due. This resulted in the loans being returned to the lender unpaid. As a direct result of this happening, the Financial Creditor has exercised their right to seek repayment from the Guarantor, as specified in the terms of the Guarantee. In light of the fact that the Guarantor did not make the payment after the Guarantee was called into effect, he submitted an application in accordance with Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) to initiate the Corporate Insolvency Resolution Process (CIRP) against the Corporate Guarantor. This action was taken because the Guarantor failed to make the payment after the Guarantee was called into effect. Because the Guarantor did not make the payment after the Guarantee was put into effect, this action was taken in response to that failure.

The NCLT Mumbai determined that the Financial Creditor invoked the Corporate Guarantee on 25.08.2020, which falls within the period specified under Section 10-A of the IBC, 2016, rendering it ineligible for initiating CIRP. In its order, dated, the NCLT Mumbai dismissed the application on the grounds of non-maintainability and determined that the Financial Creditor invoked the Corporate Guarantee. In light of the fact that the application could not be kept up to date, this decision was made as a response. On the website of the National Company Law Tribunal in Mumbai, this decision was made accessible to the general public.

The Financial Creditor argued that the NCLT should have corrected the error that it made when it considered the date that the Guarantee was activated. They stated that the NCLT made the error when they considered the date that the Guarantee was activated. With the assistance of a letter dated 11.06.2019, the use of the Guarantee was initially initiated for the first time.

Contentions of Corporate Guarantor

According to the arguments that were put forth by the Corporate Guarantor, the effective date of the Deed of Guarantee was August 25, 2020. In addition, the notice drew attention to Point No. (ix), which stated that the Financial Creditor had stated that he had issued a Notice for invocation of the Deed of Guarantee on 25.08.2020, demanding repayment of the loan amount in addition to commitment charges, interest charges, and taxes. The notice also stated that the Financial Creditor had stated that he had issued a Notice for invocation of the Deed of Guarantee on 25.08.2020. Additionally, the notice stated that the Financial Creditor had stated that he had issued a Notice for invocation of the Deed of Guarantee on 25.08.2020. This information was included because the date was stated in the notice. In addition to this, it provided evidences of the calculations that went into the Claim, such as the accumulated interest up until the 24th of August in the year 2020.

Specifically, the claim stated that the interest would be accumulated until this date. In addition to this, it was brought to the reader's attention that the letter was not addressed to the Corporate Guarantor; rather, it was addressed to Mr. Hemendra Aran and Mrs. Gitanjali Sinha. This was brought to the reader's attention in order to draw their attention to the fact that the letter was not addressed to the Corporate Guarantor. This was brought to the reader's attention so that they would be aware that the letter was not addressed to the Corporate Guarantor. The purpose of bringing this to their attention was to draw their attention to the fact that the letter was not addressed to them. It was also made abundantly clear by the Corporate Guarantor that Mr. Hemendra Aran and Mrs. Gitanjali Sinha were not directors of the company. Because of this, it appeared as though the letter could not be construed as an attempt to invoke the Guarantee that had been provided by the Corporate Guarantor. This was the impression that was given.

Judgement and Conclusion

Because the Notice for Invoking the Bank Guarantee was Issued to the Corporate Guarantor on August 25, 2020, the NCLAT New Delhi Bench came to the conclusion that the Default Occurs During the Excluded Period that is Specified in Section 10-A of the Code. This was due to the fact that the Notice for Invoking the Bank Guarantee was Issued to the Corporate Guarantor on August 25, 2020. As a direct result of this, the Bench did not agree to accept the appeal and came to the conclusion that the default took place during the time period that was disregarded. The provisions of Section 10-A of the Code state that CIRP cannot be initiated for defaults that occurred within a 12-month period beginning on 25.03.2020. This restriction applies to all defaults that occurred during this time period. The 25th of March, 2020 is the date when this restriction will take effect. This provision applies to all defaults and will take effect as soon as it is enacted.

The NCLAT drew everyone's attention to the fact that the earlier Notice did not refer to the earlier letter dated 11.06.2019 in any way. This was brought to everyone's attention by the NCLAT. The NCLAT is the organization that brought this to everyone's attention. In addition, the letter with the date 11.06.2019 was addressed to Mr. Hemendra Aran and Mrs. Gitanjali Sinha in their personal names in their capacities as Directors of Aranca Mumbai Pvt. Limited. The letter also bore the date. Neither one of them, however, was working in such a capacity for Aranca Mumbai Pvt. Limited at the time in question. The same cannot be considered to be a valid invocation of the Deed of Guarantee because of the fact that this is the case.

The CIRP Application under Section 7 of the Code that was presented before the NCLT Mumbai stated that the Bank Guarantee had been invoked on August 25, 2020. The Tribunal drew attention to the fact that the Financial Creditor had made this point abundantly clear in the application. The Financial Creditor had stated that the Bank Guarantee had been invoked on August 25, 2020. The date of the invocation of the Corporate Guarantee, which was on August 25, 2020, marked the beginning of the time period in which the obligation to make payments became due and payable.

As a direct consequence of the decision made by the NCLAT to uphold the decision that the default occurs within the timeframe defined by Section 10-A of the IBC, 2016, the Application that was submitted in accordance with Section 7 of the IBC, 2016, cannot be maintained. After taking into consideration everything that was important, the NCLAT was able to arrive at the right decision.