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ABOUT US

The Centre for Alternative Dispute Resolution, RGNUL (CADR-RGNUL) is a research centre dedicated to research and capacity-building in ADR. The ultimate objective, at CADR, is to strengthen ADR mechanisms in the country by emerging as a platform that enables students and professionals to further their interests in the field.

In its attempt to further the objective of providing quality research and information to the ADR fraternity, the CADR team is elated to present the Special Edition of the Fourth Volume of 'The CADR Newsletter'. The Newsletter initiative began with the observation that there exists a lacuna in the provision of information relating to ADR to the practicing community. With an aim to lessen this gap, the Newsletter has been comprehensively covering developments in the field of ADR, both national and international. The CADR Newsletter is a one-stop destination for all that one needs to know about the ADR world; a 'monthly dose' of ADR News!

DOMESTIC ARBITRATION

The Mandate of The Arbitrator Cannot be Challenged on the Grounds of Bias and Impartiality under Section 14 of the Arbitration and Conciliation Act, 1996: Delhi High Court

While dismissing the petition in the case of *Union of India* v. *Reliance Industries Limited*, wherein the petition dealt with the arbitrator's biasness under Section 14 of the Arbitration and Conciliation Act 1996 (A&C act), the Delhi High Court stated that it is not maintainable because de jure disqualifications as dealt with under Section 14 only includes disqualifications mentioned in the Seventh Schedule and the current allegation of impartiality and biasness is not mentioned therein. Furthermore, the issue of bias and impartiality is dealt with by Section 12 of the A&C Act. The Court further added that the present decision would not constitute a bar for the Government in pursuing the application before the arbitral tribunal. Read More

Review of an Order which Dismissed a Petition under S.11 of the Arbitration and Conciliation Act is Permissible: Delhi High Court

In *Always Remember Properties Private Limited* v. *Reliance Home Finance Limited*, a matter came before the Delhi High Court seeking recall of an order holding that as Corporate Insolvency Resolution Process ['CIRP'] proceedings had begun, the moratorium would take effect and all proceedings against the corporate debtor would be suspended. Adjudicating the case, the Court held that the review of the proceedings is done with respect to factual errors in the order and is not related to the power exercised by the Court under the said section on merits, therefore, it is permissible. Furthermore, it was held that the Court does not cease to be a court of record under Section 11 of the A&C Act and the power exercised therein is not merely administrative but purely judicial in character. Read More

A Unilateral Request by one of the Parties for Initiating the Appointment Procedure would Not Constitute Waiver of the Right to Disqualify: Delhi High Court

The Delhi Court in the case of *M/s. Osho G.S. & Company* v. *M/s. Wapcos Limited* held that waiver of the right to disqualify as provided under Section 12(5) of the A&C Act would be done by an 'express agreement' made in writing. A unilateral request by one of the parties for commencing the appointment procedure cannot be equated with the same. The Court, while holding that the unilateral appointment of the sole arbitrator by the Chairman and Managing Director (CMD) of the respondent company cannot be maintained, terminated the mandate of the arbitrator and appointed a substitute arbitrator. Read More

DOMESTIC ARBITRATION

Parties can be Referred for Arbitration under a Non-Binding Term Sheet: Delhi High Court

The Delhi High Court in *Wellspun One Logistics Park Fund* v. *Mohit Verma* referred the parties to arbitration under a non-binding term sheet holding that the arbitration agreement is a separate agreement even though it may constitute a clause of the main contract. In this case, a petition dealing with the appointment of an arbitrator for adjudication of a dispute resulting from a non-binding term sheet was filed. However, the respondents contended that the petition is not maintainable as the dispute resolution clause is included in the contents of the non-binding term sheet and remains non-binding like other clauses. The Court while appointing the arbitrator for the parties stated that though the title suggests that the term sheet is non-binding, the arbitration agreement will be specifically binding on the parties as also expressly stated in the agreement. Read More

Arbitration Proceeding against Gazprom initiated by German Energy Firm

RWE, a German energy firm, has initiated arbitration proceedings against Russia's Gazprom over missing gas deliveries. The action has been initiated post launch of an arbitration proceeding by German utility Uniper to secure compensation worth billions of euros from Gazprom over undelivered gas volumes.

In contrast, RWE's exposure to Russian gas supplies has been relatively minimal, spanning 15 terawatt hours (TWh) by 2023. However, since Russia's invasion of Ukraine began in late February, that exposure has decreased to 4 TWh. Uniper has a 200 TWh exposure and has already lost 11.6 billion euros by replacing Russian supplies that have been interrupted since the end of August. Read more

Swiss Supreme Court rules that a liberally drafted waiver of appeal may also rule out the possibility of an arbitral ruling being revised

The Swiss Federal Supreme Court ("SFSC") made its ruling on the request for the revision of an arbitral award issued in accordance with the UNCITRAL Rules, in which the arbitral panel had dismissed Croatia's charges of corruption. According to Swiss law, award revisions are an extraordinary remedy. If the SFSC grants the revision request, the arbitral award will be revoked, and the case will be sent back to the arbitral tribunal. A broadly worded waiver clause may be understood to preclude the right to revision of arbitral award, the SFSC made clear in its ruling. The SFSC also ruled that a criminal conviction for bribery does not necessarily translate into perjury in front of a UNCITRAL panel. The comments of the guilty individuals had no bearing on the arbitral award thus issued, therefore their conviction does not establish that a criminal act had a direct impact on the decision. Read more

US Court denies motion to mandate arbitration

In Lavvan Inc. v. Amyris, Inc., the United States Court of Appeals for the Second Circuit upheld a decision denying a motion to compel arbitration, concluding that the appellant's claims were not subject to arbitration because there was a lack of convincing evidence of an intent to arbitrate in the parties' contract. The Court cited precedents in support of its position that there needs to be the existence of convincing evidence before a court can presume that the parties consented to arbitrate arbitrability. According to the facts, the parties' Research, Collaboration and License Agreement ("RCLA") did not contain "clear and unmistakable evidence" of a purpose to arbitrate arbitrability, the Court decided. Read more

SIAC to hear Fintech Unicorn BharatPe

BharatPe has initiated an arbitration process in accordance with the regulations of the Singapore International Arbitration Centre (SIAC) to prevent Ashneer Grover from vesting his 1.4% of the company's shares. Grover's restricted stake is aimed to recover, and BharatPe has petitioned the SIAC to prevent him from using the title as co-founder of the company.

The controversy started when Grover and his wife were fired from all of the senior roles at the company, sparking the scandal that started earlier this year. The company conducted an internal evaluation with the aid of Alvarez and Marsal, Shardul Amarchand Mangaldas, and PwC found mistakes made under Grover's leadership. Read more

INVESTMENT ARBITRATION

Armenian Investors File the Notice of Dispute Arising Out of the Armenian-Azerbaijan Conflict of 2020

The Armenian investors of 18 hydropower plants in the Artsakh region are all set to launch an international arbitration against Azerbaijan claiming the seizure and expropriation of their property as a result of the 44-day long war between Armenia and Azerbaijan in 2020. The investors claimed several hundred million US dollars as compensation for alleged violation of several provisions of the European Energy Charter by Azerbaijan. The Azerbaijani state-owned AzEnergy Company controls the disputed hydropower plants now. The notice of dispute has been filed by the investors and it is only after the completion of three-months that the official arbitration proceeding could be initiated. Read more

Challenge to the Appointment of Charles Poncet in the Revision Proceedings of Hydro v. Albania Dismissed

The ICSID tribunal dismissed the proposal for disqualification of Dr. Charles Poncet in the revision proceedings initiated by Albania in the 110 million euros case, *Hydro v. Albania*. Albania relied on Rule 1(4) of the ICSID Arbitration rules for supporting their contention stating that the rule prohibits the appointment of Dr. Poncet because he had acted as an arbitrator in the original arbitration proceedings. However, the co-arbitrators dismissed the challenge, holding that the rule disallows the appointment of those persons "who acted in such proceedings prior to commencement of the ICSID case that gives rise to the revision request." Read more

The Reko Diq Project is All Set for Revival Post Pakistan's Supreme Court Ruling

The Supreme Court of Pakistan's decision on the presidential reference seeking its opinion on the validity of agreement regarding revival of the Reko Diq mining project has paved the way for Pakistan to avoid the ICSID penalty worth $11 billion. The original agreement for the Reko Diq mining project was signed between two firms: Barrick Gold and Antofagasta and the Government of Balochistan. However, the conflict arose after the Balochistan government refused to renew the lease and the Apex Court declared the amendments to the lease agreement, illegal and void ab initio. In 2019, ICSID tribunal imposed a penalty for illegal denial of mining. The Federal and Balochistan governments entered an out of court settlement with the two firms via which Antofagasta decided to exit the reconstituted project while Barrick agreed to 50 % partnership with the governments of Pakistan and Balochistan and three state-owned entities. Deciding on the validity of said settlement, the SC held them to be valid and legal since they were undertaken

with all the due diligence and transparency and between the competent authorities with no violation of constitution and other statutes. Read more

French Court Upholds the $1.1 Billion-Crimea Award Against Russia

The French Supreme Court has upheld the $1.1 billion award by the International Arbitration Chamber of Paris in the favor of the Ukrainian bank, Oschadbank. The claim arose out of the loss of assets suffered by Oschadbank on account of annexation of Crimea by the Russian Federation. The SC overturned the decision of the Paris Court of Appeals which sided with the Russian stance of lack of arbitration jurisdiction in the present claim since the Russian investments dated before January 1, 1992 to which "Agreement on the Mutual Promotion and Protection of Investments" does not apply. The SC held that the Court of Appeal had improperly found that the offer of arbitration and the definition of investment contained in the investment treaty included a ratione temporis restriction. Read more

ICSID Tribunal Rejects Respondent's Request Regarding Disclosure of Claimant's Party Representative while the Absence of Claimant's Legal Expert at the Hearing was Accounted For

In the case of *Orazul International Espana Holdings S.L.* v. *Argentine Republic*, the ICSID tribunal rejected the respondent's request for disclosure regarding third-party financing. The tribunal ruled that while after the 2022 revision, ICSID rules put an obligation upon the parties to disclose such financing, however the rules governing the present proceeding puts no such procedural obligation on the parties. The respondents in the case raised objections regarding Mr Kay, one of the Claimant's party representatives, who was alleged to be associated with a litigation financing company and thus indicating a doubt of third-party financing. The tribunal also pointed out the absence of "specific basis or reason" for such a request of disclosure. With respect to disclosure regarding absence of Claimant's legal expert at the hearing, the tribunal rejected such request stating that valid reasons have been provided to justify his absence. Read more

MEDIATION

Legal Services Clinic inaugurated in Nagaland by Justice SK Kaul while emphasizing the need to promote ADR

A Legal Services Clinic inaugurated by SC Judge, and Executive Chairman, National Legal Services Authority Justice Sanjay Kishan Kaul, has become the 119th Legal Services Clinic established in the State of Nagaland. In the inaugural address, the importance of mediation as an efficacious alternative mode of dispute resolution, and its preference over litigation in speedy disposal of pending cases was emphasized upon. The merits of mediation were highlighted and it was stressed to permeate mediation to every nook and corner. Read More

Blaine County launches a landlord-tenant mediation program with a view to resolve the housing crises effectively

Owing to the housing crises and losses encountered by the landlords of not receiving the rent from their tenants, Blaine County and the City of Ketchum have launched a one-year pilot landlord-tenant mediation program with the NeuroMediation Group. The free program offers the two parties more options at their disposal, like setting up payment arrangements for past-due rent as compared to going to court where it mostly comes down to whether a tenant is to be evicted from a landlord's property or not. Read More

Zelensky seeks Indian mediation for the settlement with Russia.

While the Russian-Ukrainian war continues unabated and without a clear goal at the end in exchange for continuous losses of lives and property, there have been certain hints for resolving the conflict via a diplomatic route. India has been asked by the Ukrainian president to act as a mediator between Russia and Ukraine. PM Narendra Modi, also strongly reiterated his call for an immediate cessation of hostilities, and said that both sides should revert to dialogue and diplomacy to find a lasting solution to their differences. Read More

Court can determine whether "Urgent Interim Relief" is legitimate or intended to obviate pre-institution mediation - Calcutta HC

The Calcutta HC in the case of *M/s. Odisha Slurry Pipeline Infrastructure Ltd. & Anr.* V. *IDBI Bank Ltd. & Ors.* concluded that there are no statutory restrictions, under Section 12A of the Commercial Courts Act 2015, on the court's ability to apply its judgment and consider whether the circumstances for grant of urgent interim relief have been made out by the plaintiff through proceedings. The Court cited the Delhi High Court's ruling in *Chandra Kishore Chaurasia* v. *R. A. Perfumery Works Pvt.*, where it was decided that the plaintiff's pleadings and the requested

remedy were the primary basis for determining whether a lawsuit requires urgent interim relief. Read More

"Urgent Interim Relief" Must Be Granted at The Time of Filing Suit; Ex-Post Facto Jurisdictional Fact is Ineligible - Madras HC

Madras HC, in the case of *Arvind Gupta* v. *Punjab National Bank and another,* has ruled that certain conditions must exist at the time the lawsuit is instituted in order to request an "urgent interim remedy" under Section 12A of the Commercial Courts Act and avoid the requirement of pre-institution mediation.

In accordance with Section 12A of the Commercial Courts, the Court heard from the parties and looking into the correspondence between the parties, the Court observed that mediation was a possibility and the plaintiff had no reason to refrain from approaching the bank to request mediation. The Court saw fit to deny the plaintiff's request for temporary relief because the plaintiff had not followed the requirements for avoiding pre-institution mediation. In addition, the Court protected the plaintiff's right to file a comparable lawsuit after completing the pre-institution mediation. Read More

Partnership Is Not a Heritable Status and Contract Prevails over Government Circulars- Bombay HC

On December 2, a division bench of the Nagpur bench of the Bombay High Court in the case *Shri Arunkumar S/o Dwarkalal Jaiswal* v. *State of Maharashtra* held, "the legal position is clear that partnership is not a matter of heritable status but purely depends on contract." Therefore, notwithstanding the existence of Government Circulars, the legal argument that a partnership based on its contract rather than its inherited status would take precedence. In the letters patent appeal, the Court set aside an order by a Single Judge, who had relied on a Government Circular dated 1994, which allowed the wife of a deceased partner to be added in the firm's license despite contrary provisions in the partnership deed. Read Judgment

Courts Cannot Suo Motu Grant Refund of Earnest Money If It Is Not Specifically Prayed for in Specific Performance Suit- Supreme Court

In this specific performance suit, the Trial Court granted the plaintiff an order of recovery of earnest money on the principle of unjust enrichment. This was upheld by the High Court, but the Apex Court bench noted that the plaintiff had neither prayed for the relief of refund of earnest money in the original plaint nor did it make any amendment to its plaint at a subsequent stage. "Unless a plaintiff specifically seeks the refund of the earnest money at the time of filing of the suit or by way of amendment, no such relief can be granted to him," the SC held on December 14 in the case *Desh Raj & Ors.* v. *Rohtash Singh.* Justice Surya Kant and Justice Bela M. Trivedi observed this with reference to Section 22 of the Specific Relief Act, 1963. Read Judgment

Karnataka HC Refuses Interference in Super Specialty's Dispute with Bharat Biotech over Covaxin Supply

In a recent judgement of *M/s United Brothers Healthcare Services Pvt. Ltd* v. *Ministry of Health And Family Welfare, Government of India & Others*, a single judge bench of Justice M. Nagaprasanna held that a writ petition for recovery of money, by a private entity, from a private entity, arising out of a private contract, cannot be entertained. The bench further observed that no element of the State had been party to the contract in any manner and therefore, the writ was not maintainable under the remedy of Article 226 of the Constitution of India, as the scope of issuance of a writ in mandamus is limited to enforce public duty and cannot be used against private wrongs. Therefore, the Karnataka HC has refused relief to a private super speciality

hospital in dispute with Bharat Biotech over Covaxin supply during the pandemic in 2021. Read Judgment

Arbitrator Cannot Award Damages for Additional Work Without Consent of the Employer- Gauhati HC

On December 21, in the case *Sports Authority of Assam* v. *Larsen & Toubro Ltd & Anr*, the Gauhati High Court held that an arbitrator cannot invoke Section 70 of the Indian Contract Act, 1872, to award damages on the principle of quantum meruit for any additional work carried out without the prior consent of the employer. The single judge bench observed that since the agreement did not contemplate any additional work and it was done without the prior consent of the employer, it would fall outside the ambit of the arbitration clause. Read Judgment

CASE COMMENT

The Unresolved Conundrum of the Applicablity Of CPC in passing Interim Relief under Section 9

Introduction

The Hon'ble Supreme Court in the case of *Essar House Private Limited* v. *Arcellor Mittal Nippon Steel India Limited* has held that the rigors scrupulous of every procedural rule in the Code of Civil Procedure, 1908 ('CPC') do not limit the Court's ability, while ruling on a petition under Section 9 of the A&C Act. The provision of interim remedy under Section 9 of the A&C Act does not need proof of genuine attempts to deal with the property with the goal of resisting or delaying the realisation of an imminent arbitral judgement under Order 38 Rule 5 of the CPC, which talks about the procedure where defendant may be called upon to furnish security for production of property.

Brief facts of the case

Essar Services India Private Limited ('Essar Services') and Essar Steel India Limited ('Essar Steel') entered into a service agreement/contract agreed to sign into a service contract/agreement, under which Essar Steel provided a security deposit of INR 47,41,00,000/-. Essar Steel also entered into agreements with Essar House Private Limited ('Essar House'). As per the agreement, certain portions of the Essar House property were leased to Essar Steel and Essar Steel deposited a cumulative amount of INR 35,51,00,000 as refundable security deposit with no interest. In 2017, Essar Steel filed for bankruptcy, and Arcellor's Mittal Nippon Steel India Limited ('Arcellor') proposed a resolution plan which was approved by the National Company Law Tribunal in March 2019. Arcellor claimed a repayment of the security deposit under the Service Agreement, Rental Agreement, and Business Centre Agreement. Arcellor submitted petitions to the High Court of Bombay pursuant to Section 9 of the A&C Act whenever disputes occurred between Essar Services and Essar House. These applications were allowed by a single judge. Appeals against the rulings of a single judge were denied. Special leave petitions were filed by Essar Services and Essar House contending that when awarding the interim remedy, the High Court should have taken into account Order 38 Rule 5 of the CPC and it had erred in not doing so.

Issue

Whether it is imperative that when providing the interim remedy under Section 9 of the A&C Act, the High Court shall take into account the requirements of Order 38 Rule 5 of the CPC.?

CASE COMMENT

Arguments of the parties

The Petitioners argued that for the Hon'ble Court to provide interim relief under Section 9 of the A&C Act, Essar House and/or Essar Services must be found to have intended to sell off or otherwise dispose of any or all of their assets in order to halt or postpone the execution of the legal actions. The High Court made a mistake by not evaluating whether providing interim relief satisfied Order 38 Rule 5 of the Code of Civil Procedure.

The Rrespondent, while citing several high court rulings, argued that the A&C Act's Section 9 gives the courts more authority than the CPC's clauses provide. They also argued that in addition to the specific power to secure the disputed amount, the courts have the power to appoint whatever temporary safeguards they see essential, taking the goal of the case into account. The provision grants the court the remaining authority to enact any temporary safeguards that appear reasonable and necessary.

Decision of the Court

The Essar House judgment settles the debate on the applicability of CPC under Section 9 of the A&C Act's in arbitration procedures. The Supreme Court declared that it is not obligated by "the technicalities of CPC" while securing the ends of justice as "procedural safeguards, meant to advance the cause of justice cannot be interpreted in such manner, as would defeat justice." However, the Court acknowledged that fundamental principles of CPC cannot be disregarded while evaluating the application so far as the Court's ability to uphold the rule of law is not being hindered. Additionally, the Supreme Court held that Courts have the authority to enact any temporary protective order, keeping in mind the goal of the proceedings before them. In the instant case, the Court had the residual power under Section 9 of the A&C Act to issue any additional temporary protection orders that it deemed equitable and appropriate.

The Supreme Court concluded that in order to award preliminary remedy under Section 9 of the A&C Act, firstly, a prima facie case must exist. Secondly, the Court referred to "the balance of convenience" and said that it must favour the grant of interim relief and thirdly, the applicant must approach the Court with reasonable promptness. Thus, when a strong prima facie case exists in favour of one party, the absence of averments shall not prevent the Court from granting remedy under Section 9 of the A&C Act, including the grounds for attachment before judgment under Order 38 Rule 5 of the CPC. In a circumstance wherein the judicial authority is satisfied

that the defendant is about "to dispose of whole or part of its property with intent to obstruct or delay the execution" appropriate grounds for attachment under Order 38 are established.

In essence, the Supreme Court adopted a liberal and pro-arbitration approach on the aspect of applicability of Orders 38 and 39 of CPC while granting an interim relief under Section 9 of the A&C Act.

Conclusion

The Supreme Court through the judgment at hand tried to clear its stance regarding the applicability of statutory provisions governing an application under Section 9 of the A&C Act. While doing so the Apex Court upheld the Delhi High Court judgment in Ajay Singh & Ors. v. Kal Airways Private Limited and Ors as well as the Bombay High Court's observation in Jagdish Ahuja & Anr. v. Cupino Limited wherein the Court explained that while considering a relief under Section 9 of the A&C Act, the Court is not strictly bound by the provisions of Order 38 Rule 5. It was held that "the scope of Section 9 of the Act is very broad; the court has a discretion to grant thereunder a wide range of interim measures of protection 'as may appear to the court to be just and convenient'"

However, the Apex Court in Sanghi Industries Ltd v. Ravin Cables Ltd and another SCC OnLine SC 1329, gave a completely opposite ruling a similar issue and stated that no relief under Section 9 of the A&C Act may be awarded unless the CPC requirements are met. The Sanghi judgment said that it is crucial for the court to conform to the provisions under Order 38 Rule 5 of the CPC to make a ruling in accordance with Section 9 of the A&C Act. The Court stated that unless the conditions of CPC are satisfied and the Court is of the opinion that there is a prima facie possibility of the decree or award being defeated as the party may dispose of its properties, exercise of powers under Section 9 of the A&C Act cannot be permitted.

Therefore, in view of the two conflicting judgements, the burden now falls on a larger bench to decide on the issue. Nonetheless, the position of the Apex Court in the Essar judgment holds utmost sanctity for being a pro-arbitration judgment by conferring a wider scope on interim reliefs under the A&C Act.

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