

**LEX NEWSLETTER ZONE**

Litigation Bytes:

- Unsigned Arbitration Agreement Not Invalid In All Cases.
- Quashing of FIR to be entertained by High Courts, even if Charge sheet is filed during pendency of the Quashing Petition.
- "Subsequent Transferee of Flats" not always barred from filing Consumer Complaints, says Supreme Court
- Revision petition is not maintainable in a consumer dispute against an appeal in enforcement proceedings
- Manufacturer and Dealer equally responsible for repairing of the vehicle under warranty

~ Case Analysis: - 'Disputed debt' under IBC Code vis-a-vis the N.I. Act: Recent decision by NCLAT.

**SUPREME COURT OF INDIA**

**✚ Unsigned Arbitration Agreement Not Invalid In All Cases.**

**-Vaishali Sinha, Associate**

The Supreme Court of India in the matter of *M/s Caravel Shipping Services Private Limited v M/s Premier Sea Foods Exim Private Limited*<sup>1</sup> has held that the only prerequisite for an arbitration agreement is that it should be in writing and it is not necessary that in all cases, an arbitration agreement needs to be signed.

The issue arose out of a document styled as "Multimodal Transport Document/ Bill of Lading" (BOL). The opening clause of BOL specified "the Merchant expressly agrees to be bound by all the terms, conditions, clauses and exceptions on both sides of the Bill of Lading whether typed, printed or otherwise".

It was also pointed out to the court that an arbitration clause was included in the printed terms annexed to the BOL. The Respondent filed a suit being O.S. No. 9 of 2009 before the sub-judge Court in Kochi to recover a sum of Rs 26,53,593/- in which BOL was expressly stated to be a part of the cause of action. An I.A was filed by the Appellant under Section 8 of the Arbitration and Conciliation Act, 1996 in which it was pointed out to the Court that an arbitration clause was included in the printed terms annexed to the BOL. The sub-Court, Kochi, by its judgment dated 08.01.2013 dismissed the I.A., stating that printed conditions annexed to the BOL would not be binding upon the parties.

The Appellant filed an Original Petition under Article 227 of the Constitution of India. The High Court held that the arbitration clause being in a printed condition annexed to the BOL indication no intention to arbitrate and accordingly dismissed the Original Petition. A Review filed against the said judgment was also dismissed by a judgment dated 14.06.2016. The Apex Court heard the arguments of both the parties in the present appeal and held that the term

<sup>1</sup> (C.A. No.-010800-010801 of 2018 in SLP (C) Nos. 31101-31102 of 2016),

“Merchant” expressly agrees to be bound by all the terms, conditions, clauses and exceptions on both sides of the BOL whether typed, printed or otherwise. The Apex Court pointed out that the respondent has itself relied upon the BOL as part of its cause of action to recover the sum of Rs. 26,53,593/- in the suit filed by it. The respondent, therefore, cannot blow hot and cold and argue that for the purpose of its suit, it will rely upon the Bill of Lading (though unsigned) but for the purpose of arbitration, the requirement of the Arbitration Act is that the arbitration clause should be signed. The Court referred to *Jugal Kishore Rameshwardas v Mrs. Goolbai Hormusji*<sup>2</sup>, wherein it was held that an arbitration agreement needs to be in writing though it need not be signed, which is also contained in Section 7(3) of the Act. Section 7(4) of the Act should not be construed to mean that in all cases, an arbitration agreement needs to be signed. The only pre-requisite is that it should be in writing. Accordingly, the appeal was allowed and the judgments of the High Court set aside.

**✚ Quashing of FIR to be entertained by High Courts, even if Charge sheet is filed during pendency of the Quashing Petition.**

**-Arijit Basu, Associate**

The Hon'ble Supreme Court<sup>3</sup> while hearing an appeal against an Order dated 02.02.2016 of the Hon'ble Delhi High Court observed that during the pendency of the appeal before the Delhi High Court, a charge sheet was filed in the court of MM- Patiala House and Appellant by way of amendment added an additional prayer for quashing of the Charge Sheet. Hon'ble High Court disposed off the Petition u/s 482 CrPC and refused to quash the FIR, as it deemed that the Quashing Petition had been filed pre-maturely. The Supreme Court dealt

with two questions in the matter, first whether the Quashing of FIR was untenable as the proceedings had gone past the stage of FIR and have resulted in a Charge Sheet. The Court while answering the issue in positive noted and made reference to the judgement of the Supreme Court in the case of *Joseph Salvaraj A. v. State of Gujarat*<sup>4</sup>

*“There is nothing in the words of this Section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High court can exercise jurisdiction under Section 482 of Cr.P.C even when the discharge application is pending with the trial court. Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced, and the allegations have materialized into a charge sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court”.*

The second question was whether offence under Section 406 of the CrPC is made out considering the fact that there was an agreement between the Parties and it is alleged that the Appellant has misappropriated the Security Deposit paid under the Agreement. Hon'ble Supreme Court held observed that that the case pertains to be a civil dispute and that the Respondents had made no effort to recover his money except by filing a criminal complaint. The Court while quashing the FIR held that the prosecution was malafide, untenable and solely intended to harass the Appellant.

<sup>2</sup> AIR 1955 SC 812

<sup>3</sup> Anand Kumar Mohatta & Anr. vs. The State (Govt. of NCT of Delhi) Department of Home & Anr.

<sup>4</sup> (2011) 7 SCC 59

✚ **“Subsequent Transferee of Flats” not always barred from filing Consumer Complaints, says Supreme Court**

**-Shrusti Jena Maharathy, Associate**

Justice Uday Umesh Lalit, Hon'ble Justice at Supreme Court of India, in a recent judgement<sup>5</sup> held that consumer complaints by 'subsequent transferee' of flats are not always barred. The appellant in this case had relied on the case precedent of Haryana Urban Development vs. Raje Ram, and stated that since the original allottees had transferred their interests, the complaint was not maintainable. The respondent Vrajendra Jogjivandas Thakkar, who had initiated the complaint, had received a residential flat with CCI Projects Pvt. Ltd. from a family member by virtue of a two times transfer in between the family. In order to explain the ratio of their judgement in the case at hand, the Bench explained the rationale behind the Haryana Urban Development Authority judgement as well stated that the aforementioned case is related to the situations where the original allottees had transferred their allotments in favour of total strangers. The Bench held that the present case is different, as the transfers were effected within the family. As a result, the Supreme Court held that where the facts are so largely divergent, the ratio of one case cannot be blindly applied to another. The bench thus disposed off the case, by modifying by way of reducing the compensation awarded at an earlier stage, since the Bench observed that a certain amount of delay in handover of possession was understandable.

**HIGH COURT**

✚ **Revision petition is not maintainable in a consumer dispute against an appeal in enforcement proceedings**

**-Shrusti Jena Maharathy, Associate**

The Hon'ble Delhi High Court has ruled that a revision petition is not maintainable against an appeal in enforcement proceedings in a consumer dispute. The petitioner, KA Nagmani<sup>6</sup>, questioned the National Commission's jurisdiction to entertain a Revision Petition under Section 21 of the Consumer Protection Act, against an order passed by the State Commission in an appeal preferred against an order of the District Forum, with regards to enforcing orders passed in respect of the consumer's complaint. It was contended by the petitioner that proceedings to enforce an order passed in a consumer complaint is not an order in a consumer dispute, and thus, a Revision Petition would not be maintainable.

The Court asserted that the jurisdiction of the National Commission is limited to calling for records and passing appropriate orders in any "consumer dispute", which may be pending, or may have been decided by the state commission. It has been opined that the nature of execution proceedings is fundamentally different from the nature of proceedings of adjudication of a complaint, and that such proceedings are independent.

Even though the Court clarified that while proceedings for enforcement of orders are also part of the proceedings initiated by a complainant, however would not mean that orders passed that deal with enforcement of orders adjudicating the consumer dispute, are also orders in that consumer dispute.

✚ **Manufacturer and Dealer equally responsible for repairing of the vehicle under warranty**

**-Deepika Kumari, Associate**

<sup>5</sup> CCI Projects (P) Ltd vs. Vrajendra Jogjivandas Thakkar , Civil Appeal No. 6784-6785 of 2018, SC MANU/SC/1336/2018

<sup>6</sup> K.A. Nagamani vs. NCDRC, HC Delhi in Writ Petition (Civil) No. 1746 of 2018, MANU/DE/4105/2018

In the matter of Shivam Motors Private Limited & Anr. V. Neeraj Kumar Tiwari & Anr.<sup>7</sup>, the Hon'ble National Consumer Dispute Redressal Commission has modified and partly allowed the order dated 23.04.2015 of State Commission, Chhattisgarh in Appeal No. FA/14/648 and held that the Dealer i.e. Shivam Motors Private Limited and the manufacturer, Tata Motors Limited are jointly and severally liable to pay the compensation awarded by the State Commission, Chhattisgarh.

The Hon'ble National Consumer Dispute Redressal Commission has also held that the State Commission, Chhattisgarh has erred in totally exonerating the manufacturer, Tata Motors Limited from its liability under warranty. The Hon'ble National Commission has further held that the dismissal of complaint against the manufacturer, Tata Motors Ltd. is justified only to the extent that the State Commission has not found any manufacturing defect in the vehicle. However, so far as the warranty is concerned the manufacturer, Tata Motors Ltd. is equally responsible as the Petitioners.

### Case Analysis

#### ✚ 'Disputed debt' under IBC Code vis-a-vis the N.I. Act: Recent decision by NCLAT.

By Amiy Kumar, Associate

Case: *Sudhi Sachdev Vs. APPL Industries Ltd.*

Company Appeal (AT) (Insolvency) No. 623 of 2018 (Order dated 13.11.2018)

Background of the case:- In the captioned matter, an appeal was preferred by Sudhi Sachdev promoter of M/s Auto décor Pvt. Ltd. ("**Corporate Debtor**") before the National Company Law Appellate Tribunal ("**NCLAT**"), against an order<sup>8</sup> dated 02.08.2018 passed by the National Company Law Tribunal, New Delhi

Bench ("NCLT") wherein an application under section 9 of Insolvency and Bankruptcy code, 2016 ("IBC") was filed by the AAPL Industries Ltd. ("Respondent") and was admitted and order of moratorium was passed.

The Counsel for the Appellant submitted that a cases under section 138 & 141 of the Negotiable Instrument Act, 1881 ("N.I. Act") was filed by the Respondent against the Appellant, which are pending before the competent Jurisdiction. Therefore, in view of pendency of such cases, application under section 9 of IBC is not maintainable.

#### Issues Raised

- Whether pendency of proceedings under 138 & 141 of Negotiable Instrument Act, 1881 can be considered as a dispute pending before any other court of law?
- Whether such pendency of cases can be considered as ground for rejection of an application under section 9 of IBC?

#### Ratio decidendi:

The NCLAT referring to the landmark judgement passed by Supreme Court in the matter of *Innovative Industries Ltd. Vs ICICI Bank & Ors. (2018)1 SCC 407*, wherein the Supreme court observed as follows:

*The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit*

<sup>7</sup> Revision Petition No. 2055 of 2015, NCDRC

<sup>8</sup> M/s Appl Industries Ltd Vs. M/s Auto Décor Pvt. Ltd. IB-530(ND)/2018

*or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."*

Referring to the aforementioned ruling of Supreme Court, the NCLAT held that it is not disputed that there is a debt payable to the Respondent and default on the part of the Appellant. The pendency of the cases under 138 & 141 of N.I. Act, even if accepted as recovery proceeding, the same cannot be held to be a dispute pending before a court of law. The NCLAT in the present appeal held that the pendency of the case under Section 138 & 141 of Negotiable Instruments Act, 1881 actually amounts to admission of debt and not an existence of dispute. Thus, the NCLAT found no merit and dismissed the appeal vide order dated 13.11.2018.

#### Conclusion:

The above judgement of NCLAT, appears to provide the following conclusion:

Where the existence of debt has already been admitted by corporate debtor in its Pending 138 and 141 cases filed by the Operational Creditor, the same shall amount to the admission of debt under the IBC code. In the present case, the complaint under 138 and 141 of N.I. Act was already instituted against the Appellant, prior to the application filed under section 9 of IBC by the Respondent. In the said pending proceeding, the Appellant has already admitted the defaults in making payments and debt payable to the Respondent. There was no dispute as to debt payable to the Respondent by the Appellant. However, in the event, if there is pre-existence of dispute as to debt payable in any such pending proceeding, the same cannot be considered as the admission of debt under the IBC code.

*\*It has been noticed in order copy of both the NCLT order dated 02.08.2018 & NCLAT order dated 13.11.2018, that court has erred in referring the sections under N. I. Act. It should be section 141 of the N.I. Act instead of 441.*

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