



MONTHLY NEWSLETTER

The Law Desk

July 2021 / TLD-04

CONTENTS

Limitation Act Applies To Arbitration Proceedings U/S 18(3) Of MSME Act, 2006...2

Supreme Court's Majority Verdict Quashes Some Provisions On 97th Amendment Dealing With Cooperative Societies.....4

Power Of Compounding Should Be Expressly Conferred By The Statute That Creates The Offence: SC.....6

Award That Ignores Crucial Evidence In Arriving At Its Decision Would Be Perverse.....8

Legal News and Updates.....9



1 LIMITATION ACT APPLIES TO ARBITRATION PROCEEDINGS U/S 18(3) OF MSME ACT, 2006

The Hon'ble Supreme Court in **Silpi Industries vs. Kerala State Road Transport Corporation¹ and Khyaati Engineering vs. Prodigy Hydro Power Pvt. Ltd²**, puts to rest two teething issues which occurred in the above-mentioned proceedings before the Facilitation Council "**Council**" namely (a) whether the Limitation Act, 1963 applies to arbitral proceedings commenced under section 18 (3) of the Micro, Small and Medium Enterprises Development Act, 2006 "**MSMED Act**"; and (2) whether a Counter Claim could be made by a 'buyer' in the arbitral proceedings initiated at the instance of 'supplier'.

Subsequently, both the orders were challenged before the Supreme Court, clubbing both the matter, comprising of Justice Ashok Bhushan and Justice R. Subhash Reddy held in an affirmative approach that *MSME Act*, being a special statute, certainly would have an overriding effect vis a vis Arbitration and Conciliation, 1996 "**1996 Act**", which is a general Act. The Judgment also noted that irrespective there being an existence of an agreement

between the parties for resolution of disputes between the parties through arbitration. If a seller falls in the ambit of the MSME Act, the seller can not be prohibited to approach the competent authority to present its claim.

The court opined that the provisions of Section 18(3) succinctly and aptly applied to the provisions of the 1996 Act to an arbitration initiated pursuant to a reference made to the Council as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 7 of that Act. Further, according to Section 43 of the 1996 Act, the Limitation Act is expressly applicable to the arbitrations and therefore it can be construed that limitation act will also apply to the proceedings under Section 18(3) of MSMED Act. The Supreme Court also affirmed its judgement in AP Power **Coordination Committee v Laco Komdapali Power Ltd & Ors³**, which held that the provisions of the Limitation Act, 1963 applied to proceedings under section 86(1) (f) of the Electricity Act, 2003 before the Electricity Regulatory Commission. In this background, the Supreme Court held that the provisions of the Limitation Act, 1963 applied to arbitral

¹ 2021 SCC OnLine SC 439

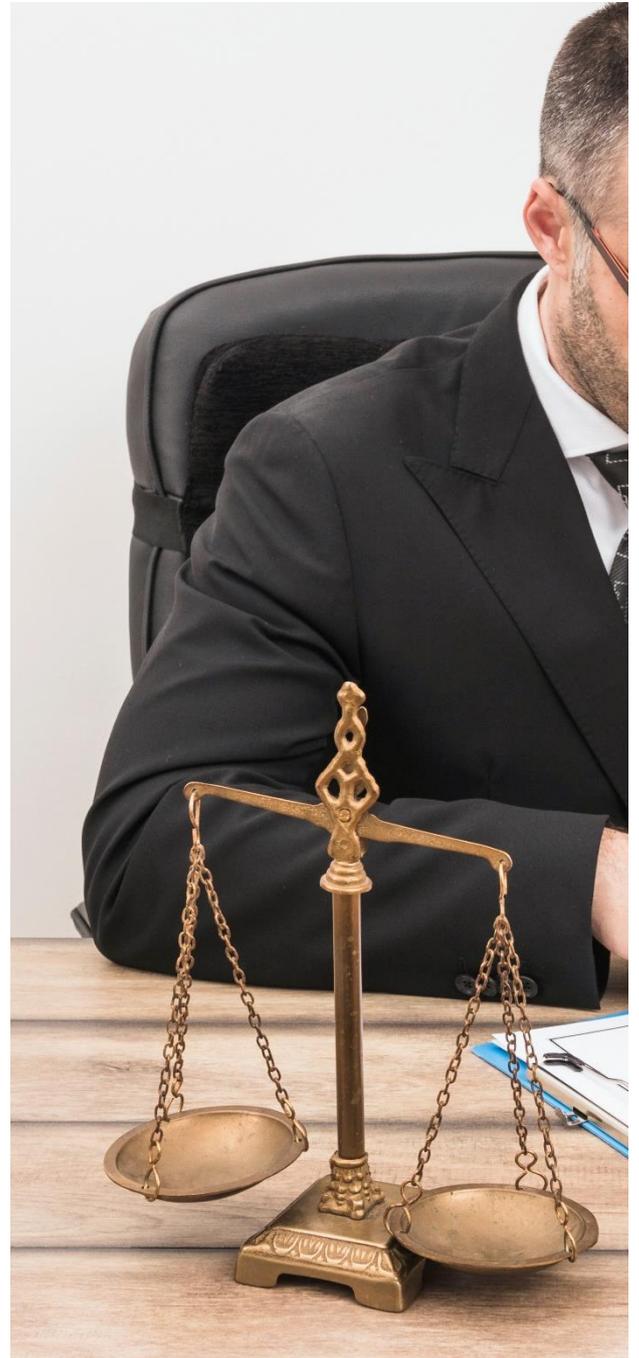
² CIVIL APPEAL NOS.1570-1578 OF 2021

³ (2016) 3 SCC 468

proceedings under section 18(3) of the MSMED Act.

Insofar as the question of maintenance of a Counter Claim is concerned it is apposite to state herein that Section 15, 16 and 17 of MSMED Act were crafted to benefit the 'suppliers' to put forth their requests for redressal of disputes before the Council under MSMED Act. The 'buyers' therefore were required to approach to either civil court or to invoke arbitration under arbitration agreement. As such, situation like these would inevitably result in contrary pronouncements from different forums.

To remove the doubts and dubiety, the Hon'ble Supreme Court in the present judgment opined that noted the wordings of Section 18 of the MSMED Act which enables 'any party to a dispute' to make a reference to the Council. It further held that, if section 18(3) expressly permits application of the Arbitration Act, there is no reason to curtail the right of the 'buyer' to bring a counter claim before the Council, especially when section 23(2A) of the Arbitration Act enables a party to bring a counter claim and plead a set off in arbitration proceedings, so long as the counter claim falls within the scope of the arbitration agreement.



2

SUPREME COURT'S MAJORITY VERDICT QUASHES SOME PROVISIONS ON 97TH

Recently, The Supreme Court in ***Union of India v Rajendra N Shah & Ors***⁴ rescinded some provisions of 97th Amendment which governs the Cooperative Societies and its management in India. The 97th Constitution Amendment was passed in December 2011 and incorporated in February 2012. The amendment was passed without any ratification by half of the states. Our Constitution is Quasi Federal but states have power to legislate upon matters which are entirely reserved for them.

Part IX B was added by the amendment which deals with imposition of the terms for proper functioning and management of cooperative societies. The Amendment aimed to overcome the issues faced by these societies. The new Amendment gave protection to formation of Cooperative societies under Article 19 (1) (c) and also inserted Article 43B which says that "The State Shall endeavor to promote voluntary formation, autonomous functioning, democratic Control and professional management of the Co-operative societies." It further set a limit on the

maximum numbers of directors in a society. The Gujarat High Court in *Rajendra N Shah v Union of India*⁵ declared the Amendment Unconstitutional for the want of ratification by half of the states. The High Court was of the view that Cooperative Societies fall under the State list and hence the Parliament had no power to make laws on subject which falls within the ambit of State List. The Central Government happened to challenge the decision of Gujarat High Court which has recently been decided by 2:1 majority by Supreme Court wherein the Court quashed some provisions of the 97th Amendment as it failed to have backed by half of the states. Though the amendment would still hold good for the Multi Cooperative society as Parliament has power to enact laws regarding Multi State Cooperative Societies. It is germane to highlight herein that the Supreme Court did not quash the whole Amendment but only those provisions regarding cooperative societies as the amendment challenges the legislative domain of the State Legislature. The Article 368(2) of Indian Constitution clearly states that if an amendment is regarding any changes with regards to the subject matter falling under the State list, it must be ratified by half of the States. Whilst applying the Doctrine of Severability, the court in order to

⁴ MANU/SC/0460/2021

⁵ MANU/GJ/0375/2013

draw a succinct distinction between Cooperative Societies and Multi State Cooperative Societies. In this regard Justice Joseph gave a dissenting view stating that Doctrine of Severability won't be applicable to the proposition in hand and therefore, the said Amendment should be quashed in totality.

Part IX B of the Constitution of India was operative with respect to Multi State Cooperative societies whereas provisions concerning cooperative societies were quashed. The Supreme Court has further opined that Amendment has affected the exclusive power under Entry 32 List and therefore the Amendment cannot be enacted without for the want of non-ratification by half of the States. The Central Government of India has recently announced the setting up of a separate Union Ministry of Cooperation which will furnish legal and policy framework for bracing the cooperative movement in the country. The newly incorporated Central Government ministry will be hoped to play a substantial role in regulation of Multi Cooperative Societies.



3

POWER OF COMPOUNDING SHOULD BE EXPRESSLY CONFERRED BY THE STATUTE THAT CREATES THE OFFENCE: SC

According to the **Black's Law Dictionary, Fifth Edition**, Compounding crime consists of the receipt of some property or other consideration in return for an agreement not to prosecute or inform on one who has committed a crime. There are three elements to this offense at common law, and under the typical compounding statute: (1) the agreement not to prosecute; (2) knowledge of the actual commission of a crime; and (3) the receipt of some consideration. In simpler terms, Compounding of an offence is a process whereby the victim and the accused reach a compromise that the accused is going to make good the liability on his part while the victim agrees to drop the charges against the accused and not pursue the case anymore. Recently, the Hon'ble Supreme Court in the case **Prakash Gupta Vs. Securities and Exchange Board of India**⁶ has observed that the power of compounding must be expressly conferred by the Statute that creates the offence. A division bench comprising of **Hon'ble Justice M.R. Shah** and **Hon'ble Justice D.Y. Chandrachud** observed that for offences lying outside the provisions of the **Indian Penal**

Code, 1860, compounding might be permitted if the Statute that creates the offence contains a provision for compounding before the offence could be made compoundable. In this case, the Appellant was being prosecuted for an offence under **Section 24(1)** of the Securities and Exchange Board of India Act, 1992 ("SEBI Act"). He sought compounding of offence u/s. 24A of the SEBI Act which provides that any offence punishable under this Act for which the punishment is neither imprisonment only nor imprisonment with fine, may either before or after the institution of proceedings, be compounded by a Securities Appellate Tribunal or a court before which such proceedings are pending. The Ld. Trial Judge at Tis Hazari Court had already rejected the application upholding the objection presented by SEBI that the offence could not be compounded without its consent. Furthermore, the Hon'ble Delhi High Court upheld the order of the Trial Judge in revision and held that an application for compounding cannot be allowed when the trial has reached the stage of conclusive arguments without SEBI's consent.

Therefore, the Appellant filed an appeal before the Hon'ble Supreme Court challenging the view taken by the Hon'ble High Court while rejecting the Revision Petition. The Hon'ble Apex court observed that the legislative sanction of

⁶ (2021) SCC Online SC 485

compounding of offences is based upon two contrasting principles. First principle is that in case if a dispute even if it is a criminal dispute, arises between two parties, then both the parties should be allowed to settle the dispute at any stage(with or without the permission of the court, depending on the offence) provided that proper restitution has been made to the aggrieved party and the second principle is that this sanction should not extend to situations where the offence is committed against the public at large, even if it may have directly affected the aggrieved party. In this case, the Hon'ble Apex Court held that the Appellants acts were quite serious in nature and "impinged upon the protection of investors and stability of the security market". Having due regard to the nature of allegations, the Hon'ble Supreme Court disposed of the Appeal stating that an order of compounding is unwarranted in this circumstance and affirmed the judgment of the Hon'ble High Court of Delhi.



4

AWARD THAT IGNORES CRUCIAL EVIDENCE IN ARRIVING AT ITS DECISION WOULD BE PERVERSE

Recently, the Supreme Court in **PSA Sical Terminals Pvt. Ltd. vs. The Board of Trustees** (Chidambranar Port Trust Tutuicorin & Ors .) “PSL”; observed that the ambit of Section 34 of Arbitration and Conciliation Act “Act” would cover the application to set aside an arbitration award that has ignored vital evidence in arriving at its decision. Furthermore, Justice RF Nariman and BR Gavai noted that a finding based on no evidence at all or if there is rewriting of a contract between the parties, as such the same would be challengeable on the grounds of patent illegality and breach to the fundamental principles of justice.

The preposition appeared in an appeal preferred by PSL against the judgment of Madras High Court, the Supreme Court made a categorical reference to the judgment in Associate Builders vs. Delhi Development Authority “Associate Builders” in order to fathom the notion of perversity. It would be apposite to refer para 31 from the Associate Builders: -

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the

same. It is important and requires some degree of explanation. It is a settled law where (i) a finding is based on no evidence or; (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse”.

After a comprehensive perusal of the Award passed by the arbitral tribunal, the Supreme Court observed that the said Award has created a novel contract between the parties therefore making the Award stand in the realm of perversity and against the principles set forth in **Ssangyong Engineering and Construction Company Limited vs. NHAI** . As such, the Court in Ssangyong Engineering held that the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. The Award cannot be made in such a way that it made parties to the contract do something for which they have not entered into a contract.

It was therefore opined in instant case that rewriting a contract for the parties would be breach of fundamental principles of justice entitling judicial interference by the Courts since such case would fall within the realm of exceptional category.

5

LEGAL NEWS AND
UPDATES

- In the case of M/s Supreme Bhiwandi Wada Manor Infrastructure Pvt Ltd vs State of Maharashtra, the Supreme Court has reiterated that there is no requirement of examining the complainant on oath under Section 200 of the Code of Criminal Procedure before a Judicial Magistrate orders police investigation under Section 156(3) CrPC.
- In the Kerala assembly ruckus case of 2015, the Division Bench comprising Justices DY Chandrachud and MR Shah denied the withdrawal of criminal prosecution against six CPI (M) members. The court said that the purpose of conferring privileges and immunities to the legislature is for the system's proper functioning without any hindrance, fear, or favour.
- A plea in the Supreme Court has been filed against Sachar Committee Report wherein it has been argued that Muslims cannot be treated as a special class entitled to benefits available to backward classes.
- The Supreme Court reserved its judgment on the petition filed by Amazon against the Delhi High Court Division Bench order that had stayed the order of the Single Judge, directing a status quo on the Future-Reliance deal.
- The Rajasthan High Court has dismissed a petition seeking prohibition in the state on offering or playing online fantasy games and other online games of mere skill by putting money at stake in expectation of winning.
- Advocate Ankani Biswas, a transgender person, has been impanelled as a panel counsellor for the State Legal Services Authority (SLSA) of West Bengal.
- The administrative committee of the Bombay High Court has decided to commence partial physical hearing of cases from August 2, 2021, in view of the improving COVID-19 situation in the State.
- Bollywood actress Shilpa Shetty has moved the Bombay High Court to restrain publication of *incorrect, false, malicious, and defamatory* information against her on social media and websites in connection with the arrest of her husband Raj Kundra in a porn film racket case.
- The Hon'ble Bench of the Supreme Court in the case of the Project Director, National Highways No. 45 E and 220 National Highways Authority of India v M. Hakeem & Anr. [LL2021 SC 311] vide its Judgment dated 20-07-2021

held that the Appellate Court only has the power to set aside or remand a case under Section 34 of the Arbitration and Conciliation Act, 1996, and cannot modify or correct an award.

- The Chief Justice of India NV Ramana said that the Supreme Court is thinking of evolving a system to electronically transmit bail orders directly to prisons so that prison authorities will not delay the release of prisoners awaiting a certified copy of the order.
- The Bar Council of India via its Press Release has informed that the Seven-Member Committee constituted by the Council to draft the *Advocates Protection Bill*.
- The murder of Dhanbad District Judge in the daylight of Jharkhand is shocking news for the entire judicial fraternity. Justice Chandrachud called it a “*brazen attack on the judiciary*”.
- The Union Cabinet has approved the amendment in the General Insurance Business (Nationalisation) Act, 1972 to facilitate privatisation of one general insurance company in the public sector.
- The Supreme Court dismissed the Review Petition, which sought for cancellation of proposed Class 12 CBSE exams for

Private/Compartment/ Patrachar students, and the review of the June 22 order which had approved CBSE's decision to cancel regular Class 12 exams and its scheme for objective assessment.

- The Delhi High Court on Thursday pulled up the Drug Controller of the Delhi Government for initiating prosecution against AAP MLA Praveen Kumar for procuring medical oxygen after observing that such an action cannot be initiated in a situation where both the Centre and the Delhi Government failed to provide sufficient oxygen to people.





CONTACT US

JAIPUR

The Law Desk

C-230, Gyan Marg, Tilak Nagar Jaipur 302004

Phone: + 91- 141- 4110610

Email: prateek@thelawdesk.org

DELHI

The Law Desk

4th Floor, Statesman House Building,

Barakhamba Road

Cannaught Place, New Delhi-110001

Phone: + 91- 11- 30446410

Email: prateek@thelawdesk.org

Disclaimer: The information contained in this newsletter is meant for information only and does not signify to be advice or opinion, legal or otherwise, whatsoever. Although we try to provide quality information, all information in this newsletter is provided "as is", with no guarantee of completeness, accuracy, timeliness or of the results obtained from the use of this information, and without warranty of any kind, express or implied, including, but not limited to warranties of performance, merchantability, and fitness for a particular purpose. The information provided herein is not intended to create an attorney-client relationship and not for advertising or soliciting. The Law Desk in no manner whatsoever intends to advertise its services or solicit work through this newsletter.