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LINE OF INTERFERENCE

Recently on January 6, 2021, a three judge bench of the Supreme Court of India comprising of Justices NV Ramana, Surya Kant and Hrishikesh Roy held that the power of the High Courts under Article 226 and 227 of the Constitution of India with respect to interference in an arbitration proceeding needs to be exercised in exceptional rarity.

In the matter of ***Bhaven Construction (Appellants) v. Executive Engineer Sardar and Sarovar Narmada Nigam Ltd. & Anr (Respondents)***[1]**,** a Civil Appeal was filed before the Supreme Court. In that case, Respondent No.1 entered into an agreement with the Appellants for manufacture and supply of bricks. Due to disputes regarding

[1] Bhaven Construction v. Executive Engineer Sardar and Sarovar Narmada Nigam Ltd.& Anr, Civil Appeal No. 14665 of 2015

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payments, the Appellant as per Clause 38 of the agreement sought for appointment of a sole arbitrator to adjudicate the dispute. Respondent 2 was appointed as a sole arbitrator thereafter. Shortly after the appointment, Respondent 1 filed an application under Section 16 of the Arbitration Act and Conciliation Act 1996 ("**the Act**") disputing the jurisdiction of the sole arbitrator which was then rejected by the arbitrator. Aggrieved by this order of the arbitrator, Respondent 1 filed a Special Civil Application under Article 226 and 227 of the Constitution of India before the High Court of Gujarat which was dismissed by the Single Judge upholding the decision of the sole arbitrator. The Single Judge of the Gujarat High Court held that the Respondent 1 had the remedy of challenging the decision of the arbitrator as to jurisdiction on the passing of a final award by filing an appeal under Section 34 of the Act. Aggrieved by the order of the High Court of Gujarat, Respondent 1 filed a Letters Patent Appeal in a Special Leave Application. The High Court of Gujarat allowed the appeal and passed an order in favour of Respondent 1.This decision was challenged before the Supreme Court by way of a Special Leave Petition. Having heard both parties, the Hon'ble Supreme Court held that the question that needs to be answered is "*whether the arbitral process could be interfered under Article 226 and 227 of the Constitution, and under what circumstance*?"

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In this regard, the Supreme Court held that the Act is a code in itself and laying emphasis on Section 5 of the Act which prohibits interference by judicial authorities except as specifically provided, reflects the intention of the legislature to curtail interference of judicial authorities with the exercise of powers by the arbitrator under the Act. The Court further held that various sections of the Act provide for clear procedures and remedies to the parties which do away with unnecessary judicial interference. The recourse to Respondent 1 against the decision of the arbitrator under Section 16(2) of the Act would lie under Section 34 which by way of its language reads as '*Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)*'. The Court ruled that use of term 'only' as occurring under this provision serves two purposes of making the enactment a complete code and laying down the procedure for such challenges to jurisdiction of the arbitrator. Instead, the Respondent 1 appealed to the High Court under Article 226 and 227 of the Constitution.

The Court referred to the cases of *Nivedita Sharma v. Cellular Operators Association of India*[2] and *M/s. Deep Industries Limited v.*

[2] Nivedita Sharma v. Cellular Operators Association of India , (2011) 14 SCC 33

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Oil and Natural Gas Corporation Limited[3] and in its judgement observed that "*it is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. His power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficie*nt".

The Court in conclusion emphasized that the Respondent 1 was not able to prove any special exceptional circumstances or 'bad faith' necessitating invocation of the remedy under Article 226 and 227 of the Constitution of India and that the High Court ought not to have interfered in the arbitral procedure. This interference would 'diminish' the efficiency of the arbitral process. Hence, in view of the above reasoning, the bench was of the opinion that the High Court erred in utilizing its discretionary power available under Articles 226 and 227 of the Constitution. Accordingly, the Supreme Court allowed the appeal and set aside the impugned Order of the High Court.

[3] Deep Industries Limited vs. Oil and Natural Gas Corporation Limited and Ors. (28.11.2019 - SC)

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'FRAUD', A NULLIFICATION OF ARBITRATION CLAUSES?

On October 26, 2020 a single judge bench of the High Court of Judicature of Bombay under its Ordinary Original Civil Jurisdiction decided in the case of ***Sai Guru Mega Solar Park Private Limited v. Union of India and 2 Ors*** [4] on the question of "*Whether allegations of fraud can nullify an arbitration clause*?"

[4] Sai Guru Mega Solar Park Private Limited v. Union of India And 2 Ors, Comm Arbitration Application No. 85 of 2020

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The Application was filed by under Section 11 of the Arbitration Act ("the Act") by Applicant 1, 'Sai Guru' a company set up as a Special Purpose Vehicle (SPV) by Applicant 2. The Application was filed against the Union of India consisted of the Ministry of New and Renewable Energy ("MNRE")-Respondent 1, the Maharashtra Energy Development Agency ("MEDA")-Respondent 2, a Government of Maharashtra Undertaking and the Solar Energy Corporation of India ("SECI"), a Government of India Enterprise-Respondent 3.

The Respondent 1 appointed Applicant 2 as the implementing agency to develop a 500 megawatt solar park under a Scheme for Development of Solar Parks and Ultra Mega Solar Power Projects. Based on various milestones set, the Respondents released funds to the Applicants for purposes of meeting the project goals. However, eventually the Applicants alleged that the Respondents were not releasing funds and not fulfilling other mandatory criteria resulting in delays in the project. On July 2, 2018 Applicant 1 invoked the arbitration clause under the Scheme. However, the Respondent 1 rejected the request for appointment of an arbitrator and instead issued a show cause notice to the Applicants demanding an answer on why they should not be blacklisted. The Respondents stated in their show cause notice that no proof was visible of any development under the project

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and subsequently launched criminal proceedings against the directors of Applicant 2 alleging the offence of criminal breach of trust.

The counsel for the Applicants argued that the actions of the Respondents defeat the purpose of the contractual provisions for arbitration. In response, the counsel for the Respondents contended that in the instant case there was an apparent case of fraud by the Applicants and therefore the entire contract being vitiated by fraud, is a nullity.

The Court relied on decisions in Rashid Raza[5]where it then held that mere allegations of fraud would not be sufficient to oust an arbitration agreement. This position of law was also followed in the case of *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Limited*[6]. Referring to those decisions, the Court in the instant case held that mere allegation of siphoning off money speaks more to non-performance of an obligation however it does not essentially point to the invalidity on the ground of fraud of the underlying agreement or the arbitration clause to render it a nullity. It was also observed that the Respondents had not filed any proceedings to have the agreement declared void.

[5] Rashid Raza v Sadaf Akhtar, Civil Appeal No. 7005 of 2019 (Arising out of SLP (C) No. 4061 of 2019)

[6] Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Limited Civil Appeal No. 5145 of 2016

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Can tenancy disputes be decided in arbitration? Supreme Court says yes!

The Supreme Court in *Suresh Shah vs. Hipad Technology India Private Limited*[7] has provided much awaited clarity against decades of uncertainty in ruling that lease or tenancy disputes which are governed under the Transfer of Property Act, 1882, are arbitrable under the Arbitration and Conciliation Act, 1996. The Supreme Court however clarified, lease or tenancy disputes governed under the special statutes (such as state specific rent legislations) are not arbitrable.

In the aforementioned matter, the Appellant and Respondent had entered into a sublease

[7] (Arbitration Petition (Civil) NO(S). 08/2020)

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agreement. There being an Arbitration clause in the agreement, a petition was filed under Section 11 (5) of the Arbitration and Conciliation Act, 1996, seeking appointment of a Sole Arbitrator to refer the disputes which arose under the lease for resolution by way of arbitration. While deliberating on the arbitrability of disputes arising out of lease agreement, a three judge bench comprising of Hon'ble Chief Justice of India SA Bobde, Hon'ble Justice AS Bopanna and Hon'ble Justice V. Ramasubramanian held that since one of the parties is a citizen of Kenya and is residing at Nairobi, Kenya, the agreement qualifies as an 'International Commercial Arbitration' as defined in Section 2(f) of Act.

While reading into the provisions contained in Section 111, 114 and 114A of the Transfer of Property Act, 1882, the bench observed that these provisions provide certain protection to the lessee/tenant before being evicted from the leased property. It clarified that the same cannot be construed as a statutory protection nor as a hard and fast rule and the purpose of the provision is to enable exercise of equitable jurisdiction by discretion of the court in appropriate cases.

The court observed that such equitable protection does not imply that the disputes

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between a landlord and tenant are not arbitrable. The bench also went on to clarify that in case of disputes arising under the Rent Acts, would fall for a different consideration under those statutes and hence, are not arbitrable. It was held that the question of granting relief of eviction under a special statute, falls within the exclusive domain of the courts specified in the respective statutes and would therefore not be arbitrable.

The court differentiated between the two scenarios and held that when a case for eviction is made out, proceedings instituted under special statutes would require consideration of not merely the terms and conditions entered into between the landlord and tenant but also other aspects such as the *bona fide* requirement of the landlord for the use of the demised premises, comparative hardship and the like as specifically set out under the said statutes. In such circumstance, the Court having jurisdiction as provided under those statutes can alone delve and determine these aspects. In view of the same, the court held that in the matter under consideration, the lease/tenancy dispute were not governed under any special statutes but under the Transfer of Property Act, 1882, making the dispute arbitrable. Accordingly, the Supreme Court proceeded to pass an order appointing Justice (Retired) Mukul Mudgal, former Chief Justice of Punjab and Haryana High Court as the Sole

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Arbitrator to resolve the dispute between the parties in this case.

In the case of *Vidya Drolia & Ors Vs. Durga Trading Corporation*[8], the appellant (Tenant) and the respondent (Landlord) entered into a tenancy agreement in respect of certain properties. The maximum period of tenancy was 10 years but even after the expiry of the 10 years period, the appellant did not vacate the schedule property. Thus, the respondent invoked the arbitration clause in the tenancy agreement and filed an application before Calcutta High Court under section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment an arbitrator. The appellant opposed the petition contending that the dispute is not arbitrable. However, the High Court of Calcutta appointed an arbitrator. When the arbitration proceedings were ongoing, the decision of the Supreme Court of India in the case of *Himangni Enterprises v Kamaljeet Ahluwalia* was rendered holding that in cases which do not involve the application of special rent Acts, then the Transfer of Property Act shall be applicable. It was held that under the Transfer of Property Act, 1882 the dispute has to be tried in a civil court. Hence, the Arbitration and Conciliation Act shall not be applicable.

[8] Judgment passed on 14/12/2020 in [Civil Appeal No. 2402 of 2019]

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In the light of the said judgement, a review application was filed by the appellant before the Calcutta High Court, but the same was dismissed. Aggrieved by the same, the landlord filed an appeal in the Supreme Court.

The Supreme Court while considering contentions of both sides, laid down 5 situations when a tenancy dispute would not be arbitrable:

1. If it relates to actions *in rem* or actions that do not pertain to subordinate rights *in personam* that arise from rights *in rem*;
2. If it affects third party rights; have *erga omnes effect*;
3. If it requires centralized adjudication, and mutual adjudication would not be appropriate and enforceable;
4. If it relates to the inalienable sovereign and public interest functions of the state, and hence mutual adjudication would be unenforceable; and
5. When the subject matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

Referring to Sections 111, 114 and 114A of the Transfer of Property Act, 1882, and applying the above principles to the matter before court and the Court held that there is nothing in the Transfer of Property Act 1882 that expressly or impliedly bars arbitration. The Supreme Court noted that landlord-

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tenant dispute under Transfer of Property Act, 1882, were not actions *in rem*, but actions *in personam* that arose from rights *in rem*. They did not affect third-party rights or have *erga omnes* effect and they also do not relate to any sovereign functions of the state. In view of the same it was held that tenancy disputes between landlord and tenant covered under Transfer of Property Act would be arbitrable.

Conclusion:

The principles laid down in both the judgments of Suresh Shah vs. Hipad Technology India Private Limited & Vidya Drolia & Ors Vs. Durga Trading Corporation II have clarified the matter of arbitrability of disputes arising under lease agreements. The five-pronged test laid down by the court in Vidya Drolia & Ors Vs. Durga Trading Corporation II to determine arbitrability in tenancy disputes enables conclusive determination on arbitrability of disputes when challenged.

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VALIDITY OF APPOINTMENT OF AN ARBITRATOR BY AN INELIGIBLE PERSON

Note: This article will strictly and succinctly be dealing with the current legal position of validity of appointment of an arbitrator by a person who is ineligible to be appointed as an arbitrator as per Section 12(5) of the Arbitration and Conciliation Act, 1996.

Introduction and Background

Section 12 of the Arbitration and Conciliation Act, 1996 (the "**Act**") provides grounds for challenge for an appointment of an arbitrator. Sub-clause (5) of Section 12 states,

"*Notwithstanding any prior agreement to the contrary,* ***any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator****:*

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

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The Seventh Schedule of the Act, provides various categories of ineligible persons, including where the arbitrator is *an employee, consultant, advisor or has any other past or present business relationship with a party*.

What have the Indian courts held in this regard?

As we may be aware, the Indian judicial system follows the system of precedents[9]. With the above background in mind, we will need to look at previous court decisions to further deepen our understanding on the subject matter.

In the case of *Bharat Broadband Network Ltd [BBNL] vs United Telecoms Ltd [UTL]*[10], the Hon'ble Supreme Court held that the appointment of an arbitrator by a person who is ineligible under Section 12(5) of the Act to be an arbitrator is void ab initio. As a brief background, in this case, the Delhi High Court (before it was appealed to the Supreme Court), had dismissed the application of BBNL, who had questioned the mandate of appointment of the arbitrator after itself appointing the arbitrator, and UTL having filed a waiver of objections under Section 12(5) of the Act. However, at this time, the Supreme Court

[9] Precedent refers to a court decision that is considered as authority for deciding subsequent cases involving identical or similar facts, or similar legal issues.

[10] Civil Appeal No. 3972 OF 2019 (Arising out of Special Leave Petition (Civil) No.1550 of 2018).

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had delivered its judgement in the case of *TRF Limited v. Energy Engineering Projects Limited*[11], wherein it held that an ineligible person cannot appoint an arbitrator. Therefore, the Supreme Court in the BBNL (*supra*) case, relying on the TRF (*supra*) judgement, while setting aside the judgement of the Delhi High Court, allowed BBNL's appeal and held that, as per Section 12(5) of the Act, the ineligibility of being appointed as an arbitrator is *de jure* in nature, and hence, this leads to an automatic termination of the arbitrator's mandate. Justice RF Nariman further went on to state in his judgement that "*in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated*".

One would assume that this would settle disputes relating to the meaning and application of Section 12(5) of the Act, in relation to appointment of an ineligible person as an arbitrator. However, in the case of Central Organisation for Railway Electrification [CORE] v. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture

[11] (2017) 8 SCC 377.

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Company[12], the three judge bench of the Hon'ble Supreme Court held that an appointment of an arbitrator, by an authority who is disqualified from being an arbitrator can be valid depending on facts. The Supreme Court had rejected the JV's contention that the General Manager of CORE, who himself becomes an ineligible person as per Section 12(5) r/w the Seventh Schedule of the Act, is not eligible to nominate the arbitrator. Disagreeing with the view expressed by the Allahabad High Court which rejected the contention of the appellant that the arbitrator is to be appointed as per General Conditions 64 (3)(a)(ii) and 64 (3)(b) of the Contract and appointed Justice Rajesh Dayal Khare as the sole arbitrator for resolving the dispute between the parties (previous to the appeal in the Supreme Court), the Supreme Court stated that "*When the agreement specifically provides for appointment of Arbitral Tribunal consisting of three arbitrators from out of the panel serving or retired Railway Officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned orders cannot be sustained.*"

[12] 2019 SCC OnLine 1635.

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The author agrees with the above view expressed by the Supreme Court in the CORE (*supra*) judgement with respect to the appointment of the arbitrator, as the author notes that the proviso to Section 12(5) of the Act states that "*Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."* In essence, this proviso entails that the parties to the contract may waive of the applicability of Section 12(5) of the Act, if they so mutually choose once the dispute between such parties to the contract has arisen.

However, in the very recent and ongoing case of Union of India v. M/s Tantia Constructions Limited[13], the three judge bench of the Supreme Court, consisting of Justices Rohinton Fali Nariman, Navin Sinha and K.M. Joseph *prima facie* disagreed with the CORE (*supra*) judgement. They stated that the primary reason for such disagreement was for "*the basic reason that once the appointing*

[13] SLP (C) No(s). 12670/2020.

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authority itself is incapacitated from referring the matter to arbitration, it does not then follow that notwithstanding this yet appointments may be valid depending on the facts of the case". This bench of the Hon'ble Supreme Court further requested the Chief Justice of the Supreme Court to constitute a larger bench to look into the correctness of the CORE (*supra*) judgement.

In the authors opinion, it would be pertinent that the above stated issue be decided at the earliest by the Hon'ble Supreme Court, as the whole purpose of arbitration would be defeated if the parties to a contract end up litigating in court (which defeats the principle of arbitration, as it is a dispute resolution mechanism which aims to reduce litigation), and of all matters, litigating to decide *if the arbitrator appointed by a person who is ineligible to be appointed as an arbitrator as per Section 12(5) of the Act* is valid or not.

Conclusion

As the CORE (*supra*) case has now been recommended to be referred to a larger bench of the Supreme Court for their views and interpretation on the matter, it needs to be seen if the Hon'ble Chief Justice of the Supreme Court accepts such request. If such request is accepted, it will be interesting to see what the Hon'ble court observes and the

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conclusion that it comes to, as the same may finally and definitively answer the query as to the validity of appointment of an arbitrator by a person who is ineligible to be appointed as an arbitrator as per Section 12(5) of the Act. However, in the event that such recommendation is not followed, and the CORE (*supra*) case is not referred to a larger bench of the Supreme Court, there may still be ambiguities that will prevail in the matter, and until such time as the CORE (*supra*) judgement is overruled or modified by a larger bench of the Supreme Court, it will continue to be relied upon by the courts in India as a precedent[14].

[14] Precedent n(1).

LAW RELATING TO ENFORECEMENT OF ARBITRAL AWARDS TAINTED BY FRAUD

According to the Black's Law dictionary, 'fraud' is a willful misrepresentation of the truth or concealment of a material fact to induce a person to act to his or her detriment. Fraud is an intentional deception or a willful misrepresentation of a material fact. Fraud is distinguishable from negligence.

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The allegation of fraud, at any stage of an arbitral proceeding can have a serious impact on the credibility of the resultant arbitral award. Fraud could encompass a wide range of acts; perjured testimony, tampered evidence, reliance on false documents, testimony of expert witness with doubtful credentials, bribery, and undue influence.

In venture *Global Engineering V. Satyam Computer Services Limited and Another*[15], the Supreme Court allowed the new ground of challenge to the Award as pleaded by venture Global Engineering considering the allegations of fraud alleged against the Chairman and Founder of the Satyam Computer Services Limited. As provided in Section 34(2)(b)(ii) of the Act, an Award is in conflict with the public policy of India, is liable to be set aside and the Hon'ble Supreme Court has held that it includes instances where the award was induced or affected by fraud. In this case the Hon'ble Supreme Court has brought to light a more clear definition of fraud and its interrelatedness with the concept of public policy which necessitates setting aside of an arbitral award.

The President of India recently promulgated an ordinance Arbitration and Conciliation (Amendment) Ordinance, 2020, amending certain provisions relating to the enforcement of awards under the Arbitration

[15] (2010)8 SCC 660

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and Conciliation Act, 1996 (*the Act*). One of the most notable amendments is the intent to address concerns raised by stakeholders, which includes circumstances where the making of the award was induced or affected by fraud or corruption. In section 36 of the Arbitration and Conciliation Act, 1996, in sub-section (3), after the proviso—

"Provided further that where the Court is satisfied that a prima facie case is made out,— (a) that the arbitration agreement or contract which is the basis of the award; or (b) the making of the award, was induced or effected by fraud or corruption, it shall stay the proceedings.

As per the new *proviso* to Section 36 of the Act, courts are empowered to grant an unconditional stay on the enforcement of an award tainted by fraud or corruption. In fact, the latest amendment is a slight departure from the 2015 amendment. In that, it has the effect of unconditionally staying the enforcement of the award passed induced by fraud or corruption.

The driving force behind the new Ordinance is that the parties must get an opportunity to seek unconditional stay of the award, where there are serious allegations of fraud or corruption. The Amendment is in fact, in line with the judgment passed by the Supreme Court on arbitrability of fraud in the Venture Global Engineering case.

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