Foreword

It gives me immense pleasure to present to you the twenty second issue of Case in Point, a quarterly update on the recent legal developments in the field of Dispute Resolution.

In this issue, we have examined the law relating to termination *simpliciter* of employment of a workman under the Industrial Disputes Act, 1947. The article discusses the judicial approach towards termination *simpliciter* and what a Court looks at when determining whether a termination was simply a discharge or in fact a dismissal for cause.

We have also examined the recent decision of the Supreme Court in *M/s SCG Contracts India Pvt. Ltd. v. K. S. Chamankar Infrastructure Pvt. Ltd. & Ors.*, wherein the Supreme Court held that a defendant will forfeit the right to file a written statement if the same is not filed within the period of 120 days from the date of the service of summons in the suit.

We have also analysed the Supreme Court's decision in *Rai Bahadur Shree Ram and Company Pvt. Ltd. v. Rural Electrification Corporation Ltd. & Ors.*, wherein the Supreme Court held that insolvency proceedings against the corporate guarantor may be initiated without initiating prior proceedings against the principal debtor under the Insolvency and Bankruptcy Code 2016.

This issue also contains a section on *Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*, wherein the Supreme Court laid down the guidelines to be followed by arbitrators while determining the rate of interest to be granted on an arbitral award in an international commercial arbitration.

We have further examined the decision of the Supreme Court in *Emaar MGF Land Limited v. Aftab Singh*, wherein the Supreme Court has considered the arbitrability of consumer disputes and held that a consumer dispute can be referred to arbitration only if the aggrieved party has not availed of its remedy under the Consumer Protection Act, 1986 and he/ she is a party to an arbitration agreement.

Lastly, the issue is concluded by an analysis of the Supreme Court's decision in *Mantri Techzone Private Limited v. Union of India & Ors.*, wherein the Supreme Court set aside the directions of the National Green Tribunal New Delhi which had increased the buffer/green zones for construction of projects in the city of Bengaluru even though the zonal regulations under the revised master plan provided for smaller areas based on which commencement certificates were awarded to different projects.

Feedback and suggestions from our readers would be appreciated.

Please feel free to send in your comments to caseinpoint@cyrilshroff.com.

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A common type of dispute that arises between employers and employees, is the validity of a decision terminating the employment of an employee. As a rule, the employer-employee relationship (including termination thereof), is governed by the employment contract, although specific statutory checks and balances may be applicable to employees who are ‘workman’ as defined by the Industrial Disputes Act, 1947 (“Act”). Employers may terminate one’s employment in accordance with their rights under the terms of the contract to avoid facing disciplinary proceedings, and tainting the employee with an allegation of misconduct. Even then it is not unusual for an employee to dispute the termination of his employment by his employer, albeit it is ostensibly pursuant to a contractual right to terminate employment based on the contract terms.

In such cases, courts are empowered to ascertain whether the exercise of this power by the employer was bona fide and properly applied. In this piece, we will discuss the judicial approach of Courts in determining whether a termination was a simpliciter discharge of the employee, or in fact a dismissal for cause where it would have been appropriate to hold an enquiry and give the employee an opportunity of being heard against such dismissal. In the latter case, justice and equity demand that the employee be heard and principles of natural justice be complied with. It therefore becomes essential to discuss the considerations before a Labour Court when deciding a dispute on the validity of such a termination.

We discuss below the following issues - (a) the authority of Labour Courts to grant relief in cases of wrongful termination; (b) whether or not the conduct of a domestic enquiry is mandatory; and (c) determining the intention behind the employer's decision to terminate one's employment.

When can Courts go behind an order of termination?

- **Statutory authority of Labour Courts to grant relief in cases of termination**

If the employee is a 'workman' as defined in the Act, the Labour Court (or the Industrial Tribunal, as the case may be) will determine whether the termination was on account of misconduct and therefore punitive in nature. Equally, the court can enquire into whether the termination was without alleging any cause, in consonance with the contractual terms of employment or relevant standing orders, and valid.

As discussed in detail in the following sections, if the Court finds that the termination was on account of misconduct, though disguised as termination simpliciter or without cause, it will examine the reasons and evidence available with the employer based on which the employer reached its decision. The Court will also examine whether the termination was *bona fide* or otherwise. If the Court comes to the conclusion that the termination/dismissal was invalid/wrongful/illegal, the employee will be entitled to some relief, which could include, depending on the facts of the case and circumstances of the termination, reinstatement, back wages and/or compensation.

In many cases, Labour Courts, sympathising with the worker, granted some form of relief even where their

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1 Section 2 (s): “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in an unauthorised or administrative capacity—

(iv) who, being employed in a supervisory capacity, draws wages exceeding ten thousand rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of an unauthorised nature.

2 Tata Engineering and Locomotive Co. Ltd. v. SC Prasad (1969) 3 SCC 372, paragraph 9

3 Section 11A: “Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen. - Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require: Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.”
termination was found to be valid. However, the Supreme Court clarified that while exercising its power under Section 11A (which deals with Labour Court's power to give appropriate relief in case of wrongful dismissal etc.) the Court must keep aside issues of sympathy and it must be based on the facts pleaded and evidence proved. Accordingly if there is no error in the termination and it is held to be valid, no relief can be granted under Section 11A.

- **Requirement of holding a domestic enquiry and following principles of natural justice**

A common defence that is set up by a workman who challenges his termination as wrongful is that while it was implemented under the guise of termination simpliciter on the basis of the employment contract, it was actually a dismissal for alleged misconduct and punitive in nature. Accordingly, such a dismissal should have mandated an enquiry by the employer which would then give the workman an opportunity to present his case against such termination.

It is however not every case in which it is feasible for an employer to conduct a full-fledged enquiry. This could be, for instance, when the employer loses confidence in the overall suitability of an employee as a result of certain acts/omissions of the employee which impact his/her performance but has no cogent evidence to prove any act of misconduct on part of the employee. Indeed, on occasion, it may also be in the interest of the employee not to characterise the termination as being one for misconduct – which could then taint their character going forward.

This presents a predicament for employers but the answer lies in the careful distinction drawn by Courts between termination for misconduct, which is of a punitive nature, and simple termination as per the employment contract or applicable Standing Orders which does not attach any stigma to such termination.

It is quite usual that employment contracts provide for employment ‘at will’ i.e. that the employment is at the volition of the employee/employer and to that intent, do not require the termination to be for cause. In place of cause, the termination is usually upon notice, or payment in lieu of notice. This is separate from termination by the employer for cause, i.e. usually for misconduct or breach of the employment contract, code of conduct etc. That said, courts have nevertheless laid down conditions that must be complied with by employers in order to show that the termination did not amount to a dismissal for cause.

While the employer is required to follow principles of natural justice, it is has been held by courts that an employer can terminate the employee in accordance with the terms of the employment contract without any enquiry or hearing where the actions of the employee have led the management to lose confidence in him. Where the applicable employment rules or the contract gives the employer the right to terminate one's employment without holding an enquiry and the conduct of the employee is such that it creates a cloud of great suspicion because of which the management loses faith and trust in him, then it is open to the employer to terminate the employee for loss of confidence and this amounts to a simple discharge and not dismissal, thus requiring no enquiry as long as it is done in a bona fide manner. The reason why courts have done away with the requirement of enquiry in such cases is because the employer is in no manner terminating by casting aspersions on an employee but merely letting the employee go, in accordance with his contractual right to terminate, and such conduct is in fact favorable to the employee in that it does not impact his future chances of employment. However, the Supreme Court in the landmark cases of Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha and Air India Corp. v. VA Rebello has held that when the termination attains a punitive or stigmatic character such that the purpose of the termination is to pin guilt on the workman, they should be given a chance to present their side of the case.  

- **The intention behind the employer's decision to terminate**

 Courts essentially perform a public function while adjudicating such cases, and depending on the facts and circumstances of a given case, the Court will examine whether the employer's exercise of power was colourable or if it was bonafide. The management should have passed the termination order in a bona fide manner and in their genuine belief to avail the defense that the termination is

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5 See State of Punjab v. Ram Singh Ex. Constable AIR 1992 SC 2188, where the Supreme Court held that misconduct can involve moral turpitude, improper or wrongful behaviour, wilful in character, doing a forbidden act, or transgression of well-established rules of action or code of conduct. But, Supreme Court further stated that misconduct cannot include a mere error of judgment, carelessness or negligence in performance of duty.
8 Id.
not punitive in nature. The terms used in the order of termination and the form which it may have taken are not considered conclusive, and the labour courts/tribunals are entitled to go behind the form and determine employer's motivation behind the decision of termination.

However, the failure to conduct an enquiry prior to termination will not always lead to the conclusion that the employer's decision was driven by mala fides. In the case of *Dinkar Bali Palekar v. Bharat Forge* services of workmen were terminated without conducting an enquiry on the ground of loss of confidence as a result of grave suspicion of their involvement in an arson incident outside the factory premises. The Bombay High Court upheld their termination, noting:

“That there was an incident of arson is indisputable. That there was some material which connected the concerned workmen with the said incident and could have given rise to a haunting suspicion of their involvement, is evident. That the material was such as could have been accepted by any reasonable employer is indubitable. To say that the employer-company did not prove the misconduct of arson against the workmen, is chasing the mirage since the employer did not allege any misconduct against them. Looked at from any angle, I see no reason to differ from the view taken by the Labour Court in both the cases.”

(emphasis added).

The employer does not therefore have to prove the misconduct (which is why an enquiry is not necessitated) since the termination is not for any specific action that requires evidence. For example, in cases where an employee has been accused in a criminal case arising from or attendant to his employment, the employer does not sit in judgment in the manner that a criminal court does. As long as the employer has material before it that raises a cloud or suspicion of a given conduct and the termination that follows is bona fide, looking at the facts and circumstances of the case, the Court will uphold the termination. However, Courts do not accept the employer's defense, *prima facie*. In cases where termination has been found to be invalid and cloaked as a dismissal for misconduct, it has been held that such termination has been without any basis or on a “whim or fancy” of the employer and the employer's bona fides are not established.

Therefore, Labour Courts essentially perform a public function acting as a check on the employer’s right of termination. If the Court finds that the termination has been colourable, it has the power to reinstate with back wages. In some cases, the wages awarded may be partial (if it is found that some fault is also attributable to the employee) or in some cases compensation may be deemed as a more appropriate remedy.

When both the options of termination for misconduct (with enquiry) and termination in accordance with the terms of the contract (without an enquiry), are available with an employer, depending on a given situation an employer may choose the latter. In doing so however, the considerations we have noted herein need to be borne in mind given that it is always open to a Court to scrutinize and examine the basis of the termination, should there be a challenge. Therefore, it also becomes essential that employers draft the terms of employment contracts and termination notices cautiously so as to avoid any adverse inference being drawn against them in the event the workman brings an action before a Court.

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12 (1997) 3 LLJ (Supp) 482.
13 L. Michael v. Johnson Pumps India Ltd. 1975 I LLJ 262.
In *M/s. SCG Contracts India Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd.*¹, the Supreme Court held that the filing of a written statement within 120 days is mandatory from the date of service of summons in the suit, failing which it would forfeit its right to do so, and is not saved even within the inherent power under Section 151 of the Code of Civil Procedure.

The counsel for the plaintiff (SCG Contracts) took the court through Order VIII Rule 1 and 10 (which provide the time period for filing of a written statement) and relied upon *Bihar and Ors. v. Bihar Rajya Bhumi Vikas Bank Samiti*, as well as *Canara Bank v. N.G. Subbaraya Setty and Anr.*² to argue that that the amendments so made now provide for the consequence of non-filing of written statement, and as this is so, the provisions of Order VIII Rules 1 and 10 can no longer be said to be directory but can only be said to be mandatory.

The Court, in its analysis traced the amendments to the CPC by virtue of the Commercial Courts, Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ("Commercial Courts Act"). The Court noted that on a perusal of the amended second proviso to Order V Rule 1 (sub-rule 1) and Order VIII Rule 1 and Rule 10 of the CPC, it is clear that if the defendant fails to file its written statement within the 120 day period, it would forfeit its right to do so. This is further buttressed by the proviso in Order VIII Rule 10 also adding that the Court has no further power to extend the time beyond this period of 120 days.

Placing reliance on *Oku Tech Private Limited v. Sanjeet Agarwal & Ors*³ and *Maja Cosmetics v. Oasis Commercial Pvt. Ltd.*⁴ the Court noted that it has been held that the amended provisions of the CPC are mandatory and not directory in nature. Further, the court held that considering the clear, definite and mandatory provisions of Order V read with Order VIII Rule 1 and 10, they cannot be circumvented by taking recourse to the inherent power under Section 151.

In view of the above decision, defendant (Chamankar Infrastructure) must ensure the filing of the written statement within the period of 120 days from the date of service of summons, Order VIII Rule 1 being a mandatory and not a directory provision.

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¹ Civil Appeal 1638 of 2019 arising out of Special Leave Petition (C) No. 103 of 2019
² (2018) 9 SCC 472
³ AIR 2018 SC 3395
⁴ CS(OS) 3390 of 2015
⁵ 2018 SCC Online Del 6698

The dispute before the Supreme Court was limited to the award of this dual rate of interest granted by the arbitral tribunal and the grant of 15% post award interest when no payment of interest was provided for in the Agreement.

The Court noted that as the ICA is seated in India, Section 31(7) of the Arbitration Act would govern the payment of interest in the present case. Analysing Section 31(7) of the Arbitration Act, the Court reiterated that (i) Section 31(7)(a) provides for pre-award interest wherein the power of the arbitrators to grant interest will be subject to any agreement on interest between the parties; and (ii) Section 31(7)(b) provides for post-award interest, where tribunal is not bound by an agreement between parties, but is bound by the principles of reasonability.

The Supreme Court noted that in this case, (i) the interest component awarded amounts to 50% of the sum awarded and is therefore disproportionate; (ii) no reasons have been provided by the arbitrator for imposition of 15% interest beyond 120 days; (iii) there was a specific contractual provision which expressly provided that there would be no consequential damages payable by the purchaser (award debtor) in the event of termination, as the supplier (award holder) would get 105% of costs incurred by SSNP as compensation. Notably, there was no provisions in the Agreement on the payment of Interest.

Disputes arose between parties resulting in the termination of the Agreement by SSNP demanding Vedanta to pay its outstanding dues under the Agreement. With no payment forthcoming, SSNP initiated arbitration proceedings raising claims in multiple currencies seeking 18% pendente lite and future interest on the sought amount. On November 09, 2011, the three member arbitral tribunal awarded SSNP certain amounts in both INR and Euros along with an interest rate of 9% from the date of institution of the arbitration proceedings upto 120 days from the date of the award. Interestingly, the award provided that in case of Vedanta’s failure to pay the awarded sum within 120 days, SSNP would be entitled to a further 15% interest till realization. Vedanta's petitions under Section 34 and Section 37 to the Delhi High Court were dismissed on February 02, 2018 and August 30, 2018 respectively, pursuant to which Vedanta approached the Supreme Court.

Accordingly, the Court found the 'dual rate of interest' to be unjustified as Vedanta is entitled to challenge the award within a maximum period of 120 days, and imposition of 15% interest beyond 120 days would foreclose or seriously...
affect his statutory right to challenge the award under Section 34 of the Arbitration Act.

Separately, the court also found that the imposition of the same rate of interest on INR and EURO components of the award would be exorbitant and amount to compensatory relief, which would be contrary to the provisions of the Agreement (which, as set out above, provided for compensation to SSNP by Vedanta’s payment of 105% of SSNP’s costs incurred). Therefore, the 9% interest rate on the EURO component was also set aside.

We note that while in this case an interest rate of 9% was found suitable for *pendente lite* and future interest, the same was in the peculiar fact scenario of this case and is unlikely to form a precedent on the actual rate of interest awarded. This view is buttressed by the views taken by courts post *Vedanta*, wherein courts have upheld a higher rate of interest. For example, in *Subhash Verma and Ors. v. Darshan Singh and Ors.*, the Delhi High Court, on February 08, 2019 relied upon the un-amended provision of Section 31(7)(b) and found an interest rate of 18% to be reasonable. In *Fitness First India Pvt. Ltd. v. Ambience Developers and Infrastructure Pvt. Ltd.*, the Delhi High Court found an interest rate of 12% to be reasonable as future interest. In *MMTC Ltd. v. Karan Chand Thapar and Bros.*, the Delhi High Court applied the amended Section 31(7)(b) and found an interest rate of 12% as reasonable.

While the reasonability of interest awarded may not be of significant precedential value, importantly, the Supreme Court prescribes certain factors which an arbitral tribunal must take into consideration while exercising such discretion reasonably: (i) the ‘loss of use’ of the principal sum; (ii) the types of sums to which the Interest must apply; (iii) the time period over which interest should be awarded; (iv) the internationally prevailing rates of interest (in case the award is in a foreign currency or partly in a foreign currency); (v) whether simple or compound rate of interest is to be applied; (vi) whether the rate of interest awarded is commercially prudent from an economic stand-point; (vii) the rates of inflation, (viii) proportionality of the count awarded as Interest to the principal sums awarded. The guiding principle is to ensure that on the one hand, the rate of interest must be compensatory as it is a form of reparation granted to the award-holder; while on the other hand it must not be punitive, unconscionable or usurious in nature. The tribunal must also keep in mind factors such as the ‘prevailing economic scenario’, reasonability and interest of justice while awarding interest.

Accordingly, Vedanta’s appeal was partially allowed and it was held that (i) the interest rate of 15% post 120 days granted on the entire sum was deleted; (ii) a uniform rate of 9% was made applicable for the INR component; and (iii) the interest payable on the EURO component would be LIBOR + 3 percentage points on the date of the award, till realization.

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1 Delhi High Court judgment dated February 08, 2019 in O.M.P. 9/2018, MANU/DE/0641/2019
In *Emaar MGF Land Limited v. Aftab Singh*¹, the Supreme Court considered whether disputes falling within the purview of Consumer Protection Act, 1986 are capable of being referred to arbitration. The appellant had challenged the order passed by National Consumer Disputes Redressal Commission (“NCDRC”) holding that consumer disputes are non-arbitrable. The parties had entered into a Buyer's Agreement and when disputes arose, the respondent approached NCDRC praying for a direction against the appellant to transfer possession of a built up villa in favour of the respondent. The appellant appeared before the NCDRC and also filed an application under section 8 of the Arbitration and Conciliation Act, 1996 (“Arbitration Act”) for referring the matter to arbitration in light of the arbitration clause in the Buyer's Agreement but NCDRC held that consumer disputes are non-arbitrable.

The respondent argued that the consequence of allowing an application under section 8 of the Arbitration Act would be that every consumer would be forced to adjudicate its dispute before an arbitral tribunal and would not be able to avail the beneficial remedy provided under the Consumer Protection Act, 1986. It was also argued that Section 2(3) of the Arbitration Act clearly states that Part I of the Arbitration Act shall not affect any other law for the time being in force by virtue of which certain disputes may not be referred to arbitration.

The Supreme Court analyzed the provisions of the Consumer Protection Act, 1986 against the amended non-obstante provision of Section 8 of the Arbitration Act and relied upon its decisions in *National Seeds Corporation Limited v. M. Madhusudan Reddy*² and *Rosedale Developers Private Limited v. Aghore Bhattacharya*³ to hold that since the Consumer Protection Act, 1986 provides a special remedy, the proceedings thereunder are required to be continued despite an arbitration agreement between the parties. The Supreme Court also relied on *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited*⁴ and *Vimal Kishor Shah v. Jayesh Dinesh Shah*⁵ and observed that the Consumer Protection Act, 1986 provided a specific remedy and this being the case, the remedy provided under the Arbitration Act for deciding such disputes is barred by implication.

The Supreme Court further examined the 246th Law Commission Report, the Statement of Objects and Reasons for the Arbitration and Conciliation (Amendment) Bill, 2015 and the notes on clauses on amendment in section 8 and concluded that the amendment was aimed to reduce the scope of judicial authority to refuse reference to arbitration (unless no arbitration agreement exists) and the amendment in section 8 cannot be meant with any other intention. The statutes providing additional/special remedies were not in contemplation while amending section 8 of the Arbitration Act and it cannot be given such an expansive meaning and intent so as to inundate the entire regime of special legislations where such disputes have been held to be not arbitrable.

On this basis, the Supreme Court held that NCDRC was correct in rejecting the application filed under section 8 of the Arbitration Act and the disputes could not be referred to arbitration. More pertinently though, the Supreme Court observed that in the event a person entitled to seek an additional special remedy provided under the statute (being the remedy provided under the Consumer Disputes Act, 1986 in this case) does not opt for such remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only in cases where specific remedies are provided for and are opted for by a party that the judicial authority can refuse to refer the dispute to arbitration.

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¹ Review Petition (C) Nos. 2629-2630 of 2018 in Civil Appeal Nos. 23512-23513 of 2017
² (2012) 2 SCC 506
³ (2018) 11 SCC 337
⁴ (2011) 5 SCC 532
⁵ (2016) 8 SCC 788
While the Supreme Court has referred to its judgments in *Booz Allen* and *Vimal Kishor Shah* to note that certain disputes, including consumer disputes, may not be arbitrable, it has gone on to decide that consumer disputes can be referred to arbitration where no recourse has been sought under the statute such as the Consumer Protection Act, 1986 which provides an additional/special remedy. Therefore, it would seem that the issue of whether a consumer dispute is arbitrable or not has not been settled conclusively. Instead, the Supreme Court has left the door open for consumers to choose whether they want to submit the dispute to arbitration or to the consumer forum. The consequence which seems to flow from this decision is that a consumer dispute would be arbitrable if the consumer chooses to refer the matter to arbitration but as soon as the consumer approaches the consumer forum, no application under Section 8 of the Arbitration Act would lie. Such an approach is a departure from other tests of arbitrability, viz. the nature of dispute, right relied upon by the party in dispute, the nature of relief sought, etc. and instead seeks to suggest that the arbitrability of a dispute would depend on the option exercised by the consumer. It remains to be seen whether the test applied here will be followed in subsequent decisions or the Supreme Court would revert back to the test laid down in *Booz Allen*. The issue may become clear once the Supreme Court decides the issue in the case of *Vidya Drolia v. Durga Trading Corporation*\(^6\) where the Supreme Court has referred the matter to a 3 judge bench to decide on the arbitrability of disputes under Transfer of Property Act, 1882.

\(^6\) Civil Appeal No. 2402 of 2019
In *Mantri Techzone Pvt. Ltd. v. Forward Foundation & Ors.* and other connected appeals ("Judgment"), a three judge bench of the Hon’ble Supreme Court ("Supreme Court") considered various appeals filed before it wherein the judgment dated May 4, 2016 of the Hon’ble National Green Tribunal, Principal Bench, New Delhi ("NGT") in Original Application No. 222 of 2014 ("Original Application") was challenged by Mantri Techzone Private Limited ("Respondent No. 9"), Core Mind Software and Services Private Limited ("Respondent No. 10"), the State of Karnataka and other developers who were aggrieved by the general directions issued by the NGT in its judgment.

The Original Application was filed by Forward Foundation, Praja RAAG and Bangalore Environment Trust ("Applicants") before the NGT alleging that the commercial projects being developed by Respondent No. 9 and Respondent No. 10 in the valley land immediately abutting Agara Lake and the land lying between Agara and Bellandur Lakes ("Project Lands"), were exposing the entire ecosystem of the area to severe threat of environmental degradation and consequential damage. On May 7, 2015, in exercise of its jurisdiction under Section 20 of the National Green Tribunal Act, 2010 ("NGT Act"), the NGT passed an order inter alia directing that a committee be constituted to inspect the Project Lands and other areas of Bangalore ("Committee"), to examine the allegations made against Respondent No. 9 and Respondent No. 10 in the valley land immediately abutting Agara Lake and the land lying between Agara and Bellandur Lakes ("Project Lands"), were exposing the entire ecosystem of the area to severe threat of environmental degradation and consequential damage. On May 7, 2015, in exercise of its jurisdiction under Section 20 of the National Green Tribunal Act, 2010 ("NGT Act"), the NGT passed an order inter alia directing that a committee be constituted to inspect the Project Lands and other areas of Bangalore ("Committee"), to examine the allegations made against Respondent No. 9 and Respondent No. 10 and recommend appropriate restoration steps and buffer zones around lakes. In the interim, Respondent No. 9 and Respondent No. 10 were restrained from creating any third party interests or parting with possession of the Project Lands and were also directed to pay a sum of Rs. 117.35 Crores and Rs. 22.5 Crores respectively to the Karnataka State Pollution Control Board ("KSPCB").

The order dated May 7, 2015 was challenged by Respondent No. 9 and Respondent No. 10 in an appeal before the Supreme Court and on May 20, 2015, the Supreme Court disposed of this appeal by granting liberty to Respondent No. 9 and Respondent No. 10 to file an application before the NGT to re-hear the matter on merits and decide it afresh. Accordingly, the matter was re-heard by the NGT, which then passed the judgment dated May 4, 2016 holding that the buffer/green zones to be maintained from the periphery of the lakes/rajakaluves be increased to 75 (seventy five) meters in respect of lakes, 50 (fifty) meters in respect of primary rajakaluves, 35 (thirty five) meters in respect of secondary rajakaluves and 25 (twenty five) meters in case of tertiary rajakaluves. Further, the environmental compensation amount was upheld in respect of Respondent No. 9, the environmental compensation for Respondent No. 10 was reduced from Rs. 22.5 crores to Rs. 13.5 Crores and Respondent No. 9 and Respondent No. 10 were directed to demolish offending structures from the Project Lands.

In the Judgment, the Supreme Court has analyzed the right of appeal available under Section 22 of the NGT Act and the scope of enquiry in such an appeal. It has noted that Section 22 of the NGT Act affords the right of appeal to a party aggrieved by an order of the NGT on the grounds specified in Section 100 of the Code of Civil Procedure, 1908 ("CPC"), which entails that an appeal can be filed only where a substantial question of law is involved. The determination of whether a question of law is 'substantial' or not would, in turn, necessitate an examination of its public importance, effect on rights of the parties, and the settled legal position in relation to such a question. The Supreme Court has further observed that the right of appeal granted under this provision does not ipso facto permit a party to seek re-appreciation of the factual matrix of the entire matter or the evidence therein, nor does it allow a party to re-argue its case in such an appeal.

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1 Sir Chunilal V. Mehta and Sons, Ltd. v. Century Spinning and Manufacturing, 1962 Supp. (3) SCR 549
The Supreme Court has also provided clarity on the powers/jurisdiction of the NGT. Considering the provisions under Section 15 of the NGT Act, it has observed that the scope of Sections 15(1)(b) & (c) of the NGT Act have not been made relatable to Schedule I of the NGT Act. This conspicuous difference between Section 15(1)(a) and Section 15(1)(b) & (c) of the NGT Act has been observed as affording a wider range of powers to the NGT. Further, it has been noted that power and jurisdiction afforded to the NGT under Section 14 of the NGT Act is independent of the power provided under Section 15 of the NGT Act and that Section 18 of the NGT Act recognizes the right to file separate applications under the two provisions, which have different periods of limitation. Even Section 20 of the NGT Act, which mandates application of the principles of sustainable development, precautionary principle and 'polluter pays' principle in the orders of the NGT, has been observed to offer a wide range of powers to the NGT to take restorative measures in the interest of the environment when coupled with its powers under Section 15(1)(c) of the NGT Act. As such, the Supreme Court has taken a supportive stance on wide powers being granted to the NGT.

The Supreme Court has also held that a Central legislation enacted under Entry 13 of List-I Schedule VII of the Constitution of India will have an overriding effect over State legislations. Drawing reference to Section 33 of the NGT Act, which provides that the provisions of the NGT Act shall have an overriding effect over any other law or any instrument having effect by virtue of any law other than the NGT Act, it has been held that the NGT while providing for restoration of environment in an area, can specify buffer zones around specific lakes and water bodies which contradict zoning regulations under state legislations or the RMP 2015. The Supreme Court also observed that the facts of the case gave rise to an independent cause of action under Section 15 of the NGT Act, therefore, the limitation period of 5 (five) years from the date on which cause of action arises was available to the Applicants. As such, it was held that the Applicants cannot be restricted to the limitation period provided under Section 14 of the NGT Act i.e. 6 (six) months.

With respect to the general directions issued by the NGT in its judgment dated May 4, 2016 which affected the builders/developers in the city of Bangalore, the Supreme Court has observed that the learned senior counsel appearing for the Applicants submitted that there were no objections to set aside these general directions except to the extent those directions related to Respondent No. 9 and Respondent No. 10. As such, the contentions of the appellants in the other connected appeals were not taken into account by the Supreme Court in view of the lack of opposition by the Applicants to allowing such other connected appeals and accordingly, the general directions passed by the NGT in the judgment dated May 4, 2016 in relation to buffer zones have been set aside.
Rai Bahadur Shree Ram and Company Pvt. Ltd. v. Rural Electrification Corporation Ltd. & Ors.

[Order dated February 11, 2019 in [Civil Appeal No.1484-2019].]

In Rai Bahadur Shree Ram and Company Pvt. Ltd. v. Rural Electrification Corporation Ltd. & Ors. 1, a Division Bench of the Supreme Court dismissed the Civil Appeal preferred against an order of the NCLAT which held that an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") for initiation of corporate insolvency resolution process by a financial creditor, is maintainable against a corporate guarantor without initiation of such process against the principal borrower/debtor. 2

The appeal before the NCLAT arose out of an order dated July 6, 2017 by which the adjudicating authority (being the NCLT Bench at Kolkata) admitted an application under Section 7 of the IBC preferred by the 'Rural Electrification Corporation Limited' ("Financial Creditor") against 'Ferro Alloys Corporation Ltd. ("Corporate Guarantor")', who had guaranteed repayment of loans availed by the principal debtor ("Principal Debtor").

In construing whether the application under Section 7 was maintainable against the Corporate Guarantor, the court noted that the term "corporate guarantor" found no mention in the IBC. The court observed that in absence of any express provision providing for inter-se rights, obligation and liabilities of a corporate guarantor qua a financial creditor under the IBC, the same would have to be gleaned from the Indian Contract Act.

Drawing on principles laid down in decisions of the Supreme Court (which in turn relied on rulings by High Courts), the court observed that under Section 128 of the Indian Contract Act, the liability of the surety is coextensive with that of the principal debtor, 3 and such liability to pay the entire amount was immediate and not contingent on exhaustion of remedies against the principal debtor. The court also drew on observations to the effect that the very object of a guarantee (typically given as a collateral security to a lender) is defeated if the creditor is asked to postpone his remedies against the surety.

On the facts, the court considered the terms of the deed of guarantee in question, particularly the Corporate Guarantor's obligation to pay forthwith without demur or protest upon invocation of the guarantee by the Financial Creditor on the Principal Debtor's failure to discharge its obligation to pay. The court also noted that the Principal Debtor and Corporate Guarantor had both admitted their liability in their respective audited balance-sheets. Holding that non-payment of such admitted debt amounted to a "default" (within the meaning of Section 3(12)), the court observed as soon as a guarantee is invoked against a corporate guarantor, the guarantee becomes a debt and the corporate guarantor becomes a 'corporate debtor' in terms of the IBC.

Note that while the Supreme Court dismissed the captioned Civil Appeal by way of a non-speaking order, the NCLAT's decision stands 'merged' into said order and enjoys the status of a Supreme Court ruling.

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1 Order of the Supreme Court of India dated February 11, 2019 in Civil Appeal No.1484-2019
2 Order of the NCLAT dated January 8, 2019 in Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017
3 Bank of Bihar Ltd. vs. Dr. Damodar Prasad & Anr. (1969) 1 SCR 620; State Bank of India v. Indexport Registered and Ors.(1992) 3 SCC 159
**Cabinet nod for setting up of the GST Appellate Tribunal**

The Union Cabinet has approved the creation of a National Bench of Goods and Services Tax Appellate Tribunal (GSTAT). The GSTAT will be in New Delhi and will be presided over by a president. It will consist of a technical member from the Centre and a technical member of the States.

This is pursuant to Chapter XVIII of the Central Goods and Services Tax Act (the “CGST Act”), which provides for an appeal and review mechanism for dispute resolution under the GST regime. Section 109 of this Chapter empowers the Centre to constitute, on the recommendation of the GST Council, an appellate tribunal for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority.

**Cabinet approves the New Delhi International Arbitration Centre Ordinance, 2019**

The Union Cabinet, has approved promulgation of the Ordinance for establishing the New Delhi International Arbitration Centre (NDIAC) for the purpose of creating an independent and autonomous regime for institutionalised arbitration. Previously, the New Delhi International Arbitration Centre Bill, 2019 was passed by Lok Sabha, however, the Bill eventually lapses with the dissolution of the Lok Sabha.

**Aadhaar Amendment Ordinance Permitting Use of Aadhaar for SIM Connections & Bank Accounts Promulgated by the President**

The President has promulgated Aadhaar and Other Laws (Amendment) Ordinance 2019 (the “Ordinance”) to make amendments to the Aadhaar Act, 2016 (the “Act”), Prevention of Money Laundering Act, 2005 & Indian Telegraph Act, 1885. Recently, the Constitution Bench of the Supreme Court had upheld the constitutional validity of the Act with certain restrictions and changes. The compulsory use of Aadhaar based KYC for mobile connections and bank accounts was prohibited by the Apex Court, which was to be followed with amendments in the various Acts, in order to ensure that personal data of Aadhaar holder remains protected against any misuse and Aadhaar scheme remains in conformity with the Constitution. Towards this, the Aadhaar and Other Laws (Amendment) Bill, 2018 was passed by the Lok Sabha which eventually lapsed.

The Ordinance amends the Act to *inter alia* provide for voluntary use of Aadhaar for taking mobile connections and opening bank accounts. Other salient features of the Ordinance include offline verification, i.e. use of Aadhaar number to establish identity without authentication using biometric data or other electronic means; Virtual ID, which enables one to authenticate identity without providing aadhaar number; authentication failure due to old-age, sickness, or technical reasons should not result in denial of any service, benefit or subsidy; civil penalties for collection, use and disclosure of Aadhaar information in contravention with the provisions of the Act.

**Ministry of Finance Enhances Income Tax Exemption for Gratuity to 20 Lakhs**

The Ministry of Finance recently enhanced the income tax exemption for gratuity as stipulated under section 10 (10)(iii) of the Income Tax Act, 1961 to Rs. 20 lakhs from the existing Rs. 10 lakhs. The latest enhancement of tax exemption limit on gratuity follows a government notification issued on March 29, 2018, under which the ceiling was increased from Rs 10 lakh to 20 lakh effective from the date of the notification.

**Justice PC Ghose appointed as India's First Lokpal**

Former Supreme Court judge Justice Pinaki Chandra Ghose has been appointed as the country’s first Lokpal. In addition, four judicial and four non-judicial members have been appointed.
Triple Talaq Ordinance Re-Promulgated by the President

The President re-promulgated The Muslim Women (Protection of Rights on Marriage) Second Ordinance 2019, which seeks to protect the rights of married Muslim women and prevent divorce by the practice of instantaneous and irrevocable ‘talaq-e-biddat’, i.e triple-talaq by the their husbands" and to "provide the rights of subsistence allowance, custody of minor children to victims of triple-talaq.

The Muslim Women (Protection of Rights on Marriage) Bill 2018 as amended (the “Bill”) makes pronouncement of triple-talaq a non-cognizable and non-bailable offence. The Bill further stipulates that cognizance of the offence can be taken only on complaint is lodged by the victim wife or her close blood relatives. Further, the Bill states that the offence was compoundable at the instance of the wife on such terms and conditions as deemed fit by the Magistrate. The Bill also states that the offence is bailable, and Magistrate can grant bail, but only after hearing the wife.

Leprosy Cannot be a Ground for Divorce

The Central Government notified the Personal Laws (Amendment) Act 2019, to remove leprosy as a ground for divorce. By virtue of this, the provisions pertaining to the leprosy as a ground for divorce or separation under the Divorce Act, 1869, the Dissolution of Muslim Marriage Act, 1939, the Special Marriage Act, 1954, the Hindu Marriage Act, 1955 and the Hindu Adoption and Maintenance Act, 1956 shall stand amended.

Key Judicial Appointments

The Supreme Court Collegium comprising Chief Justice Ranjan Gogoi, Justice N.V. Ramana and Justice S.V. Bobde has approved the appointment of Advocates Avinash G. Gharote, N.B. Suryawanshi, Madhav Jamdar, Anil Kilor and Milind Narendra Jadhav as judges of the Bombay High Court.

Further, Advocates Jyoti Singh, Prateek Jalan, Anup Jairam Bhambhari and Sanjeev Narula have been appointed as judges of the Delhi High Court.

Additionally, the collegium comprising collegium comprising the Chief Justice Ranjan Gogoi and Justices A.K. Sikri, S.A. Bobde, N.V. Ramana, Arun have appointed Justices Dinesh Maheshwari and Sanjiv Khanna as the new judges to the Apex Court.
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The views expressed in this newsletter do not necessarily constitute the final opinion of Cyril Amarchand Mangaldas and should you have any queries in relation to any of the issues set out herein or on other areas of law, please feel free to contact us on cam.publications@cyrilshroff.com or write to following coordinates:

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