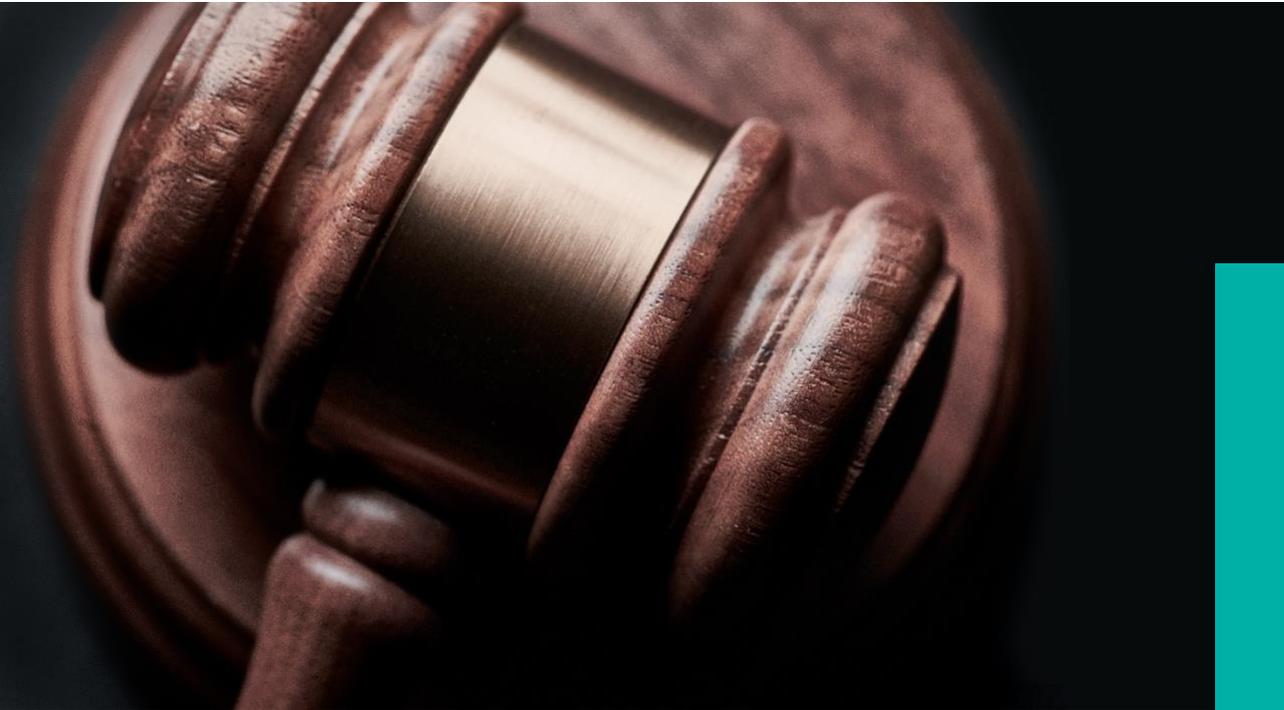


Dispute Resolution & Arbitration

Monthly Update
July 2023

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DISPUTE RESOLUTION AND ARBITRATION UPDATE



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Gujarat Composite Ltd v. A Infrastructure Ltd & Ors

Supreme Court of India | Civil Appeal No. 3259 of 2023 and 3260 of 2023

Background facts

- Gujarat Composite Ltd (**Appellant**) entered into 2 license agreements with A Infrastructure Ltd (**Respondent No. 1**) and its sister concern for licensing the operation of its manufacturing units. Thereafter, the Appellant and Respondent No. 1 executed a supplementary agreement for the advancement of certain sum to the Appellant and it was agreed that Respondent No. 1 would be permitted to create a mortgage on the licensed manufacturing units to secure the ad hoc advance.
- Subsequently, a tripartite agreement was executed between the Appellant, Respondent No. 1 and Bank of Baroda (**Respondent No. 2**), whereby Respondent No. 2 sanctioned a loan of INR 500 lakh to Respondent No. 1. Further, an amendment was introduced to the tripartite agreement to restrict the transfer of title deeds of the land of Appellant during the term of license agreement.
- The dispute arose between the parties when Respondent No. 1 called upon the Appellant to extend the term of the license agreement. The Appellant, however, denied such proposal. The extension was sought because the Appellant was unable to pay certain dues owed to Respondent No. 1. Thereafter, when the tenure of the original license agreement ended, Respondent No. 1 did not hand over the possession and declared its intention to continue with possession. The Appellant then issued a notice to Respondent No. 1 claiming recovery of possession of the manufacturing units, as well as certain monetary dues on the primary ground that the license had expired by efflux of time and such possession was illegal.
- Since several attempts to amicably resolve the dispute failed, the Appellant served a notice on the Respondent No. 1 invoking arbitration under the license agreement. In response, Respondent No. 1 contested the arbitrability of the dispute since it was inextricably interconnected with other related transactions, asserting that as the jurisdiction of the Arbitrator was derived from the agreement, adjudication of the dispute would go beyond the scope of the said agreement.
- In the aforementioned backdrop of events, the Appellant preferred a composite arbitration petition before the Gujarat High Court (**HC**) against Respondent No. 1. On the other hand, Respondent No. 1 filed commercial civil suit before the Commercial Court at Ahmedabad (**Commercial Court**). Vide Order dated December 13, 2017, the Commercial Court rejected the application of the Appellant under Section 8 of Arbitration & Conciliation Act, 1996 (**Arbitration Act**) and held that there was no arbitration clause in the tripartite agreement and no reference

had been made to the original or supplementary contract to give effect or consider the arbitration clause as a part and parcel of the tripartite agreement.

- Thereafter, the Appellant filed an Appeal, and the HC too dismissed it on the grounds that the matter in the suit falls partly within and partly outside the arbitration agreement, and involves non-parties, thus, Section 8 of the Arbitration Act would not be attracted.
- Being aggrieved by the decision of the HC and Commercial Court, the Appellant preferred an Appeal before the Supreme Court (SC).

Issue at hand?

- Whether the issues raised in suit went beyond the license agreement for the purposes of application under Section 8 of the Arbitration & Conciliation Act?

Decision of the Court

- At the outset, the SC perused Section 8 of the Arbitration Act, which deals with the Court referring the parties to arbitration and noted that the suit should be in respect of a matter which the parties have agreed to refer, and which comes within the ambit of arbitration agreement. The SC relied on its judgement in the case of *Ameet Lalchand Shah v. Rishabh Enterprises & Anr*¹ and observed that the amendment to Section 8 of the Arbitration Act after the decision in *Sukanya Holdings Pvt Ltd v. Jayesh H Pandya & Ors*² could be seen in the background of the recommendations of 246th Law Commission Report in which, inter alia, it was observed that as per the proposed amendment, judicial authority would not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void.
- The SC placed reliance on its judgement in *Oil and Natural Gas Corporation v. Discovery Enterprises*³ concerning the group of companies doctrine and noted that the factors:
 - The mutual intent of the parties
 - The relationship of a non-signatory to a party which is a signatory to the agreement
 - The commonality of the subject-matter
 - The composite nature of the transaction
- The performance of the contract is responsible for deciding if a company within a group of companies, which is not a signatory to arbitration agreement, would nonetheless be bound by it. The SC noted that there had been multiple transactions in this case, and further it observed that except the original license agreement, none of the other agreements contained any arbitration clause even if they related to the same property and involved the Appellant and the Respondent No. 1. Moreover, SC noted that the genesis of the contractual relations between Appellant and Respondent No.1 is from the original license agreement, and it does not ipso facto lead to the availability of the arbitration agreement in relation to the dispute in question, which emanates from the tripartite agreement, and which cannot be determined without reference to the said tripartite agreement and without involving all the parties.
- The SC further observed that there is no doubt about non-existence of arbitration agreement in relation to the entire subject-matter of the suit, and when the substantive reliefs claimed in the suit falls outside the arbitration clause in the original license agreement, the view taken by the HC does not appear to be suffering from any infirmity or against any principle laid down by this Court.
- In view of the above, the SC held that the view taken by the Commercial Court and the HC in declining the prayer of the Appellant for reference to arbitration under Section 8 of the Arbitration Act cannot be faulted and accordingly, SC dismissed the Appeal.

HSA Viewpoint

The Supreme Court has rightly dismissed the Appeal and upheld the decision of the Commercial Court and High Court, which had rejected the application of the Appellant for the reference to arbitration under the Section 8 of the Arbitration Act. It is pertinent to note that the language of the provision contained in Section 8 of the Arbitration Act is 'in a matter which is the subject of an arbitration agreement' and the words 'a matter' indicates that the entire subject-matter of the suit should be subject to arbitration agreement. In the present case, there was no arbitration clause in the tripartite agreement and no reference had been made to the original or supplementary license agreement 'which contained arbitration clause' to give effect or consider the arbitration clause as a part and parcel of the tripartite agreement, and thus the SC held that the dispute is outside the subject matter of the arbitration agreement. This judgement clarifies that the Court cannot refer a dispute to Arbitration under Section 8 of the Arbitration Act when a suit is instituted where the subject matter lies outside the arbitration agreement and the substantive relief claimed in the suit lies outside the arbitration agreement.

Ghanshyam v. Yogendra Rathi

Supreme Court of India | 2023 SCC OnLine SC 725

Background facts

- The Respondent instituted a suit for eviction of the Appellant from the suit premises which is part of H-768, J.J. Colony, Shakarpur, Delhi and for mesne profits on the averment that he is the owner of the said property by virtue of an agreement to sell dated April 10, 2002, power of attorney, a memo of possession and a receipt of payment of sale consideration as well as a will of the Appellant bequeathing the said property in his favor.
- The possession of the suit premises was handed over to the Respondent pursuant to the agreement to sell. Subsequently, on the request of the Appellant, the Respondent allowed the

¹ (2018) 15 SCC 678

² (2003) 5 SCC 351

³ (2022) 8 SCC 42

Appellant to occupy the ground floor and one room on the first floor of it for a period of 3 months as a licensee.

- The Appellant failed to vacate the suit premises despite expiry of the license period and termination of license vide notice dated February 18, 2002. Furthermore, the Appellant opposed the suit on the grounds that the documents had been manipulated on blank sheets but did not contest their execution or the fact that the possession memo or the sale consideration stipulated in the agreement had not been paid.
- The Trial Court held that the Respondent has proved his right over the property and since the license of the Appellant stands determined, he is entitled to a decree of eviction and payment of mesne profits, though not at the rate claimed by the Respondent, but at the rate of INR 1000 per month for the use and occupation of the premises in dispute. A categorical finding of fact was recorded that there is no evidence to prove that any of the above documents were obtained by misrepresentation, manipulation or by playing fraud upon the Appellant.
- The suit as per the pleadings is that of eviction and mesne profits on the averment that the Respondent is the owner of the property. He has claimed ownership on the strength of the aforesaid documents, especially the agreement to sell and the memo of possession as well as the receipt of payment of sale consideration.
- After having lost from all the three Courts, the Appellant, herein, has preferred this Appeal.

Issue at hand?

- Whether the documents, namely the power of attorney, will, agreement to sell coupled with possession memo and receipt of payment of sale consideration, would confer any title upon the Respondent so as to entitle him to a decree of eviction and mesne profits?

Decision of the Court

- At the outset, the Division Bench of Supreme Court held that *'the Power of Attorney executed by the Defendant has no bearing because neither a Sale Deed nor any other action done by the Power of Attorney holder in accordance with it has been executed, which may have conferred title on the Respondent. The specified general Power of Attorney is rendered ineffective if any document is not executed by the person holding it as a result.'*
- The Apex Court further observed that *'the will executed has no meaning as the same comes into effect only after the death of the executants and not before it.'* It was noted that the general Power of Attorney and the will as executed, as well as any practice followed by a State or the High Court that recognizes these documents as being documents of title or documents granting rights in any immoveable property, violate the law. The precise legal requirements, which demand the execution of a deed of title or transfer and its registration in order to provide right and title to an immovable property worth more than INR 100, would prevail over any such practice or custom that may be in use.
- The Supreme Court relied on various cases such as the decisions of the Delhi High Court in the case of **Veer Bala Gulati v. Municipal Corporation of Delhi & Anr**⁴ and in the case of **Asha M Jain v. Canara Bank & Ors**⁵ holding that the agreement to sell with payment of full consideration and possession along with irrevocable Power of Attorney and other ancillary documents is a transaction to sell even though there may not be a Sale Deed.
- The Apex Court relied on the case of **Imtiaz Ali v. Nasim Ahmed**⁶ and **G Ram v. Delhi Development Authority**⁷ in which the Delhi High Court observed that an agreement to sell or the Power of Attorney are not documents of transfer and as such the right title and interest of an immovable property do not stand transferred by mere execution of the same unless any document as contemplated under Section 54 of the Transfer of Property Act, 1882, is executed and is registered under Section 17 of the Indian Registration Act, 1908.
- The Supreme Court held that *'an agreement to sell may not be legally regarded as a sale transaction or a document transferring the proprietary rights in immovable property, but once the prospective buyer has fulfilled his obligations under the agreement and is lawfully in possession, he or she acquires possessory title that is subject to protection under Section 53A of the Transfer of Property Act, 1882. No one, including the transferor or anybody deriving rights from him, may infringe upon the aforementioned possessory rights of the potential buyer'*
- The Supreme Court ruled that the Plaintiff has rightly been held to be entitled to a decree of eviction with mesne profits. Accordingly, the Supreme Court dismissed the Appeal.

HSA Viewpoint

This decision of the Supreme Court is a landmark judgement in which it is rightly said that the Power of Attorney executed is of no significance where neither the Sale Deed has been executed nor any action pursuant thereof has been taken by the Power of Attorney holder. This judgement recognizes that an agreement to sell or the Power of Attorney are not documents of transfer and title right and interest of immovable property by mere execution is not transferred unless it got registered under the Section 54 of the Transfer of Property Act, 1882, is executed and is registered under Section 17 of the Indian Registration Act, 1908.

⁴ (2003) 104 DLT 787

⁵ (2001) 94 DLT 841

⁶ AIR 1987 DELHI 36

⁷ AIR 2003 DELHI 120

Coal India Ltd & Anr v. Competition Commission of India & Anr

Supreme Court of India | Civil Appeal No. 2845 of 2017

Background facts

- Coal India Ltd (CIL), a state-owned company, is the largest coal producer in India. The case originated from complaints filed by the Maharashtra State Power Generation Company (Mahagenco) and Gujarat State Electricity Corporation Limited (GSECL) before the Competition Commission of India (CCI) on the basis that CIL and its subsidiaries abused their dominant position and engaged in unfair trade practices, resulting in anti-competitive effects in the market.
- By way of an Order dated December 09, 2012 the CCI held that CIL was in contravention of the Competition Act, 2002 (The Act) for imposing unfair/discriminatory conditions and indulging in unfair/discriminatory conduct in the matter of supply of non-coking coal to power producers. Additionally, the CCI levied a penalty of INR 1,773.05 crore on CIL under Section 27(b) of the Act. The said Order passed by the CCI was assailed by CIL before the Competition Appellate Tribunal (COMPAT).
- By way of an Order dated May 17, 2016, COMPAT upheld the Order dated December 09, 2012 passed by the CCI whereby it held that CIL and its subsidiaries were acting independently of the market forces and enjoy undisputed dominance in the relevant market of production and supply of non-coking coal to thermal producers in India and thereby, abusing their dominant position in contravention of the provisions of the Act.
- On March 24, 2017 the CCI reduced the penalty from INR 1773.05 crore levied upon CIL to INR 591 crore. The said ruling came after COMPAT, in May 2016, ordered a fresh investigation into the case involving CIL and three of its subsidiaries, reasoning not all the members of the CCI who signed off on the ruling were present during the hearings.
- Soon thereafter, the *Finance Act, 2017*⁸ brought Appeals filed against the orders of the CCI under the Act within the purview of the National Company Law Appellate Tribunal (NCLAT). The NCLAT succeeded the COMPAT, which was a specialist standalone appellate body to decide Appeals against CCI's orders.
- Aggrieved by the Order dated May 17, 2016 passed by COMPAT, CIL filed the present Civil Appeal before the Supreme Court of India (SC)

Issue at hand?

- Whether the CIL and its subsidiaries would come under the purview of the Act, despite of being the public sector undertaking?

Decision of the Court

- At the outset, the SC examined the various provisions of the law on the present issue i.e., the Monopolistic and Restrictive Trade Practice Act, 1969 (MRTP Act or Act).
- Thereafter, the SC noted the significance of coal by pointing out that it serves as a significant raw resource in the creation of essential final products. It was stated that in light of the *Nationalization Act*⁹ unquestionably resulted in the creation of a monopoly, as CIL is a government company which came into being, as contemplated under Section 5 thereof. Coal mines were vested in the Central Government which are operated run by CIL, who is tasked with the power and the duty to distribute coal. This would attract the Directive Principle enshrined in Article 39(b) of the Constitution of India, which states that 'the State' should focus its policy on making sure that ownership and control of 'material resources' are 'distributed' in a way that 'serves the common good.'
- The SC also examined the various relevant provisions of the Nationalization Act and agreed that subject to directives and policy considerations, there is a large measure of power with CIL; however, they cannot seek immunity from the operation of laws which otherwise bind them. The objections taken by CIL about the applicability of the Act were noted, which were founded upon the inconsistencies and consequent anomalous results, which would arise from the Act being applied to CIL.
- The SC noted that CIL is not a department of the Government, it is a Government company. In fact, what is excluded from the definition of the expression 'enterprise', is a Government Department carrying on Government functions. Carrying on business in mining cannot be described as a sovereign function. There is nothing in the definition which excludes a state monopoly which is

⁸ Finance Act, 2017 came into force on 1st April 2017

⁹ Coal Mine (Nationalization) Act, 1973

even set up to achieve the goals in Article 39(b) of the Indian Constitution. The SC went on to state that the Act prohibits the abuse of dominant position by an enterprise or a group. A group has been defined in the context of Section 5 of the Act which deals with regulation of combination. Accordingly, it was held that CIL answers the description of an enterprise as defined.

- Further, the SC analyzed Section 19(4) of the Act and stated that it empowers the CCI to have regard to 'all' or 'any' of the factors to arrive at the finding that an enterprise enjoys a dominant position or not. Accordingly, even a single factor being 'any' factor may form the foundation to find whether an enterprise enjoys dominance, which the CCI is bound to take into consideration.
- In the context of Section 28 of the Nationalization Act read with the object of the Act and bearing in mind the scheme of the Act and the language employed as it is, it was held that that the later enactment must prevail.
- The SC further examined the expression 'common good' in Article 39(b) stating that in a Benthamite sense it involves achieving the highest good of the maximum number of people. The meaning of the words 'common good' may depend upon the times, the felt necessities, the direction that the Nation wishes to take in the future, the socio-economic condition of the different classes, the legal and Fundamental Rights and also the Directive Principles themselves. As far as the time dictated content of common good goes, it simply means that 'economics' itself not being bound in chains, but it is a dynamic concept. The attainment of common good would be dependent on the appreciation and understanding of a generation as to how economic common good is best achieved. As to how the common good is best served is best understood by the representatives of the people in the democratic form of Government. Properly construed and operated fairly, the 'Act' would, in other words, harmonize with common good being its goal as well. Relying upon its decision in *Samatha v. State of AP*¹⁰, the SC reiterated that distribution of coal is intended to subserve common good.
- In the decision of Ashoka Smokeless Coal India Pvt Ltd, the SC was dealing with the validity of a decision taken by CIL to go in for e-auction of coal. It was noticed that the said judgement was pronounced on December 1, 2006 when coal was still a necessary commodity, where the Court determined that holding an e-auction did not amount to price fixing. The SC agreed with CIL and as held by it in *State of Karnataka and Another v. Shri Ranganatha Reddy*¹¹ distribution is a word of wide meaning, and it is covered by Article 39(b) of the Constitution.
- Accordingly, the SC held that there was no merit in the contention of CIL that the Act will not apply to the it, on the basis that CIL is governed by the Nationalization Act which cannot be reconciled with the Act. The same was subject to CIL having all the rights to defend their actions under the law. The SC directed that the Appeal be posted for being dealt with on merits.

HSA Viewpoint

The judgement carries significant implications for the coal industry, competition enforcement in India as well as public sector enterprises like CIL. It reinforces the importance of preventing abusive behavior by dominant players and serves as a reminder that dominant firms must refrain from unfair practices that hinder competition and harm consumers. From a broader perspective, this judgement contributes to the overall development of competition law in India. It demonstrates the mature understanding of competition issues and the effective enforcement of the Competition Act by the CCI. Going forward, the judgement is likely to impact the behavior of dominant firms across various sectors, be it a public and/or private enterprise, as it establishes clear boundaries for acceptable practices.

BL Kashyap and Sons Ltd v. Mist Avenue Pvt Ltd

Delhi High Court | OMP (COMM) 190/2019

Background facts

- BL Kashyap and Sons Ltd (**Petitioner**) and Mist Avenue Pvt Ltd (**Respondent**) entered into a civil and structural works Agreement (**Agreement**) in the year 2014. The value of the said Agreement was approximately INR 229 crore. The said Agreement contained an arbitration clause for resolving any disputes arising out of the said Agreement.
- Certain disputes arose between the parties relating to payment under the said Agreement. In order to resolve the disputes, the parties mutually entered into a Memorandum of Understanding (**MOU**) on October 8, 2015. The said MOU did not contain any arbitration clause and simply stipulated that the Petitioner would be entitled to adopt '*any legal measures*' in case the Respondent failed to make the agreed payment contemplated under the MOU.
- A fresh dispute arose between the parties when payments provided under the MOU were not made by the Respondent to the Petitioner. Consequently, the Petitioner invoked the arbitration clause under the said agreement and an Arbitrator was appointed by way of an Order dated July 28, 2017 passed by the Delhi High Court (**DHC**) in the proceedings initiated by the Petitioner under Section 11 of the Arbitration and Conciliation Act, 1996 (Act).
- The Petitioner filed seven claims amounting to INR 351,769,185 before the Arbitrator. The Respondent raised a preliminary objection as to the arbitrability of the disputes on the basis that the MOU didn't contain an arbitration clause and after execution of the MOU the said Agreement was rescinded. It also contended that it had paid an excess amount of INR 3,283,865 to the

¹⁰ 1977 (4) SCC 471

¹¹ (1997) 8 SCC 191

Petitioner, which it was entitled to claim. The Arbitral proceedings continued, and the matter was heard finally.

- Noting that a sum of INR 6,786,200 was paid by the Respondent to the Petitioner [which was not disclosed in the statement of claims], the Arbitrator concluded that, even upon the Petitioner's case that the MoU was not fully complied with, it would not lead to the conclusion that the arbitration clause contained in the 2014 Contract stood revived.
- Aggrieved by the Award passed by the Arbitrator, the Petitioner filed the present Petition under Section 34 of the Act before the DHC.

Issue at hand?

- Whether an arbitration clause survives a supervening agreement between the parties?

Decision of the Court

- At the outset, the High Court examined the judgement of the Supreme Court in the case of *Young Achievers v. IMS Learning Resources Pvt Ltd*¹² referred by the Arbitrator in the impugned Award. The DHC further examined the judgements in the cases of *Union of India v. Kishorilal Gupta & Bros*¹³, *Lata Construction v. Rameshchandra Ramniklal Shah*¹⁴, *Nathani Steels Ltd v. Associated Constructions*¹⁵ and *Damodar Valley Corporation v. KK Kar*¹⁶ relied upon by the parties.
- The High Court after examining the said judgements held the following:
 - An arbitration clause contained in an agreement which is void ab initio cannot be enforced as the contract itself never legally came into existence.
 - A validly executed contract can also be extinguished by a subsequent agreement between the parties.
 - If the original contract remains in existence, for the purposes of disputes in connection with issues of repudiation, frustration, breach, etc., the arbitration clause contained therein continues to operate for those purposes.
 - Where the new contract constitutes a wholesale novation of the original contract, the arbitration clause would also stand extinguished by virtue of the new agreement.
- The Court further held that Courts have limited grounds for interfering with Arbitral Awards based on patent illegality. When it comes to matters of contractual interpretation, the findings of the Arbitral Tribunal, being the chosen domestic tribunal, are generally deserving of respect unless they are deemed irrational or perverse. In this context, irrational or perverse means that the interpretation is so implausible that no reasonable person could have reached such a conclusion.
- The High Court finally held that the issue of whether the MOU resulted in the novation of the Agreement is a matter of contractual interpretation. The Court, in its role under Section 34 of the Act, is not required to provide its own interpretation of the contractual documents, but rather to assess whether the provisions can support the interpretation made in the challenged Award. Therefore, within the limited scope of a Court's jurisdiction under Section 34 of the Act, the conclusion reached by the Arbitrator that the MOU constituted a novation of the agreement was considered valid and could not be challenged.
- In view of the above, the Petition was dismissed.

HSA Viewpoint

This decision clarifies and provides circumstances when an arbitration clause survives in case a subsequent agreement has been entered into between parties. This judgement reiterates the position that the scope of interference of a Court in a Petition filed under Section 34 of the Act is very limited & narrow and a Court under Section 34 of the Act, cannot provide its interpretation of contractual document but can only assess whether provisions of the document support the interpretation provided in an Arbitral Award.

Dheeraj Singh v. Greater Noida Industrial Development Authority & Ors

Supreme Court of India | 2023 SCC OnLine SC 768

Background facts

- The Respondent State Government of UP had issued a notification under Section 4(1) read with Section 17 of the Land Acquisition Act, 1894 on April 30, 1993 whereby a large tract of land, including the land of the Appellants herein was acquired for the purpose of Greater Noida. The declaration of the said lands under Section 6 of the Act was issued on April 25, 1993, and the possession of the aforesaid lands was taken on different dates between August 13, 1993 and May 31, 1994.
- The Appellant is aggrieved from the fact that subsequent to the possession of the said lands being acquired, the Special Land Acquisition Officer determined the market value of the plots at three

¹² (2013) 10 SCC 535

¹³ AIR 1959 SC 1362

¹⁴ (2000) 1 SCC 586

¹⁵ 1995 Supp (3) SCC 324

¹⁶ (1974) 1 SCC 141

different rates i.e., INR 32.52, INR 22.44 and INR 16.46 per square yard, vide his order dated July 27, 1994. The Appellant sought reference under Section 18 of the Land Acquisition Act and claimed compensation at the rate of INR 350 to INR 500 per square yard on grounds of parity to other lands acquired in the vicinity. The District Judge, in the aforesaid reference, vide its judgement dated May 09, 2002, determined the market value of the said lands at INR 400, but deducted 1/3 amount for development charge, and fixed the market value at INR 267 per square yard and granted INR 80 as solatium per square yard with interest at the rate of 9% and 15% per annum, and an additional compensation at the rate of 12% per annum on the market value with effect from the date of transfer of possession.

- The Respondent Authority filed an Appeal wherein the Appellant filed cross-objections seeking further enhancement. The High Court confirmed the compensation determined by the District Judge without, as alleged by the Appellant, considering its cross-objections consequent to which the Appellant's review petition was dismissed. Hence, the present special leave petition.

Issues at hand?

- Whether cross-objections have the trappings of a regular Appeal and need to be considered on the parameters of an Appeal by the Appellate Court?
- Whether the High Court applied its mind to the Appellant's cross-objections and if so, to what extent?

Decision of the Court

- In cases where the decree given by the Court of first instance is partly in favor but also partly against a Respondent, two remedies within Order 41 Rule 22 remain with the Respondent, which is to file their cross objections; and to support the decree in whole. A third remedy in law also exists, which is the right to file a cross Appeal.
- The Appellant having filed cross-objections, the Court held that such cross-objections, though not a regular Appeal but filed in an already existing Appeal, have all the trappings of an Appeal under Order 41 Rule 22 of the Code of Civil Procedure 1908 (CPC) and, therefore, must be considered in full by the Court adjudicating upon the same.
- While the High Court has given a detailed analysis of all other issues raised in the Appeal and both the lower Court orders, however, the Appellant's cross objections in specific, finds no discussion, much less even a mention.
- Relying on the judgement of *Santosh Hazari v. Purushottam Tiwari (Dead) by LRs*¹⁷, the Apex Court held that the Court of Appeal has a duty to apply its mind to all issues of fact and law raised before it, and to discharge such duty, it must also record its findings against all such issues raised.
- Further relying on the judgement of *Madhukar v. Sangram*¹⁸, the Apex Court while re-iterating the principles enunciated in Santosh Hazari supra, held that failure of the Court of first Appeal to record its findings qua all the issues raised before it warrants that the matter must be remanded to the same Court again for fresh adjudication.
- The High Court, in the present case, was under an obligation to consider the cross objections filed by the Appellants herein, which it failed to do. As such, the matter was remanded to the High Court for fresh adjudication on the grounds raised in the cross objections during Appeal by the Appellants herein.

HSA Viewpoint

The Apex Court has rightly affirmed the settled legal view that while cross-objections have all the trappings of an Appeal and need to be considered on factual and legal objections by the Appellate Court, non-consideration of the same entails remanding the matter to the Appellate Court to consider the cross-objections for fresh adjudication.

Indira Devi v. Veena Gupta & Ors

Supreme Court of India | 2023 SCC OnLine SC 762

Background facts

- One Kishori Lal Sahu executed a conditional Sale Deed dated August 05, 1977 (**Sale Deed**) in favor of the Appellant for a total sale consideration of INR 5,000 with the condition that in case the vendor repays the sum of INR 5,000 to the Appellant by July, 1984, the vendee would return the property by means of a registered Sale Deed at the cost of the vendor.
- In the meanwhile, Kishori Lal Sahu executed a registered Gift Deed dated February, 14, 1983 (**Gift Deed**) in favor of his daughter-in-law (**Respondent No. 1**) for the care extended to him in old age.
- The vendors were ready and willing to return INR 5,000 to the Appellant to get the Sale Deed registered back in their name but the Appellant was not agreeing to the same. A civil suit was filed by the Respondent No. 1 along with Kishori Lal Sahu 'now deceased' in 1983, praying for a direction to the Appellant to accept INR 5,000 as consideration money and execute Sale Deed in

¹⁷ (2001) 3 SCC 179

¹⁸ (2001) 4 SCC 756

respect of the suit property in favor of Respondent No. 1 and that on failure to do so, a decree be passed directing Appellant to register the Sale Deed in favor of the Respondent No. 1 and the and as a consequence, the Plaintiffs be put in possession of the property in question. In the alternative, a prayer was sought against the then tenant one Kaleshwar Prasad Singh on the ground that there is a relationship of landlord and tenant between him, and Kishori Lal Sahu 'now deceased' and decree of eviction be passed in favor of the plaintiffs on the ground of personal necessity and non-payment of rent and the possession be got delivered.

- The suit was dismissed by the Trial Court and upheld by the lower Appellate Court while reversed by the High Court.
- **Submissions on behalf of the Appellants:**
 - Relying on the judgements of the Apex Court in the matter of *Bhoju Mandal v. Debnath Bhaqat*¹⁹ and *Kapilaben v. Ashok Kumar Jayantilal Sheth, through POA Gopal Bhai Madhusudan Patel*²⁰, the Appellants submitted that the vendor Kishori Lal Sahu had no right to assign his right to repurchase the property, to any third party, the right being personal to him. Even otherwise there was no clause in the Sale Deed in terms of which such right could be assigned to anyone else.
 - The Respondent could not get the suit property by way of the Gift Deed since she could get the property only on payment of the consideration money mentioned in the Sale Deed.
 - It is not evident that the Plaintiffs were always ready and willing to fulfil the condition as mentioned in the conditional Sale Deed as they had no money available with them.
 - The stand taken in the written statement filed in the suit was that Late Kishori Lal Sahu was not keeping good health, hence the Gift Deed executed in favor of the Respondent was not a valid document.
 - The suit was not maintainable since multiple reliefs had been claimed. On the one hand, the claim was made for specific performance whereas on the other hand, the plea of tenancy was also raised.
- **Submissions on behalf of the Respondents:**
 - As per the Gift Deed, Respondent No. 1 had all rights available to her which Late Kishori Lal Sahu had in terms of the Sale Deed. The Respondents were always willing to pay the sale consideration of INR 5,000 to the Appellant who refused to accept the same, thereby necessitating the Respondents deposit the amount of INR 5,000 in Court on being permitted to do so on the Respondent's application.
 - The right to get the suit property back was assigned by Late Kishori Lal Sahu to the Respondent No. 1 vide a registered Gift Deed.
 - Relying on the judgements of the Apex Court in the matter of *TM Balakrishna Mudaliar v. M. Satyanarayana Rao*²¹ and *Shyam Singh v. Daryao Singh (Dead)*²², the Respondents submitted that the vendor Kishori Lal Sahu had the right to assign his right to repurchase the property to the Respondent who was not a third party being of the same family.

Issues at hand?

- Whether the vendor could assign the right contained in a Sale Deed to get the property registered back or the right being personal cannot be assigned?
- Whether one can infer a prohibition against assignment or transfer in a conditional Sale Deed when there is no express term providing for such assignment or transfer?

Decision of the Court

- Relying on then judgement of *TM Balakrishna Mudaliar v. M. Satyanarayana Rao* (supra) with reference of an earlier judgement titled *Sakalaguna Nayudu v. Chinna Munuswami Naykar*²³, the Apex Court held that the benefit of a contract of repurchase which did not show that it was intended only for the benefit of the parties contracting, could be assigned. The option given to repurchase the property sold would prima facie be assignable.
- Relying on the Apex Court judgement in the matter of *Shyam Singh v. Daryao Singh (Dead)* (supra), it was held that in that case the question under consideration was whether such a prohibition against assignment or transfer can be read into the document by implication. The opinion expressed was that a long period of ten years was fixed for obtaining re-conveyance, no implied prohibition of transfer or assignment can be inferred in the document keeping in view the provisions of Section 15 (b) of the Specific Relief Act. As such, unless the contents of the document

HSA Viewpoint

The Apex Court re-iterated the settled legal position in respect of assignability or transferability of rights under a conditional Sale Deed or document of transfer, while at the same time clarifying the conditions when such transfer or assignment may be deemed implied.

¹⁹ 1963 Supp (2) SCR 82

²⁰ (2020) 20 SCC 648

²¹ (1993) 2 SCC 740

²² LRs (2003) 12 SCC 160

²³ AIR 1928 PC 174

in question and evidence in relation thereto are so clear to infer a prohibition against assignment or transfer, the right of repurchase has to be held to be assignable or transferable and cannot be treated as personal to the contracting parties. No reference to the words 'assignees' or 'transferees' in such conditional Sale Deed or document of transfer is inconsequential.

- The condition of right to repurchase in Sale Deed will not be personal to the vendor unless the terms in the documents specifically state so. Such a right can always be assigned and the contract containing such condition shall be enforceable. The only exception being that such a right should not be personal in nature.
- The benefit of contract is assignable in cases where it does not make any difference to the person on whom the obligations lie, to which of two persons he is to discharge.
- In the present case, there is no term in the Sale Deed that debars its assignment to any other person. The clause only mentions regarding right of repurchase. The option is given to the vendors with the obligations on the vendee.
- The argument raised by the Appellant that such an assignment of a right cannot be treated as a gift since consideration money is involved is rejected since the executor of the Gift Deed i.e. Kishori Lal Sahu (now deceased), being then a co-Plaintiff in the civil suit, had transferred his right to repurchase the property in favor of Respondent No. 1. That right could always be assigned by him with whatever conditions attached to it.

Voltas Ltd & Anr v. The Municipal Commissioner of Thane Municipal Corporation & Ors

Bombay High Court | Writ Petition No. 7222 of 2007

Background facts

- Voltas Ltd (**Petitioner**) was in absolute possession of a plot situated on part of layout admeasuring 2195 sq. meters bearing Survey No 166 to 173 part, Survey No 282 to 287 part and Survey No 304 to 306 part at Village Majiwada, Pokhran Road No 2, Taluka & District - Thane known as Vasant Vihar Housing Complex (**Property**).
- Thane Municipal Corporation (**TMC**), by virtue of two correspondences dated March 9, 2006 and July 20, 2006, demanded possession of all lands under reservation including a plot of land exclusively reserved for retail market. The TMC wanted the land to be handed over to them free of cost. Aggrieved by such arbitrary decision of TMC, an interim application was filed bearing Interim Application No.1463 of 2022 (**IA**) before the High Court of Bombay (**Court**).
- The Petitioner had submitted a composite proposal dated February 4, 2005 for construction on entire plot of 3000 sq. meters as per applicable town planning law i.e., Unified Development Control and Promotion Regulations for Maharashtra, 2020 (**UDCPR 2020**) and sought to construct a retail market to the extent of 50% of the land and 805 sq. meters of the adjoining land, reserved collectively for municipal retail market in the development plan finalized in Thane city.
- UDCPR 2020 governed town planning development, and Chapter 11 provided for acquisition and development of reserved sites in development plans, Regulation 11.1 read with Table A- provided for the use of land situated within the planning authority which have been reserved for certain purpose in development plan which shall be regulated in accordance with type and manner of development/redevelopment as per the provisions mentioned in Table 11-A therein.
- The Petitioners, by virtue of the IA, requested the Court for permitting them to develop the said property, seeking the benefits that the Petitioners were entitled to and accruing to them under Clause 68(V) read with Clause II- (C) of Appendix P of the Development Control Regulations framed for TMC and other applicable provision of law.

Issues at hand?

- Whether TMC is justified in demanding possession of all lands reserved for a retail market which come under the ambit of ULC Act?
- Whether the conditions enumerated under Clause 10 of order dated January 11, 1984, (**Exemption Order**) under Section 21 of the ULC Act persist to survive despite of repeal of the ULC Act by State of Maharashtra?

Decision of the Court

- The Court discussed the landmark judgement of *Salim Alimahomed Porbanderwalla & Anr v. State of Maharashtra & Ors*²⁴ wherein it was held that the State Government cannot charge

²⁴ WP No. 4849 OF 2022

premium on retainable land and there cannot be any revenue entry relating to Section 20 of ULC Exemption Order in respect of such retainable land. It further held that against the payment of premium on the surplus vacant land, the Petitioners therein were entitled to have the revenue entry deleted. Furthermore, the Court clarified that on payment of premium on surplus vacant land, the land becomes free of all conditions as stipulated by Section 20 of ULC Exemption Order.

- The Court, in ***Mira Bhayandar Builders and Developers' Welfare Association v. Deputy Collector***²⁵ had held that as the landowners have taken benefit of the schemes under Section 20 of the ULC Act by constructing buildings, they cannot wriggle out their obligations to surrender flats to government. In that case, the Court refused to set aside the letter addressed by the State Government to the Registrar to not register the documents of flats constructed under the scheme and upheld the circular directing the Sub-Registrar to verify if the scheme holder had sought a time extension to complete the scheme, not to register a document if no time extension had been sought. The same issue came up in the case of ***Jayesh Tokarshi Shah v. Deputy Collector***²⁶ wherein another Division Bench had considered similar circulars prohibiting registration of conveyance flats constructed under delayed Section 20 schemes which did not have time extensions or NOCs wherein the Court observed that there have been conflicting views of several benches and therefore reference was sought to a full bench.
- The Full Bench of the Court, by majority, upheld the view of the Division Bench that although the conditions under Exemption Order would survive, the State Government cannot take any action under the ULC Act such as withdrawal of exemption, since the ULC Act has been repealed and is no longer in force; however, the State Government can ensure compliance of the terms and conditions of withdrawal of the Exemption Order or without taking any recourse to Section 20(2) of the ULC Act.
- The Court heavily relied on ***Swastik Constructions v. State of Maharashtra & Ors***²⁷ wherein it was held that Section 21 of the ULC Act would not survive the Repeal Act and hence the conditions of the Exemption Order under Section 21 are not enforceable. Subsequently, challenging the order of the Court, the Supreme Court of India (SC) passed an order dated October 5, 2015, confirming the decision of the Bombay High Court, pursuant to which the State Government issued a circular dated December 5, 2018 directing all Municipal Corporations (including TMC) to not insist compliance with ULC conditions under Section 21 of the ULC Act.
- The Court further held that since the town planning law was altered and UDCPR-2020 was approved, which governed the development including Chapter 11, Regulation 11.1 read with Table 11-A which pertinently deals with the Commercial Market and Mandies (i.e. weekly market, vegetable market, open market, hawkers market) wherein, it has been specifically mentioned that *'the Planning Authority/Appropriate Authority shall acquire the land and develop the reservation for the same purpose or (i) the Authority may allow the owner to develop the reservation, subject to handing over to the planning authority and independent plot along with the constructed amenity of total area, mentioned in Note-1 and as per the norms prescribed by the Authority (ii) the owner shall be entitled develop the remaining land for the uses permissible in adjoining zone with full permissible FSI of the entire plot and permissible TDR potential of the entire plot (iii) the Authority, if required, shall allow the TDR for unutilized FSI, if any (after deducting in-situ FSI) to be utilized as per TDR regulations (iv) Reservation may be allowed to be developed in parts'*.
- The Court conclusively held that the Petitioners were entitled to develop the retail municipal market wherein the Petitioners were required to construct 50% of the built-up area of the entire plot upon 40% of physical land at their own cost as per the specifications stipulated by TMC and transfer the same to TMC. Further the Court held that the Petitioners were entitled to use the entire floor space index (FSI) or any other FSI that may be permitted in UDCPR-2020 in the future, including ancillary FSI and fungible FSI, on the remaining 60% of the physical plot for other own use and for selling the premises in the open market. Thus, the Court held that the Petitioners were at liberty to submit a revised proposal for redevelopment in consonance with UDCPR-2020 and deliver the possession of same within the time stipulated to TMC.

HSA Viewpoint

By virtue of this judgement, much required clarification has been brought by the Court as to whether developers and landowners are required to comply with the conditions of the Exemption Order under the ULC Act, despite of repeal of the ULC Act by State of Maharashtra since the Competent Authorities have persistently shown interest on such lands through coercive means and enforced compliance with the conditions of the scheme sanctioned. Further, we say that, now since a new town planning law has been enforced (UDCPR-2020), it would have been irrational to hold the reservation of the plot previously instituted under Section 21 of the ULC Act, thereby constraining the entire development to a development regulation regime that is no longer in force.

²⁵ 2009:BHC-AS:15192-DB

²⁶ MA No.2003/2021 in SLP(Crl) No. 5868/2021

²⁷ WP No. 1178 f 2014

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