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What's Inside

(1)

Draft of affidavit of assets formulated by JR Midha J in the *Bhandari Engineers* line of cases set aside (Delhi High Court)

05 July 2021 | Delhi Chemical and Pharmaceutical Works Pvt. Ltd. & another v. Himgiri Realtors Pvt. Ltd. & another | EFA (OS) Comm.) No. 4/2021 | Rajiv Sahai Endlaw & Amit Bansal JJ | 2021 SCC OnLine 3603

Order XXI of the Code of Civil Procedure, 1908 ("CPC") deals with the execution of decrees and orders. Rule 41 (2) says that if a decree for the payment of money has remained unsatisfied for 30 days, the court may, on an application of the decree-holder, require the judgment-debtor to make an affidavit stating the particulars of the assets. The format of this affidavit is Form 16-A of Appendix E, CPC.

In the *Bhandari Engineers* line of cases, JR Midha J passed many judgments from time to time, drafting and re-drafting the form in which in execution petitions, the judgment-debtors were required to disclose their assets. But, in effect, these orders were set aside by the 2-judge bench in *Delhi Chemicals* ruling that the court does not have the power to make draft affidavits and direct adoption of that format in all execution petitions.

It appears that the chronicle started in a matrimonial case, *Kusum Sharma* v. *Mahinder Kumar Sharma*, 2015 SCC OnLine Del 6793. Midha J noted the practice in matrimonial courts requiring parties to file the affidavit of assets in Form 16-A. But for several elaborate reasons that he gave he believed that the format is not comprehensive, so he drafted a new one.

Then, in an execution petition, in *Bhandari Engineers (I)*, 2016 SCC OnLine Del 182, decided on 11 January 2016, he noted that if the judgment-debtor does not make proper disclosure in Form 16-A, the court can exercise its inherent power under Section 151 CPC and direct filing of further affidavits. For this proposition, he relied on *Kusum*. He further opined that in all execution cases for recovery of money, the judgment debtor should file, at the initial stage itself, an affidavit of assets in Form 16A as on the date of the institution of the suit, and as of the current date and also bank accounts for the last three years.

After that, in *Bhandari* (*II*), 2019 SCC OnLine Del 11879, decided on 05 February 2019, Midha J formulated the draft(s) of affidavits to be mandatorily filed by the judgment-debtors in all execution proceedings. He located his source of power in Section 151 CPC, Order XXI Rule 41, CPC, Sections 106 and 165 of the Evidence Act ("EA"), and Article 227 of the Constitution of India.

In *Bhandari (III)* of 05 December 2021, available here, Midha J modified the format. He again referred to the same sources of his power and gave detailed reasons.

In *Bhandari (IV)* of 05 August 2020, available here, the format was modified some more. Finally, more modifications were done in *Bhandari* (*V*) 2021 SCC OnLine Del 3595 on 24 June 2021.

Delhi Chemical involved a dispute between the landowner and Himgiri Realtors, the real estate developer. A money award was made in Himgiri's favour. Delhi Chemical was asked to pay, but the decree-holder Himgiri was required to deliver back the possession of the land owned by Delhi Chemical.

Himgiri applied for execution and set out in the petition the schedule of properties of the judgment-debtor Delhi Chemical (including the land already in possession of Himgiri). Further, Himgiri did not apply for a direction to Delhi Chemical (the judgment debtor) to make an affidavit stating the particulars of its assets.

In one of the hearings on 23 December 2019, JR Midha J directed Delhi Chemical (judgment-debtor) to file affidavits in the form that had been formulated in *Bhandari* (*III*). Delhi Chemical applied for a review but it was dismissed.

Delhi Chemical challenged these two orders in an appeal under Section 13 (1A) of the Commercial Courts Act, 2015 ("CCA").

The appellate court examined the correctness of *Bhandari III* to the extent relevant. Rajiv Sahai Endlaw, writing for the appellate court, held that the source of the court's power that Midha J relied on could not be invoked because:

(a) The court cannot invoke its inherent jurisdiction under Section 151 CPC if a

party has a remedy under the CPC itself.

(b) Once specific provisions have been made in the CPC, the court cannot contravene them exercising powers under Sections 106 and 165 of the EA. Also, powers under these provisions do not extend to issuing general directions.

(c) The rule-making powers under Article 227 of the Constitution vests with the "Full Court." It does not enable individual judges to issue general rules. The rule making procedure is set out in Part X CPC (Sections 121 to 130). It includes amending or varying Order XXXI Rule 41 but only by following the prescribed procedure.

The court also held:

(a) In breach of the right of privacy, the judgment-debtor in a money decree cannot be directed routinely to disclose far-reaching information formulated in *Bhandari III* affecting substantive rights of the judgment-debtors.

(b) The particulars of the assets were known to the executing court (from the execution petition). Therefore, it was required to immediately attach any of the properties from which the decretal amount could be recovered.

(c) There was no reason for issuing directions to file an affidavit in a form other than prescribed, and that too without an application by the decree-holder.

Several preliminary questions also had been raised in the matter on the court's jurisdiction. On these, the court said as follows:-

(a) An appeal, even though not specifically enumerated under Order XLIII CPC (like the one here filed against an order in an execution petition directing to file affidavits), is maintainable under Section 13 CCA. The proviso to Section 13 (1A) is enabling, not disabling. This is what was held by a 2-judge bench in *D & H India Ltd.* v. *Superon Schweisstechnik India Ltd.* 2020 SCC OnLine Del 477. "Though we … entertain doubts as to the correctness of the view taken in D&H …it is deemed expedient to settle the law" on the issue of the affidavit.

(b) The jurisdiction of the Commercial Court/Commercial Division under Section 10 CCA also extends to an execution petition.

The direction to the judgment-debtor to file an affidavit of assets in any form was set aside.

Access the court's decision here.

Categories: Section 36 ACA | Enforcement | Enforcement of Domestic Awards | Execution of Arbitral Award | Order XXI CPC | Interim Measure by Court | Section 37 ACA | Appealable Orders| Affidavit of Assets | Order XLIII CPC | Section 10 CCA | Section 13 CCA | Article 227 Constitution of India

(2)

An arbitration clause contained in a unilateral invoice may satisfy the form requirements (Delhi High Court)

05 July 2021 | Swastik Pipe Ltd. v. Shri Ram Autotech Pvt. Ltd. | Arb. P. 241 of 2021| Sanjeev Narula J | 2021 SCC OnLine Del 3604

An unsigned invoice contained an arbitration clause, based on which Swastik applied for the appointment of an arbitrator. The respondent was unrepresented throughout.

Narula J noted that an arbitration agreement within the meaning of Section 7 ACA could be unsigned. But, "since the terms and conditions printed on an invoice are generally inserted unilaterally by the party issuing the invoice", was there a mutual intention to be bound by the arbitration clause?

In answer, Narula J examined the law on what constitutes intent. Then, he fell back on the proposition that an arbitration agreement could be contained in an exchange of communication [Section 7 (4) (b) ACA] or exchange of statement of claim and defence [Section 7 (4) (c) ACA].

He appointed an arbitrator reasoning as follows:

(a) Because the respondent did not appear, the assertion of the existence of the arbitration agreement is unrebutted. This consequence follows also from

not responding to the notice of arbitration, which was served.

(b) The parties had been transacting for some time, and some of the invoices raised were paid during the same time (as the dispute) and thus acted upon. Therefore, it could be safely inferred, *prima facie*, that parties were *ad idem* as to the arbitration agreement too.

(c) The final decision on the existence of the arbitration agreement is in the domain of the arbitrator.

Access the decision here.

Categories: Section 7 ACA | Arbitration Agreement | Section 11 ACA | Appointment of Arbitrators | Formal Validity of Arbitration Agreement | Existence of Arbitration Agreement | Consequence of Not Appearing

(3)

Ad-interim order made in Section 9 petition is not appealable (Meghalaya High Court)

06 July 2021 | National Thermal Power Corporation v. Meghalaya Power Distribution Limited | Arb. A. No. 1 of 2021 | HS Thangkhiew and W Diengdoh JJ | 2021 SCC OnLine Megh 134

The Meghalaya High Court refused to entertain an appeal against an *ad interim* order made in an application under Section 9 ACA. The matter was a dispute between the power generating company NTPC and its licensee MPDL. An *ad interim* order was made *ex parte* by Shillong's Commercial Court against NTPC, directing it to maintain the *status quo* on encashment of a letter of credit. However, the court gave liberty to apply for vacation or modification of the order. NTPC applied for vacating the order, but that application was rejected. Now, NTPC filed an appeal under Section 37 ACA read with Section 13 CCA.

The court concluded that:

(a) Section 37 (1) (b) ACA contemplates appeals against final orders only. Section 8 CCA narrows the scope further and bars a petition against an interlocutory order of a Commercial Court.

(b) The order in the case was *ad interim* and not conclusive as to the reliefs sought.

(c) Section 13 (1) CCA merely provides the appeals forum and does not confer an independent right of appeal. Thus, if an appeal is not maintainable under Section 37 ACA, it would not be maintainable under Section 13 CCA.

All other arguments, including a challenge that the matter fell under the Electricity Act and the Commercial Court had no jurisdiction under the ACA was left to be determined by the Section 9-court.

Access the decision here.

Categories: Section 37 ACA | Appealable Orders | Section 13 CCA | Section 9 ACA | Interim Measures by Court | Ad Interim Orders | Section 8 CCA | BGS Soma | Kandla Export | Maintainability | Electricity Act

(4)

The power to issue interim directions does not involve final adjudication, interpreting, and enforcing a contract (Delhi High Court)

06 July 2021| Navayuga Bengalooru Tollway Pvt. Ltd. v. National Highways Authority of India | OMP (I) (Comm.) 152 of 2021 | Asha Menon J | 2021 SCC OnLine Del 3611

A single-judge bench of Asha Menon J has reiterated what the 2-judge bench (of which Menon J was a part) had said recently in *National Highways Authority of India* v. *Bhubaneswar Expressway Private Limited*, FAO (OS) (COMM) 66/2020. See our Highlight here.

Menon J rejected an application under Section 9 ACA that sought a direction from the respondent NHAI to release 90% of the total debt due (INR 1400 crores approximately). The applicant had argued that the liability was established, and the money had to be paid by NHAI for the benefit of the applicant's lenders.

She distinguished *Jetpur Somnath Tollways Ltd.* v. *NHAI*, 2017 SCC OnLine Del 9453. She ruled that the power to issue interim measures can only be exercised if it does not involve final adjudication and does not require an interpretation of the contract. Thus, even if a party asking for a direction were to offer bank

guarantees securing the deposits (made by the other party), the domain to decide substantive claims is of the arbitrator, not the court.

Access the judgment here.

Categories: Section 9 ACA | Interim Measures by Court | Section 37 ACA | Appealable Orders | Mandatory Orders | Interim Mandatory Injunction | Mandatory Injunction | Final Relief | Limitation | Limitation Under Section 37 ACA | Admitted Liability | Securing the Amount in Dispute in Arbitration | Jetpur Somnath

(5)

Arbitration Act is not inconsistent with the RERA Act (Patna High Court)

07 July 2021| Bihar Home Developers and Builders v. Narendra Prasad Gupta | Request Case No. 28 of 2020 | Sanjay Karol CJ | 2021 SCC OnLine Pat 1355

A single judge of the Patna High Court has ruled that the Real Estate (Regulation and Development) Act, 2016 is not inconsistent with the ACA. Sanjay Karol CJ relied on Section 88, RERA, which provides that the provisions of RERA shall be in addition to, and not in derogation of, the provisions of any other law. He also found no inconsistency between the two enactments within the meaning of Section 89 RERA (that gives RERA the primacy over another statute in case of an inconsistency).

Karol J also said that the petitioner's right to invoke arbitration was not foreclosed or waived merely because they had approached the authority under RERA.

An argument that the underlying agreement and the arbitration agreement were fraudulently obtained (because the respondent was not allowed to read the document before it was signed and registered with RERA) was also rejected.

After it received the notice of arbitration, the respondent filed a suit to declare the agreements null and void. It had also initiated criminal proceedings alleging fraud, in which the Magistrate ruled (presumably when declining to take cognizance) that forgery was not made out. Karol J said that neither the civil action nor the respondent's petition in the High Court against the Magistrate's order prohibited him from appointing an arbitrator.

The dispute had arisen in the context of a development agreement registered with RERA. The petitioner launched the project but had later invoked the arbitration clause alleging that the respondent concealed correct ownership information and disputes *inter se* co-owners.

Read the judgment here.

Categories: Section 11 ACA | Appointment of Arbitrators | Arbitrability | Arbitrability of Fraud | Forgery | Fraud | Nonarbitrability | Vidya Drolia | Ayyasamy | RERA | RERA and Arbitration

(6)

A ground that has a foundational link to pleas on record, and was before the arbitrator, can be introduced to amend the set-aside application (Calcutta High Court)

12 July 2021| Indian Oil Corporation (IOC) v. Tapas Kumar Das | AP No. No. 827 2018 | Moushumi Bhattacharya J | 2021 SCC OnLine Cal 2050

The respondent had raised a dispute on the termination by IOC of his dealership. In arbitration, some of the respondent's claims were allowed. IOC applied to set aside the award in 2018 within limitation and in 2021 applied to amend the set-aside grounds. The proposed grounds concerned the "Marketing Discipline Guidelines" framed by the Ministry of Petroleum regulating some types of dealership granted by public oil companies like IOC.

IOC's case re the proposed ground was that the arbitrator lacked jurisdiction because the respondent invoked arbitration without following the appellate remedy provided in the Guidelines. Though the existing set-aside grounds referred to the Guidelines, the jurisdictional point was not taken.

Allowing the proposed amendment, Bhattacharya J found and ruled as follows:

(a) The Guidelines were before the arbitrator. He framed an issue on it and took a view.

(b) A new ground is generally not permitted because Section 34 (3) ACA provides a specific time frame to challenge an award. Thus, allowing the addition of a new ground would defeat the objective of the ACA. But a ground that has a foundational link to the unamended ground would pass muster.

(c) The relevant test is whether the petitioner would be constrained to file a new application to challenge the award. The petitioner "passes this test" because the Guidelines constitute a significant part of the record and concern an important challenge. Thus, it goes to the root and should be allowed to determine the real question in controversy.

For the delay in applying, the court imposed a cost of INR twenty-five thousand.

Read the judgment here.

Categories: Section 34 ACA | Section 34 (3) ACA | Amendment | Amendment of Pleading | | Grounds for Setting Aside Arbitral Award | Object of ACA

(7)

Appointment mechanism hit by *Perkins* does not make the entire arbitration agreement invalid (Delhi High Court)

12 July 2021| Jyoti Sarup Mittal v. Executive Engineer, South Delhi Municipal Corporation | Arb. Petition No. 2725 of 2021 | Vibhu Bakhru J | 2021 SCC OnLine Del 3674

SDMC had executed with the petitioner an infrastructure contract. The General Conditions of Contract ("GCC") had an elaborate dispute resolution clause, including a pre-arbitral mechanism and then arbitration if necessary. The clause on the appointment mechanism provided that the arbitrator was to be appointed by the "Commissioner, MCD" (Commissioner, SDMC). However, "if for any reason it was not possible", the clause stated, "the matter should not be referred to arbitration at all."

When the petitioner applied under Section 11 ACA, it was common ground that the unilateral appointment clause had perished because of the expansive reading of Section 12 (5) ACA by the Supreme Court in *Perkins* and *TRF*. SDMC argued that the appointment had to be made by the Commissioner or not at all!

The "key question" was whether the entire arbitration clause must fail if the appointment mechanism was impermissible? Bakhru J "answered in the negative" and also relied on the *TK Engineering* case he had decided in March 2021 (see Highlight here). He reasoned that:

(a) The essence of the arbitration agreement was to resolve the dispute by referring it to an independent and impartial arbitrator.

(b) This agreement would not perish even if it were not possible to follow the mechanism of appointment set out in the contract. Therefore, the clause is, at best ancillary and may be considered severable.

(c) The provision that the matter should not be referred to arbitration is premised on the assumption that the Commissioner, MCD, is empowered to make the appointment. This clause cannot be read restrictively. The effect of the legislative amendments (interpreted by the Supreme Court in *Perkins*) that requires an independent and impartial tribunal cannot be read to mean that the arbitration agreement itself becomes ineffective.

(d) The court must endeavour to hold parties to their bargain.

As to SDMC's other contentions, Bakhru J said: (a) the argument that the GCC was not signed "feebly" made, and it was not disputed that the GCC was an integral part of the agreement, (b) it was contentious if the claims were time-barred and, therefore, a matter for the tribunal, (c) the argument that the petitioner did not follow the pre-arbitral mechanism was factually incorrect.

An arbitrator was appointed.

Read the judgement here.

Categories: Section 11 ACA | Appointment of Arbitrators | Independence and Impartiality of Arbitrator | Inoperative | Invalidity of Agreement | Invalidity of Arbitration Agreement | Perkins | Section 12 (5) ACA | Section 12 ACA | Severability | Doctrine of Severability | TRF | Pre Arbitral Mechanism | Pre Arbitral Procedure | Time Barred Claim | Vidya Drolia | Competence Competence | Kompetenz Kompetenz | Competence of Arbitral Tribunal to Rule on its Jurisdiction

(8)

Award set aside because there was no proper notice of the tribunal's appointment or of the proceedings (Delhi High Court)

15 July 2021| Komal Narula v. DMI Finance Pvt. Ltd. | OMP (Comm.) 166 of 2019 | Vibhu Bakhru J | 2021 SCC OnLine Del 3698

An arbitral award was set aside by Bakhru J, accepting the petitioner's argument that she did not have any notice of the appointment of the arbitral tribunal or the arbitral proceedings.

The tribunal had proceeded *ex parte* against several parties (including the petitioner and her former husband) on the assumption that they had refused service. In the tribunal's view, the petitioner refused service in 2016. But Bakhru J found that the refusal in 2016 was at the former matrimonial home of the petitioner, which she had already left in 2014.

The same notice was sent by a speed post to the petitioner's current address, and was not received back. Bakhru J noted Section 3 ACA and said that the speed post receipt was on record, so the petitioner would be deemed to be served. But this, in his view, did not establish that "in fact, the petitioner was served the notices or was aware of the proceedings."

He also said that the tribunal's assumption that the petitioner refused the notice was rebuttable. Further, a lawyer who had appeared once in the early stages of the proceedings was presumed to represent the petitioner too, which was not factually correct.

The award against the petitioner was set aside with liberty to institute fresh proceedings.

Read the judgment here.

Categories: Section 3 ACA | Receipt of Written Communications | Section 34 ACA | Application for Setting Aside Arbitral Award | Section 34 (2) (iii) ACA | Proper Notice | Inability to Present Case

(9)

Blacklisting order for breach of contract stayed to enable parties to approach the tribunal (Delhi High Court)

15 July 2021| Apaar Infratech Private Limited v. NHPC Limited | OMP (I) (Comm.) 207 of 2021 | Vibhu Bakhru J | Citation not available

A contract for a hydropower project awarded to the petitioner was terminated, alleging delay in commencing the project. Later, after an opportunity to show cause had been afforded, the petitioner was blacklisted in terms of the "Guidelines for Banning Business Dealings."

The petitioner applied to the court under Section 9 ACA challenging the order, but, as contemplated under their agreement, the parties were asked to arbitrate under the SCOPE Forum of Conciliation and Arbitration (SFCA). The application was directed to be treated as one made under Section 17 ACA.

Later, because the tribunal's constitution was taking time, the petitioner applied to the court again under Section 9 ACA.

Bakhru J took note of the precedent and noted that blacklisting not only affected the petitioner's business but its ability to secure contracts from other agencies. He also noted the phraseology used by the Supreme Court to describe blacklisting: "stigma", "instrument of coercion", "civil death", and others. Considering the nature of the dispute (breach of contract) and the serious adverse consequences on the petitioner, he thought it apposite to stay the order for six weeks to enable the parties to approach the tribunal.

Read the judgment here.

Categories: Section 9 ACA | Section 17 ACA | Interim Measures by Court | Interim Measures Ordered by Arbitral Tribunal | Blacklisting | Erusian

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