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Corporate Laws

Landmark Judgement

LMJ 07:07:2024

BALCO EMPLOYEES UNION (REGD.) v. UNION OF INDIA & ORS [SC]

Transfer Case (Civil) 8 of 2001 with connected cases.

B.N. Kirpal, Shivaraj V. Patil & P. Venkatarama Reddi,JJ. [Decided on 10/12/2001]

Equivalent citations: AIR 2002 SUPREME COURT 350, 2001 AIR SCW 5135, 2002 CLC 171 (SC), (2002) 100 FJR 152, (2002) 2 SCT 12, (2002) 1 CGLJ 128, (2002) 1 LABLJ 550, (2001) 8 SUPREME 660, (2002) 1 SCJ 123, 2002 (2) SCC 333, (2001) 8 SCALE 541, (2002) 108 COMP CAS 193, (2002) 1 COMLJ 205, (2001) 10 JT 466 (SC)

Government company- policy decision of disinvestment- whether amenable to judicial review-Held, No. Whether the disinvestment decision was unfair-Held,No.

Brief facts:

The validity of the decision of the Union of India to disinvest and transfer 51% shares of M/s Bharat Aluminium Company Limited (hereinafter referred to as 'BALCO') is the primary issue in these cases. The moot question before the court was whether the policy decision of the government could be subject to judicial review.

Decision: Dismissed.

Reason:

In a democracy, it is the prerogative of each elected Government to follow it's own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the Court.

Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the Courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of a policy, the appropriate forum is the Parliament and not the Courts. Here the policy was tested and the Motion defeated in the Lok Sabha on 1st March, 2001.

Thus, apart from the fact that the policy of disinvestment cannot be questioned as such, the facts herein show that fair, just and equitable procedure has been followed in carrying out this disinvestment. The allegations of lack of transparency or that the decision was taken in a hurry or there has been an arbitrary exercise of power are without any basis. It is a matter of regret that on behalf of State of Chattisgarh such allegations against the Union of India have been made without any basis. We strongly deprecate such unfounded averments which have been made by an officer of the said State.

The offer of the highest bidder has been accepted. This was more than the reserve price which was arrived at by a method which is well recognised and, therefore, we have not examined the details in the matter of arriving at the valuation figure. Moreover, valuation is a question of fact and the Court will not interfere in matters of valuation unless the methodology adopted is arbitrary [see Duncans Industries Ltd. vs. State of U.P. & Ors, (2000) 1 SCC 633].

The ratio of the decision in Samatha's case (supra) is inapplicable here as the legal provisions here are different. The land was validly given to BALCO a number of years ago and today it is not open to the State of Chattisgarh to take a summersault and challenge the correctness of its own action. Furthermore even with the change in management the land remains with BALCO to whom it had been validly given on lease.

Judicial interference by way of PIL is available if there is injury to public because of dereliction of Constitutional or statutory obligations on the part of the government. Here it is not so and in the sphere of economic policy or reform the Court is not the appropriate forum. Every matter of public interest or curiosity cannot be the subject matter of PIL. Courts are not intended to and nor should they conduct the administration of the country. Courts will interfere only if there is a clear violation of Constitutional or statutory provisions or non-compliance by the State with it's Constitutional or statutory duties. None of these contingencies arise in this present case.

In the case of a policy decision on economic matters, the Courts should be very circumspect in conducting any enquiry or investigation and must be most reluctant to impugn the judgement of the experts who may have arrived at a conclusion unless the Court is satisfied that there is illegality in the decision itself.

Lastly, no ex-parte relief by way of injunction or stay especially with respect to public projects and schemes or economic policies or schemes should be granted. It is only when the Court is satisfied for good and valid reasons, that there will be irreparable and irretrievable damage can an injunction be issued after hearing all the parties. Even then the Petitioner should be put on appropriate terms such as providing an indemnity or an adequate

undertaking to make good the loss or damage in the event the PIL filed is dismissed.

For the aforesaid reasons stated in this judgment, we hold that the disinvestment by the Government in BALCO was not invalid. Transferred Case (Civil) Nos. 8, 9 and 10 of 2001 are dismissed. The parties will, however, bear their own costs.

LW 47:07:2024

APL APOLLO TUBES LTD v. TANISHA SCAFFOLDING (INDIA) PVT LTD [NCLAT]

Company Appeal (AT) (Ins) No. 1285 of 2019

Sharad Kumar Sharma & Jatindranath Swain. [Decided on 11/06/2024]

Insolvency and Bankruptcy Code,2016- section 9- CIRP application- rejected on the ground that there was no matching purchase order- whether tenable- Held,No.

Brief facts:

The Appellant had filed a CIRP application against the Respondent. The case set up by the Appellant was that it had supplied certain manufactured products for the purposes of marketing to the Respondent, but the amount against such supplies was not remitted and fell due to be paid. The Respondent did not dispute the demand made in the notice of demand issued under section 8 of the IBC. However, the said Application has been rejected by the Impugned Order, contending thereof that the Applicant's claim pertaining to the amount due to be paid to the Appellant by the Respondent as per the Demand Notice and the accompanying invoices has not been supported by the respective Purchase Orders so as to justify the amount claimed by the Appellant.

Decision: **Allowed.**

Reason:

It is a trite law that when the Courts/Tribunals created under a statute while adjudicating upon a civil right between the parties before the Court or the Tribunal concerned have to confine their finding limited to the extent of respective pleadings and evidence laid by the parties. The Tribunals or the Courts are not expected to substitute their own stand or finding in supporting case of either of the parties before it in the absence of there being any pleading raised before it to controvert the pleading raised by the other side in support of their case. Rather the Courts/Tribunals should refrain from stepping into the shoes of a litigating party by substituting their own finding in the absence of there being any pleading evidence.

It is the settled law which needs no further elaboration that in a judicial proceeding where despite orders being passed by the court or the Tribunal calling upon the opposite side to file objection to the pleading raised by the Appellant/Applicant, if the same is not controverted, it will be deemed to have been accepted by the other side and would be taken as to be true. Be that as it may, since at no point of time, the Respondent had filed any objection to the contrary to the proceedings under section 9 of I & B Code before the Adjudicating Authority, that is, NCLT, Bangalore Bench, we are of the view that it would meet the ends of justice if the Impugned Order dated 05.09.2019 is quashed and the matter is remitted back to the NCLT, Bangalore Bench to decide CP(IB)No.116/BB/2018 afresh after providing an opportunity to the Respondent to file their objection to the Application under section 9 and to decide the same afresh.

Considering the fact that the proceedings drawn on dates as back as in 2016, it is hoped and trusted that the Learned Adjudicating Authority will make all efforts to decide proceedings as expeditiously as possible. Subject to the above, the Company Appeal would stand allowed.

LW 48:07:2024

PADMANABHAN v. PRIYA S. ANAND [NCLAT]

Company Appeal (AT) (CH) (Ins) No.167 of 2024 & 168 Of 2024

Sharad Kumar Sharma & Jatindranath Swain. [Decided on 4 /06/2024]

Brief facts:

Appellants in these two connected Company Appeals are erstwhile Director(s) of M/s. RRP Housing Private Limited (the `Corporate Debtor'), which were engaged in the Real Estate Projects. The Corporate Debtor was put into liquidation and the assets were sold and sale certificate was also issued to the auction purchaser. Now the appellants sought to challenge the sale under these appeals.

Decision: **Dismissed.**

Reason:

Looking into the circumstances particularly when the Appellant(s) questions the Sale Certificate and Sale made by the Liquidator, it would have been apt on his part to have earlier approached the Liquidator himself at the time of publication of Sale inviting the bids from the Prospective Buyer, which was made by the Liquidator. Having not done so and having waited till the same was actuated upon by publication on 05.05.2022, this inaction would not give the liberty to the Appellant(s) to open a new chapter by putting a question to the Sale Certificate which has been affirmed by the Liquidator who has filed the IA No. 1301 dated 12.03.2024 and who has further proceeded to distribute the Funds of the Liquidation to satisfy the Claims raised. To this, the Appellant contends that the pleadings which he had agitated in the respective Interlocutory Applications, filed before the NCLT were not addressed upon by the Learned Adjudicating Authority as no finding has been recorded while deciding the same by the Impugned Order.

After having perused the Impugned Order under challenge and considering the argument extended by the Learned Counsel for the Appellant(s), it is felt that the same may not be sustainable for the reason, firstly, since his status being that of an Ex-Director / Shareholder, the Appellant(s) ceases their rights for questioning the Auction proceedings, secondly, as the Liquidation process had attained finality against them by the Order of the Appellate Tribunal and that too, further when the Auction held on 05.05.2022 has already been affirmed by the Order of 31.03.2024 and thirdly, the funds accrued from the such Sale have already been distributed, as notified by the Liquidator on 12.03.2024.

At this belated stage questioning the Auction Sale made on 05.05.2022 by the Liquidator, on the alleged procedural discrepancies as argued by the Learned Counsel for the Appellant without substantiating it, may not be a subject which could de-novo be scrutinised and be considered by this Tribunal, particularly when he has not placed his grievances at the appropriate stage, before the Liquidator himself at the stage when he issued the publication of Notice and was proceeding with the Auction Sale, when the Appellant has never questioned the publication, which was issued for Sale of the Property under Liquidation and rather had accepted the Auction Sale without raising any objection and since he had filed the IAs belated for setting aside the Auction Sale by filing the same only on 19.12.2022.

In view of the stage at which the Interlocutory Application was filed, coupled with the fact that since the proceedings for Liquidation in the present case has already attained finality and his status being that of an Ex-Director / Shareholder of the Corporate Debtor, the prayer made in his Application may not be taken as to be a ground to re-open the entire proceedings of Auction Sale, which was held as a consequence to the finality attached to the Order of Liquidation. Owing to the reasons as recorded above, we do not find any merit in the appeals and the same are dismissed.

Competition Laws

LW 49:07:2024

RACHNA KHAIRA v. GOOGLE INDIA PRIVATE LIMITED [CCI]

Case No. 03 of 2023

Ravneet Kaur, Anil Agrawal, Sweta Kakkad & Deepak Anurag [Decided on 24/06/2024]

Competition Act, 2002-section 4- abuse of dominance-

Brief facts:

The Informant was primarily aggrieved by the disclosure of contact book of mobile phone users by Truecaller, whose primary function is to identify incoming calls by matching the caller's number with its database. The Informant alleges that Google is giving Truecaller special access to Android users' contact book details, which violates Google's own policies. The same is alleged to be an abuse of its dominant position in the relevant market by Google in violation of provisions of Section 4 of the Act.

Decision: **Dismissed.**

Reason:

The allegation in the present matter pertains to Google's Play Store, which is a distribution channel for app developers to reach out to the Android smart mobile users.

In respect of alleged conduct on part of Google, the Commission found merit in the argument of Google that the Informant, while making allegations against Google for giving preferential treatment to Truecaller and not taking any action for violating its own policies, has relied on a version of Truecaller's app which is not available on Play Store. The Informant in her rejoinder has contested these submissions by Google, but has not substantiated the same. Therefore, the allegation of the Informant remains unsubstantiated.

The presence of other caller ID and spam protection apps on Play Store providing the same service and undertaking the same function indicates that Google does not prohibit other caller ID apps from undertaking the same function and providing the same service as Truecaller. Accordingly, the allegation that Google is limiting competition in the market for caller ID and spam protection by exclusively allowing Truecaller to share contact information does not appear to be validated.

In relation to the allegations of the Informant that Google has allowed Truecaller to access data from Android platform before banning harvesting of such data through change in policies, it is noted that the Informant has not placed any material on record to establish that such policy change has granted any competitive advantage to Truecaller over its rivals.

The Commission has perused the rival submissions of the Informant and Google as mentioned supra. Based on the experiment run by the Informant, it appears that users have voluntarily provided the contact details data to Truecaller. Therefore, the allegations of the Informant that Truecaller is engaging in 'unauthorised publishing' or that Google has allowed any preferential access to Truecaller do not appear to be substantiated.

Thus, the Commission is of the view that the allegation of the Informant remains unsubstantiated and despite sufficient opportunity, the Informant has not provided

any evidence to prima facie establish that Google is according either preferential treatment to Truecaller or resorting to discriminatory practises by allowing access to user's contact data to Truecaller while denying the same to the competing applications.

Given the facts and circumstances of the present case, the Commission finds that no prima facie case of contravention of the provisions of Section 4 of the Act is made out against Google in the instant matter. Accordingly, the Information is ordered to be closed forthwith.

LW 50:07:2024

METALLURGICAL PRODUCTS INDIA PRIVATE LTD v. GOVERNMENT OF INDIA & ANR [CCI]

Case No. 33 of 2023

Ravneet Kaur , Anil Agrawal, Sweta Kakkad & Deepak Anurag [Decided on 29/05/2024]

Competition Act, 2002- section 2(h) - enterprise- section 4- abuse of dominance- atomic energy related products- whether DAE is an enterprise under the Act-Held,No. Whether complaint maintainable-Held,No.

Brief facts:

The Informant filed the present complaint, alleging abuse of dominance by Government of India through The Secretary, Department of Atomic Energy ("OP-1"/ "DAE") and IREL (India) Ltd. ("OP-2"/ "IREL"). The primary grievance of the Informant pertains to: (i) refusal to renew the off-take agreement after 2017 for processing of Uranium contained Leach Residue; (ii) rejection of import licenses applications for Columbite and Tantalite; and (iii) refusal/non- approval of an alternate disposal plan.

Decision: **Dismissed.**

Reason:

At the outset, the Commission observes that the processing of products in question (i.e., Columbite and Tantalite) generate radioactive substance (i.e., Uranium) which is governed under AEA and that the subject of atomic energy finds special mention under Section 2(h) of the Act.

The Commission notes that the grievance of the Informant with respect to import license and alternate disposal plan lies against the DAE as both these activities are under the domain of the DAE only. With regard to the grievance relating to refusal to renew the off- take agreement by IREL, the Commission notes that the said agreement was entered into on the direction of DAE vide its letter dated 04.04.2003. The said agreement was not renewed on the direction of DAE as communicated vide its letter dated 05.01.2018. The Commission also notes that Informant, vide letter dated 16.01.2019, requested DAE to advise UCIL for finalizing an off-take agreement in place of IREL indicating the fact that such off take agreements are entered into only on the direction of DAE. Thus, all the allegations are essentially against DAE.

The Informant has alleged violation of Section 4 of the Act against OPs which deals with abuse of dominant position by an 'enterprise' in the relevant market. As per the scheme of Section 4, any anti-competitive conduct would be analyzed only if it is done by an 'enterprise', as defined under Section 2(h) of the Act.

Thus, from a conjoint reading of Section 2(h) of the Act and the relevant Allocation of Business Rules, it is amply clear that DAE is exempted from the purview of 'enterprise' in terms of the provisions of the Act. Accordingly, conduct of DAE does not invite scrutiny under the provisions of the Act.

Furthermore, based on the above, the Commission notes that the IREL has no role to play in renewal of the off-take agreement, rejection of import licenses, and non-approval of an alternate disposal plan. Based on the facts and circumstance of the instant case and analysis carried out in preceding paragraphs, since no prima facie case is made out either against DAE or IREL, the matter may be closed.

Labour Laws

LW 51:07:2024

WORKMEN OF BEML LTD v. UNION OF INDIA& ORS [KNT]

Writ Petition No.573/2024 (L-RES)

K.S.Hemalekha,j. [Decided on 21/06/2024]

Contract Labour (Regularisation & absorption) Act- contract workers working for more than 20 years- employer issued Notification for recruitment of workers-union demanded regularisation of employment and quashing of employment notification- whether regularisation grantable-Held, No. Whether employment notification could be quashed-Held to be kept in abeyance.

Brief facts:

The grievance of the petitioners was that respondent No.2 BEML has employed only around 450 permanent workmen and has engaged around 1800 workmen as contract workmen, even though they are working in the permanent and perennial nature of work and performing the same work as regular workmen employed in such posts. It is the case of the petitioners that the workmen are

supervised only by managerial person of respondent No.2 and there are no employees of the so called contractors, who are in any manner involved with the petitioners-workmen other than remitting the wages, sanctioned by the respondent No.2 and collecting huge commissions for remitting the wages at the cost of petitioner- workmen. It is the case of the petitioners that the workmen are continuing to perform permanent and perennial nature of work and many of these workmen have been working continuously for respondent No.2 for more than 20 years.

The petitioner-union in continuation of their earnest attempt to get their legitimate rights/demands, addressed several representations to respondent No.2, when the situation stood thus, respondent No.2 published Recruitment Notification dated 27.09.2023 calling recruitment of Group-C position across BEML Limited. It is the case of the petitioner that by virtue of notification which specifies that requisite qualification for wage Group-C is ITI with National Apprentice Certificate and not Diploma Engineering, which is a general qualification and majority of the petitioners-workmen are ITI qualified and have completed National Apprentice Certificate and the impugned notification deprives the petitioners-workmen of their legitimate expectation for getting regularized with their service for having the same skills for applying to the said posts, but due to the age restrictions, none of the petitioners can apply for the posts as per the impugned notification and they are deprived of their minimum rights. The petitioner sought regularisation of contract workers, abolition and quashing of the Notification.

Decision: Partly allowed.

Reason:

The issue on hand is "Whether inviting applications from the candidates to recruit to Group-C position by the company-respondent No.2, while they are already a significant number of workmen/workers performing similar duties as contract workers, without being regularized, is fair and lawful.

The issue in this petition is whether the employment of the contract workers without regularization having been engaged for prolonged period when they are essentially performing duties similar to those of Group-C position, they may have a legal claim to regularization under the Labour Laws, but the jurisdiction of this Court under 226 seeking for regularization by the contract workers, was working under the principal employer or were under the contractors and whether there was an relationship of employer and the employee is essentially a question of fact, the remedy to the petitioner is to approach the industrial tribunal for declaring either the contract labour system under which they had employed was camouflage and that they are direct employees of the respondent No.2 and for consequential relief, the appropriate remedy is to approach the industrial tribunal and this Court has no jurisdiction to absolve the petitioners by regularization on the ground that the work for which the petitioners were engaged as contract labour was perennial in nature, the said question would be on determination of several number of factors.

In the instant case, the petitioner has sought for direction to the respondent No.2 to regularize the employment of the petitioner-workman, who are represented by the petitioners-union and to grant all benefits consequent to upon after absorbing them as permanent workmen, the prayer seeking regularization by this Court by the contract workman is not maintainable and the prayer (a) of the writ petition cannot be granted as the petitioners have to approach the appropriate forum for seeking appropriate relief. However, it is essential to assess whether inviting application for Group-C position while existing contract workers remained unregularized is fair and equitable? And prayer No.(b) and (c) are seeking to declare the notification in Annexure-L is illegal and arbitrary.

If the contract workers are qualified and have been performing satisfactorily, there may be concerns of fairness in not offering them the opportunity to apply for these positions. If, there is genuine reasons to fill the Group-C positions with external candidates due to skill gaps or other valid reasons, this could be a legitimate justification, ignoring the rights of the contract workers who may be entitled to regularization, it would be prudent for the employer to review the status of the contract workers, assess their eligibility for regulations, and ensure that the recruitment process of group-C positions is conducted in a manner, i.e., fair and transparent.

Prayer (a) of the writ petition seeking regularization before this Court is not maintainable, petitioners to approach the appropriate forum having jurisdiction. However, this Court feels it appropriate in the peculiar facts and circumstances to keep the impugned notification in abeyance for a period of one month from today, with the said observation writ petition stands disposed of.

LW 52:07:2024

S. JAMUNA RANI vs THE CHENNAI PORT TRUST & ANR [MAD]

W.P.No.30615 of 2013

R.Kalaimathi,J. [Decided on 26/06/2024]

Compassionate appointment- petitioner's husband went missing- she applied for employment on compassionate ground- employer rejected the same- whether rejection correct-Held, No.

Brief facts:

The Petitioner's husband, who was the employee of the Respondent Port Trust, developed chronic schizophrenia and was missing from 20.09.2000. Therefore, she lodged a complaint about the missing of her husband and the Royapuram Police gave a report dated 27.07.2008,

stating that her husband could not be traced. The Petitioner applied to the Respondent for consideration of appointment on compassionate ground was rejected by the impugned letter dated 27.12.2012. Hence, this writ petition.

Decision: **Allowed.**

Reason:

It appears that the terminal benefits were settled in favour of the petitioners as per this Court's order in the year 2009 and thereafter, the petitioner has made her application on 12.12.2012.

As per the scheme of compassionate appointment in Chennai Port Trust, the maximum time a person's name can be kept under consideration for offering compassionate appointment is 3 years, subject to the condition that the prescribed Committee has reviewed and certified the penurious condition of the applicant at the end of the 1st and the 2nd year. The scheme further reads that after 3 years, if compassionate appointment is not possible to be offered to the applicant, then, the case of the applicant will be closed finally and will not be considered again.

Though the petitioner's husband is said to be missing since 20.09.2000 and she has lodged a complaint on 18.10.2000 and a final report was filed by the Royapuram Police on 27.07.2008. It is relevant to note that as mentioned supra, by an order of this Court dated 24.07.2009 in W.P.No.20968 of 2008, the petitioners have got all the monetary benefits and the 1st petitioner has submitted her application to the respondents seeking compassionate appointment on 12.12.2012.

As per the instructions extracted in paragraph No.9, supra, and as per the existing scheme for compassionate appointment, the request of the 1st petitioner can be considered, if it is made within 5 years from the crucial date. The 1st petitioner has given an application within 5 years from the date of the final report of Royapuram Police. However, the impugned order was passed, stating that the application was belatedly given, which is factually incorrect, as per the scheme for compassionate appointment in the Chennai Port Trust.

In the given circumstances, the order impugned stands quashed. Consequently, the writ petition stands allowed as mentioned below :

i. The 1st petitioner shall give an application afresh for consideration of appointment on compassionate ground for anyone of her legal heirs, as she is aged about 60 years, preferably within a period of four weeks from the date of receipt of a copy of this order. ii. The respondents shall consider the said application of the 1st petitioner and shall complete the said exercise, within a period of 12 weeks from the date of receipt of the application from the 1st petitioner.

General Law

LW 53:07:2024

CM CEMENT CONCRETE PVT. LTD v. UNION OF INDIA & ANR [GAU]

Arbitration Petition No. 35 of 2023

Michael Zothankhuma, J. [Decided on 18/06/2024]

Arbitration and Conciliation Act, 1996- Section 11 and 12 -appointment of arbitrator and qualifications- serving/retired officials appointed as arbitrators by the Respondent- whether allowed-Held, No.

Brief facts:

The Petitioner -contractor and the Respondent-Railways entered into a contract agreement to build and operate a 25,000 MT Capacity godown with private Siding. Clause 64 of the contract agreement provided for the dispute resolution between the parties through arbitration, which stated that an Arbitral Tribunal of three members shall be constituted where members were to be appointed by the General Manager of the Respondent for dispute resolution. Disputes arose between the parties and the Petitioner filed the present petition is for appointment of an Arbitrator. While the petition was pending the Respondents constituted the arbitral tribunal by appointing its serving/retired officials.

Decision: **Allowed.**

Reason:

I have heard the learned counsels for the parties. The question to be decided is as to whether the respondent Railways could have appointed serving/retired Railway Officers as Arbitrators, in the absence of any waiver given by the petitioner under Section 12(5) of the Act.

In the case of *Perkins Eastmen Architects DPC & Anr v. HSCC (India) Limited, reported in (2020) 20 SCC 760*, the Supreme Court has held that any person, who falls under any of the categories specified in the 7 th Schedule, shall be ineligible to be appointed as an Arbitrator. Further, a person, ineligible to become an Arbitrator, cannot nominate another as an Arbitrator.

In view of the two judgments of the Supreme Court stated above and the fact that the application for appointment of an Arbitrator had been made subsequent to the amendment of Section 12 of the Act, this Court is of the view that the respondent Railways could not appoint/ nominate Arbitrators from amongst its own serving/ retired officers, to decide the disputes between the parties.

In the case of Central Organization for Railway Electrification (supra), the 3 Judges Bench of the Hon'ble Supreme Court held that when a contract agreement specifically provides for appointment of an Arbitral Tribunal consisting of 3 Arbitrators, from out of the panel of serving or retired railway officers, the appointment of the Arbitrator should be done in terms of the agreement as agreed by the parties. This judgment is in complete variance with the judgments passed in TRF Limited (supra) and Perkins Eastman (supra).

Due to the conflicting decisions of the Hon'ble Supreme Court and the subsequent decisions of the other Benches of the Supreme Court, like in the case of *Union of India v. Tantia Constructions Ltd., reported in (2021) SCC OnLine SC 271*, the conflicting decisions have been referred to a larger Bench for final resolution of the issue, with regard to whether the express terms provided in a contract agreement would hold sway while constituting an Arbitral Tribunal, in view of Section 12(5) and the 7th Schedule of the Act.

The issue that now arises is as to which judgment should be followed by this Court. By applying the judgment of the supreme Court in the case of Union Territory of Ladakh (supra), this Court held that it was bound to follow the earlier judgment of the Supreme Court, i.e., TRF Limited (Supra) wherein the Managing Director of N.F. Railway could not have constituted the members of the Arbitral Tribunal, in terms of Section 12(5) and the 7 th Schedule of the Act.

Thus, it is clear that the respondent Railways could not have constituted an Arbitral Tribunal consisting of serving/retired Railway Officers, as it was not in consonance with Section 12(5) and 7th Schedule of the Act, in the absence of any waiver given by the petitioner to Section 12(5) of the Act.

LW 54:07:2024

RAGHAVENDRA SHANKAR GONDI v. SUNDARAM FINANCE LIMITED [MAD]

Civil Miscellaneous Appeal No.1441 of 2024

N.Anand Venkatesh,J. [Decided on 27/06/2024]

Arbitration and Conciliation Act, 1996- Section 37- appeal against orders- arbitration proceedings- interim order against the appellant attaching / freezing bank accounts- whether tenable-Held, No.

Brief facts:

The 1st respondent, who is the claimant has initiated arbitration proceedings for recovery of money from the appellants. The case of the claimant is that the appellants have availed loan facilities under an agreement dated 30.11.2018. After receiving the loan amount, the payments were not made regularly as per the terms of the agreement. The 2nd appellant stood as a guarantor for the said loan. Since default was committed, notices were exchanged and ultimately, the dispute was initiated before the Arbitrator. Pending the adjudication, an interim application was filed for issuing prohibitory orders restraining the Garnishee from making any payment to the appellants to the extent of amount that is repayable by the appellants to the 1st respondent.

Decision: Allowed.

Reason:

The arbitrator taking into consideration the material placed before the Tribunal passed an interim order directing the bank not to disburse any amount up to a limit of 27,27,739.73/- , to the 1st appellant or to anyone claiming under him and to remit the amount to the claimant directly and further restraining the claimant from withdrawing any amount up to a limit of 27,27,739.73/-.

The appellants have filed this appeal mainly on the ground that the interim order that has been passed by the learned Arbitrator virtually amounts to passing the decree in favour of the 1st respondent and permitting the 1st respondent to take away the entire amount that is available in the credit of the bank account of the 1st appellant.

In the considered view of this Court, the interim order that is passed under Section 17 of the Act is more in the nature of an interim measure to ensure that the claimant is not left high and dry after an award is passed in their favour and that some security is available to enable the claimant to ultimately see the colour of the coin. However, this does not mean that the interim measure will virtually tantamount to granting the final relief to the claimant. That goes beyond the object of Section 17 of the Act.

The apprehension of the 1st respondent / claimant is that if the amount that lies in the bank is permitted to be operated by the appellants, they may take away the entire amount and the claimant will not have any security to ultimately recover the amount from the appellants. In such a scenario, the interim measure ought to have been to restrain the appellants from withdrawing the amount until some security is given at least for the admitted liability. However, the arbitrator has not only restrained the bank from disbursing the amount to the 1st appellant but also has directed the bank to remit the amount to the 1st respondent / claimant. Such interim order virtually takes away the right of defence for the appellants and it also tantamount to passing a final order without even affording an opportunity to the appellants.

In the light of the above discussion, this Court is inclined to modify the interim order passed by the Arbitrator. Accordingly, there shall be a direction to the Garnishee namely State Bank of India not to disburse any amount up to a limit of Rs.27,27,739.73 to the 1st appellant or to anyone claiming under him. The garnishee shall also not remit the amount to the 1st respondent / claimant till final adjudication happens before the Arbitrator. It is also left open to the appellants to file an application before the Arbitrator seeking for lifting the garnishee order by raising all the grounds. On such filing of application, the 1st respondent / claimant shall be provided an opportunity and an order shall be passed by the learned Arbitrator, within a period of four weeks from the date of filing of the application by the appellants to lift the garnishee order.

The above order will sufficiently balance the rights of both the parties. This Court intentionally did not go into the merits of the case since it may have a bearing in the proceedings that are pending before the learned Arbitrator.