Corporate Laws

Landmark Judgement

LMJ 04:04:2024

ASEA BROWN BOVERI LTD v. INDUSTRIAL FINANCE CORPORATION OF INDIA & ORS [SC]

Civil Appeal No.3574 of 1998

R.C. Lahoti & Ashok Bhan , JJ. [Decided on 27/10/2004]

Equivalent citations: AIR 2005 SC 17; Com LJ 433 SC; 2004 (8) SCALE 146; 2004 (12) SCC 570; 2004 (9) JT 258; (2005) 126 Comp Cas 332.

Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992- Lease finance transaction for 56 cars- special court treating it as simple lease transaction – order to return 56 cars to custodian- whether correct-Held,No.

Brief facts:

This is an appeal under Section 10 of the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter 'the Act', for short), feeling aggrieved by an order dated 28.7.1998 whereby rejecting an objection petition preferred by the appellant, the Special Court has directed the appellant to hand over possession of all the 56 cars to the custodian within one week from the date of the order.

The appellant entered into a lease finance contract with the notified person (Fairgrowth Financial Services Ltd) for the said 56 cars and paid the lease rentals to Fairgrowth regularly. Respondent No.1 is the custodian of the notified person Fairgrowth. The appellant continued to pay the lease rentals to the custodian and the lease had come to an end. The Special Court ordered the return of 56 cars to the custodian , against which the appellant had approached the Supreme Court.

Decision: Allowed.

Reason:

In our opinion, financial lease is a transaction current in the commercial world, the primary purpose whereof is the financing of the purchase by the financier. The purchase of assets or equipments or machinery is by the borrower. For all practical purposes, the borrower becomes the owner of the property in as much as it is the borrower who chooses the property to be purchased, takes delivery, enjoys the use and occupation of the property, bears the wear and tear, maintains and operates the machinery/ equipment, undertakes indemnity and agrees to bear the risk of loss or damage, if any. He is the one who gets the property insured. He remains liable for payment of taxes and other charges and indemnity. He cannot recover from the lessor, any of the above mentioned expenses. The period of lease extends over and covers the entire life of the property for which it may remain useful divided either into one term or divided into two terms with clause for renewal. In either case, the lease is non-cancellable.

All the abovesaid features are available in the transaction entered into by the appellant. In addition, we find that the registration of the 56 cars stood in the name of the appellant from the very beginning and on payment of full amount including termination fee, as agreed upon, nothing more was needed to be done to vest the appellant with ownership and only loan documents were needed to be discharged and cancelled.

There are certain tax benefits which by styling the transaction like a financial lease become available to the lessor (financer) and the lessee (borrower) both. Accounting standards have been devised consistently with which the entries are made in the accounts so as to satisfy the requirements of tax laws and to avail the best benefits by way of tax planning to both the parties.

However, so far as the Act is concerned, we have to go by the provisions of the Act, keeping in view the real nature of the transaction ascertaining the real intention of the contracting parties in the light of the facts and circumstances of a given case. Once a party has been notified under sub-Section (2) of Section 3 of the Act then under sub-Section (3), notwithstanding anything contained in any other law for the time being in force with effect from the date of notification under sub-Section (2), any property, movable or immovable or both belonging to notified party stands attached simultaneously with the issue of the notification and becomes liable to be dealt with by the custodian in such manner as the Special Court may direct. The properties of the notified persons, whether attached or not, do not, at any point of time, vest in him. He is merely a custodian and not a receiver nor is he a final liquidator so as to enjoy control over the properties. In other words, the position of the custodian is the same as that of the notified person himself. We are, therefore, of the opinion that the custodian remains bound by the obligations incurred by the notified party itself, if not incurred fraudulently or to defeat the provisions of the Act.

For the purpose of deciding the controversy before us, it is not necessary for us to examine whether the transaction entered into between the appellant and Fairgrowth, the respondent No. 3, would at all attract the applicability of the provisions of the Act in view of sub-section (2) of Section 3 thereof. The learned counsel for the

appellant has taken a very fair stand submitting that the appellant is prepared to pay if anything is still found to be due and payable by it but in any case the 56 cars could not have been held liable and directed to be delivered to the custodian. It was a simple case of accounting. If the appellants have cleared all their payments in accordance with the agreement dated 4.12.1990, initially to Fairgrowth and thereafter to the custodian including payment of terminal fee subject to adjustment for security deposit and the interest accrued thereon, then all that had remained to be done was the transfer of ownership on paper which the custodian should have been directed to do, submitted the leaned counsel. But, as we have already noticed, the registration of the cars already stands in the name of the appellant. On a scrutiny of the accounts, if in the opinion of the Special Court, nothing had then remained to be paid by the appellant, then it was only a matter of calculation, the difference between the appellant's statement of account and the one prepared by the Chartered Accountant at the instance of the custodian being bonafide, the appellant could, at best, have been directed to pay the deficit. But in no case submitted the learned counsel for the appellant, the 56 cars could have been directed to be delivered to the custodian. In spite of having made full payment (bonafide error or dispute as to calculation excepted), direction for delivery of cars to the custodian has caused failure of justice. We find ourselves in agreement with the submission so made. The appeal is allowed.

LW 25:04:2024

SEL MANUFACTURING COMPANY LTD v. PUNJAB SMALL INDUSTRIES & EXPORT CORPORATION LIMITED [NCLAT]

Company Appeal (AT) (Insolvency) No. 881/2022

Rakesh Kumar Jain & Ajai Das Mehrotra. [Decided on 20/03/2024]

Insolvency and Bankruptcy Code,2016 – Long term lease of land- corporate debtor defaulting in making lease payments- lessor making claim after the approval of resolution plan- whether claim is legal and valid- Held, Yes.

Brief facts:

A Lease Deed dated 22.12.2008 was executed between the appellant and the Respondent with respect to Plot No.256-57, Phase-VIII, Focal Point, Ludhiana for a period of 99 years ("subject Plot"). Insolvency proceedings were initiated against the appellant vide order dated 11.04.2018. The public announcement was made by the Insolvency Resolution Professional (IRP) and claims were invited. No claim was filed by the respondent before the Resolution Professional during the CIRP proceedings. The resolution plan was approved by the Adjudicating Authority ["NCLT" Chandigarh] on 10.02.2021.

On 05.03.2021, the respondent issued a demand notice pertaining to the subject plot whereby it claimed an amount of Rs.1,12,97,128/-. The appellant had filed IA No. 598 of 2021 before the NCLT seeking quashing of the said demand, which was dismissed vide impugned order dated 03.06.2022.

Decision: Dismissed.

Reason:

We have gone through the submissions of the appellant and the respondent including the judgments relied upon by them. The appellant has mainly relied upon the 'clean slate principle' enunciated in the judgments of *Ghanshyam Mishra and Sons Pvt. Ltd. v. Edelweiss Assets Reconstruction Company Limited* and *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.* It is appellant's contention that under the said principle, the new management cannot be saddled with any unexpected claims and should be allowed to commence and restart the business on a 'clean slate'.

The said principle is coded in Section 31(1) of the IBC, 2016 which states that an approved resolution plan is binding on all stakeholders including Corporate Debtor, its employees, Members, Creditors, including Central & State Government or any local authority or Guarantors. The cases cited by the appellant are in support of the said 'clean slate principle'.

The issue for consideration in this case is whether in the factual matrix of this case, the successful resolution applicant can be granted ownership of leasehold rights over the subject plot without payment of dues to the respondent. In other words, whether the said 'clean slate principle' will be applicable to the facts of this case.

The subject asset was allotted to the Corporate Debtor on lease hold basis for 99 years. One of the conditions of the allotment was that the price of the plot is subject to variation with reference to the actual measurement of the plot and cost of acquisition of land and in case of enhancement of compensation on account of acquisition of land by the Court or otherwise, the allottee was required to pay the additional price of the plot within 30 days from the date of demand.

The respondent had time and again written to the appellant to make payment of enhanced land price due to enhancement in respect of said plot, in view of enhanced compensation confirmed in the judgment of Hon'ble Punjab and Haryana High Court dated 25.08.2008 and Judgment of Hon'ble Supreme Court of India dated 25.03.2015.

We find that demand for enhanced land cost was raised much before initiation of CIRP and evidently, it was not brought to the notice of the IRP or the CoC. Even the pending litigation before Civil Judge (Senior Division), Ludhiana regarding the subject plot was not brought to the notice of the CoC and the successful Resolution Applicant.

In our opinion, the protective umbrella of IBC, 2016 for CIRP cannot be extended to an extent that public authorities are asked to part with their assets without full

payment of their dues or without compliance to terms and conditions of the sale or lease deed or their transfer policy. The 'clean slate principle' will not apply to the factual matrix of the present case, where there was prior demand from public sector land authority which was also not disclosed during CIRP to the IRP or the CoC.

The Adjudicating Authority in the impugned order has rightly noted that the payment demanded by the respondent is to clear the defect in the title of the land itself, and is not linked to the CIRP proceedings.

In the result, we do not find any reason to interfere in the order of the Adjudicating Authority. The Appeal is dismissed.

LW 26:04:2024

DIPAK DAHYALAL v. M/S STEEL RESOURCES & ANR [NCLAT]

Company Appeal (AT) (Insolvency) No. 300 of 2024

Ashok Bhushan, Barun Mitra & Arun Baroka. [Decided on 12/03/2024]

Insolvency and Bankruptcy Code,2016 -CIRP admitted- appeal- condonation of delay- whether Tribunal can condone 41 days delay -Held,No.

Brief facts:

The present appeal arose out of the Order dated 22.11.2023 passed by the Adjudicating Authority (NCLT-Mumbai Bench-VI) wherein the Adjudicating Authority admitted the Section 9 petition filed by the Operational Creditor admitting M/s Pritdip Impex Pvt Ltd - Corporate Debtor into the rigours of CIRP. Aggrieved by this impugned order, the present appeal was filed by the suspended director. A delay condonation application also filed seeking condonation delay of 41 days in filing the present appeal.

Decision: Dismissed.

Reason:

We have duly considered the arguments advanced by the Learned Counsels for both parties and perused the records carefully including the judgements cited.

IBC by virtue of being a special statute, this Tribunal is not empowered to condone any delay beyond the statutory prescriptions in IBC containing a provision for limitation. This legal precept has been squarely laid down by the Hon'ble Supreme Court and for this purpose we may refer to the judgement of the Hon'ble Supreme Court in Kalpraj Dharamshi vs Kotak Investment Advisors Ltd (2021) 10 SCC 401 wherein it has been noticed that IBC being a special statute, for purposes of calculating the period of limitation to file an appeal, the governing section shall be Section 61 of the IBC.

The same guiding principle has been further expounded by the Hon'ble Supreme Court in V. Nagarajan vs SKS Ispat and Power Ltd & ors in Civil Appeal No. 3327 of 2020 wherein the need to bear in mind the stringent time-frame of IBC and the need to avoid delays in taking the insolvency proceedings to their logical culmination has also been squarely emphasised.

It needs no emphasis that judgments of the Hon'ble Apex Court reign supreme and therefore binding on us. The ratio contained in the above-cited four seminal judgements of the Hon'ble Supreme Court, is crystal clear that the statutory provisions of IBC have to be followed when it comes to counting the period of limitation in matters of appeal. It is also clear that it has been well settled that limitation for filing of the appeal in respect of IBC matters does not commence on the date when any Appellant becomes aware of the order but shall commence from the date of the order.

At this stage, even if for arguments sake, we accept the contention of the Appellant that they were not present before the Adjudicating Authority when the impugned order was passed ex parte, from the material made available on record by the Respondent No. 1, it is clear that the NCLT Registry had sent the impugned order by email. Therefore, it becomes all the more questionable on the part of the Appellant to raise the plea that he was not aware of the impugned order. That a free copy of the impugned order dated 22.11.2023 had been served upon the Appellant on 29.11.2023 by the Registry of the NCLT, Mumbai has been placed on record by the Respondent. This makes it amply clear that the Appellant was well aware that the Adjudicating Authority had passed the impugned order but for reasons better known to themselves they did not show due diligence in filing the appeal in a timely fashion.

Another ground taken for the delay is that due to Christmas vacations, the Tribunal was closed and hence the Appellant was restrained from filing the appeal. This explanation lacks merit since the Registry of this Tribunal was operational during this period and the facility of e-filing was available 24 by 7. The Appellate Registry where the appeals are lodged was actually e- functional during this period. Thus, the Appellant cannot rightfully claim that it was precluded from filing the appeal during this period and seek exclusion of time on the lame and facile pretext that this Tribunal was closed.

In any case, the IBC being a special statute which does not make it obligatory that the order of the Adjudicating Authority is required to be send to the interested parties, the same cannot be insisted upon by the Appellant in their defence. Therefore, the grounds of denial of fair play and natural justice cannot be reasoned out by the Appellant to explain the laches. Neither are we in a position to accept such an explanation since it goes against the grains of the IBC which provides for timely resolution/liquidation of the Corporate Debtor. Needless to add, at the cost of repetition, we stand guided by the precepts and principles laid down in the four judgments of the Hon'ble Supreme Court which we have copiously referred to in the foregoing paragraphs.

We are of the firm opinion that Section 61 of the IBC has to be interpreted keeping in mind the overall purpose

and object of the IBC which inter-alia includes timely resolution of the CIRP. That being an avowed objective of this legislation and it being settled law that for purposes of calculating the period of limitation to file an appeal in any IBC proceeding, the governing Section shall be Section 61 of the IBC, we are of the considered view that the submission of the Appellant that the period of limitation shall commence for filing the appeal when the Appellant became aware of the order is untenable. Accepting any such defence will induce an element of unpredictability, uncertainty and delay in the resolution process which cannot be countenanced as it is likely to turn the timely framework of the IBC upside down.

Undisputedly, the present impugned order was pronounced on 22.11.2023. Thus, limitation for filing the appeal starts from 22.11.2023 and does not depend upon when the Appellant becomes aware of the order. The date on which the order is pronounced is to be excluded from the calculation of limitation in terms of Section 12(1) of the Limitation Act. The 30 days period comes to an end on 22.12.2023 and further period of 15 days comes to an end on 07.01.2024. The Appeal having been filed on 01.02.2024, the appeal has clearly been filed with a delay of more than 15 days from the date of expiry of limitation. Our jurisdiction to condone the delay is limited to only 15 days under Section 61(2) of IBC, hence, the delay condonation application cannot be entertained.

In view of the foregoing discussions, we are of the view that the delay condonation application deserves to be dismissed. In result, the delay condonation application is dismissed and the Memo of Appeal is rejected.

LW 27:04:2024

PEOPLE INTERACTIVE INDIA PRIVATE LIMITED v. ALPHABET INC & ORS [CCI] WITH CONNECTED CASES

Case No. 37 of 2022

Ravneet Kaur, Anil Agrawal, Sweta Kakkad, Deepak Anurag. [Decided on 15/03/ 2024]

Competition Act,2002- section 4 – abuse of dominance- billing policy of Google for in-app purchases and paid apps- whether Google abused its dominant position-Held, Yes.

Brief Facts:

The Informants have alleged that the OPs have abused their dominant position in the relevant markets in the following manner:

- Google is charging 11% or 26% commission from the app developers even on payments made through ABS and thus, Google is charging commission for the services which it is not even providing. The same is alleged to be unfair for app developers.
- Google's imposition of an excessive service fee / commission on app developers for processing payments through the GPBS and for processing payments through ABS under UCB.
- Google's imposition of an excessive service fee leads to app developers having less resources at their disposal to improve/develop their app offerings, restricting development in the app market.
- Google imposes a discriminatory and disproportionate service fee / commission on app developers who offer paid downloads and IAPs and reduce the incentives of app developers to monetise their apps or develop paid apps thereby denying market access to such app developers in the market.

Decision: Investigation directed.

Reason:

It is noted that the Informants are primarily aggrieved by the billing policy of Google for in-app purchases and paid apps. The Informants have alleged that Google is abusing its dominant position in the relevant market by imposing its payment policy and thus, is in violation of various provisions of Section 4 of the Act.

The Commission is of the prima facie view that Google has imposed unfair price in violation of Section 4(2)(a)(ii) of the Act which warrants a detailed investigation. Moreover, it appears that such imposition results in app developers having fewer resources to enhance or develop their app offerings, thereby constraining the growth of the app market, which appears to be in violation of Section 4(2)(b)(ii) of the Act. Additionally, Google's imposition of unfair service fee on app developers could force them out of the market or deter them from entering due to increased operational costs, thus denying market access to these developers. This behaviour also curtails the freedom of app developers to select their business model and user engagement methods. Furthermore, Google's discriminatory and disproportionate service fee on developers offering paid downloads and IAPs appears to be diminishing incentives for app monetization and paid app development, further obstructing market access for such developers, potentially violating Section 4(2)(c) of the Act.

The Commission notes that Google claims that service fee is charged for multitude of services provided by Play Store to app developers. Taking this forward, if the service fee is for the services rendered to app developers, then the reasoning given by Google i.e., consumption of content within the app, for not charging Physical Delivery Apps, does not appear to be reasonable. This issue assumes importance in view of the fact that various Physical Delivery Apps are very large in size and yet do not contribute towards recoupment of Google's investment in

Play Store (as claimed by Google). Extending this further, it is not clear as to why consumption only apps have been allowed relaxation when their content is consumed within the app. On the whole, the applicability of service fee seems to be arbitrary and discriminatory.

In this regard, the Commission also takes cognisance of submissions made by the Informants that Google has not provided any objective metric or rationale for distinguishing between digital content/services and physical content/services, and it arbitrarily determines whether a particular content/service is physical or digital, leading to inconsistent categorizations. It has been further submitted that the primary function of apps categorized as "dealing in physical goods" is to operate an online platform connecting users with goods or service providers. For instance, dating apps which enable users to connect with others digitally and then meet in person, are considered as offering digital content/services by Google. Conversely, apps providing transportation services (like Uber and Ola), online shopping (like Amazon and Flipkart), food ordering (like Zomato and Swiggy), or home services (like Urban Company) allow users to connect with and book the service providers. Subsequently, users of these apps meet these providers in the physical world to avail themselves of the services. These apps are classified by Google as offering physical content/services.

It has also been alleged by IBDF/IDMIF that Google is also discriminating amongst similarly placed apps in the OTT industry itself. For example, the app Amazon Prime Video app offers IAPs (subscription of its Prime service, movies for rent and access to other channels such as BBC iPlayer, Lionsgate Play) but the use of GPBS has not been mandated on that app so it is free to use its own embedded payment system. It is therefore, alleged that Google is selectively and arbitrarily imposing its Payments Policy upon certain app developers in a discriminatory manner.

In view of the foregoing, the Commission is of the prima facie view that Google has violated the provisions of Section 4(2)(a), 4(2)(b) and 4(2)(c) of the Act, as elaborated supra which warrants detailed investigation.

LW 28:04:2024

REKHA OBEROI & ORS v. MGF DEVELOPMENT LTD & ORS [CCI]

Case No. 28 of 2023

Ravneet Kaur, Anil Agrawal, Sweta Kakkad, Deepak Anurag. [Decided on 12/03/ 2024]

Competition Act, 2002 - Sections 3 and 4- management of mall- not handing over the management of the mall to the buyers of the retail space - charging high maintenance charges- selling joint common areas without the consent of the shop owners- whether violates competition – Held,No.

Brief facts:

The Informants are the retail shop owners in the Mall and are aggrieved by the way Mall has been managed. The gravamen of grievance is that (ii) the management of the Mall has not been handed over to the association of the owners of the Mall (buyers of the retail space in the Mall) and it continues to be in the hands of OP-1 acting through OP-2 (maintenance agency); and (ii) charging of high maintenance and electricity charges; selling joint common areas without consent of the shop owners. The Commission also notes that the Informants have claimed the Mall to be a relevant market and the conduct of OPs causing AAEC in such market.

Decision: Dismissed.

Reason:

The Commission notes from the information available in public domain that Metropolitan Mall is not the only mall situated in Gurugram and there are other malls situated in Gurugram and nearby areas. Thus, the Commission is of the view that the case does not merit any narrow delineation of relevant market for the purposes of Section 4 of the Act. As far as the alleged abuse is concerned, the Commission is of the view that the grievances of the Informants like payment of maintenance and electricity charges, rights and entitlement to joint common areas etc. are in the nature of contractual/ civil issues/disputes. Further, the Informants have alleged that OPs are acting as a cartel. The Commission notes that the Informants have failed to demonstrate which similar trade or activity they are engaged in to fulfil requirements of horizontal relation as per Section 3(3) of the Act. The Commission also does not find any merit in the case for its examination under Section 3(4) of the Act. Thus, the Commission is of the view that no competition concerns seem to arise in the present matter given the nature of allegations and the alleged conduct of the parties so arrayed by the Informant.

The Commission is, thus, of the opinion that there exists no prima facie case of contravention of the provisions of Section 3 and Section 4 of the Act against the OPs in the present case and therefore, the matter be closed forthwith under Section 26(2) of the Act. Consequently, no case for grant for relief as sought under Section 33 of the Act arises and the same is disposed of accordingly. It is clarified that this order is from the perspective of the Competition Act, 2002 and the Commission has not expressed any opinion on the merits of the litigation pending between the parties.

Labour Laws

LW 29:04:2024

GOVT. NCT OF DELHI v. REHMAT FATIMA [DEL]

LPA No. 199 of 2024

Rekha Palli & Shalinder Kaur,JJ. [Decided on 12/03/2024]

Maternity Benefit Act, 1961- sec 5 – contractual employee- contract of employment expired during

the maternity leave period- whether the employee to be given the benefit for the period overshooting the contract period also-Held, Yes.

Brief facts:

The respondent was appointed as a stenographer on contractual basis for a period of one year with the respondent no. 3 i.e., Delhi State Consumer Forum on 07.02.2013 and the said contractual period was extended from time to time either without any break or with notional break of one or two days. After the respondent had rendered over five years of unblemished service, she on 28.02.2018 submitted an application for grant of maternity leave of 180 days w.e.f. 01.03.2018 in accordance with the provisions of the Act.

The appellants, however, did not accede to her request and informed her that since her contractual period of engagement was set to expire on 31.03.2018, no maternity leave benefits would be granted to her. Consequently, the respondent filed a writ petition wherein she had not only made a prayer for grant of maternity benefits for the period of her maternity leave but also sought that her services be continued on the post of stenographer on contractual basis, on which post she had worked uninterruptedly for over five years since 2013. The learned Single Judge has rejected the respondent's prayer for re-engagement on the post of stenographer on contractual basis and allowed her prayer for the maternity benefit.

The present appeal seeks to assail the order passed by the learned Single Judge wherein the learned Single Judge has partly allowed the writ petition filed by the respondent by directing the appellants to grant her maternity and medical benefits for a period of 26 weeks on account of her pregnancy as per the provisions of the Maternity Benefit Act, 1961 (hereinafter referred to as "the Act").

Decision: Dismissed with costs.

Reason:

We find (the appeal) is wholly misconceived and is in fact, in the teeth of various decisions of the Apex Court wherein it has been categorically held that even women working on contractual basis are entitled to be granted the benefits under the Act even if these benefits exceed the duration of their contractual engagement.

The only submission of learned counsel for the appellant is that the term of the contractual engagement of the respondent was expiring on 31.03.2018 and, therefore, the appellant could not be saddled with the liability to pay wages for the entire period of the purported maternity leave availed by her, which period extended till 31.08.2018 i.e., way beyond 31.03.2018. He, therefore, contends that the respondent could, at the best, be paid wages till 31.03.2018 and not for any period thereafter.

On the other hand, learned counsel for the respondent supports the impugned order and submits that the learned Single Judge has rightly allowed the writ petition filed by the respondent by holding that she ought to be released all medical, monetary and other benefits that accrued in her favour on account of her pregnancy, for which she made an application on 28.02.2018 while her contractual engagement was admittedly still continuing. He, therefore, prays that the appeal be dismissed.

In order to appreciate the aforesaid submissions of learned counsel for the appellants, it would be apposite to note the brief factual matrix of the matter as emerging from the record.

From a perusal of the aforesaid, we find that the learned Single Judge has by placing reliance on Section 5 of the Act come to a conclusion that the benefits payable to the respondent would not come to an end on expiry of the term of her contractual engagement. Having perused Section 5 of the Act, we see no infirmity in the approach adopted by the learned Single Judge. We, therefore, find no merit in the appellant's plea that the respondent was not entitled to receive any benefits under the Act for the period beyond 31.03.2018, the date when the term of her contractual engagement was expiring. In fact, we are surprised that the Govt. of NCT of Delhi, which is giving great publicity to the steps being taken to promote the interest of women in Delhi and has under its recently announced scheme i.e., Mukhyamantri Mahila Samman Yojna promised to pay all adult women in the city except those who are tax-payers/government employees or are drawing pension, a monthly sum of Rs.1,000/- in the future has chosen to file such a misconceived appeal to assail an order which grants the benefits under the Act to a young woman, who has with utmost dedication served in the Delhi State Consumer Forum over 5 years.

For the aforesaid reasons, we find absolutely no reason to interfere with the impugned order insofar as it directs the appellants to pay to the respondent salary and other monetary benefits for a period of 26 weeks for which period she had sought maternity benefits. The appeal being misconceived is along with all pending applications dismissed with costs of Rs.50,000/. Costs be paid to the respondent within four weeks from today.

LW 30:04:2024

MAHANADI COALFIELDS LTD v. BRAJRAJNAGAR COAL MINES WORKERS UNION [SC]

Civil Appeal No(s). 4092-4093 of 2024 [@ SLP (C) No(s). 6370-6371 of 2024]

P. S. Narasimha & Sandeep Mehta,JJ. [Decided on 12/03/2024]

Industrial Disputes Act,1947 read with contract Labour (Regulation and Abolition) Act,1972- regularisation of contract labour engaged in the work of permanent nature- Tribunal and the High Court directed regularisation- whether correct- Held, Yes.

Brief facts:

The Appellant, Mahanadi Coalfields Ltd., a subsidiary of Coal India Ltd. floated a tender for the transportation of crushed coal and selected a successful contractor for

performance of the agreement for the period 1984 to 1994. The contractor employed workmen for execution of this contract. The respondent-union espoused the cause of the workmen who were engaged by the contractor and sought permanent status for them.

The issue passed through the processes of settlement, determination of the dispute by the industrial tribunal and the dismissal of the writ appeals and the review petition filed by the appellant. The High court upheld the decision of the Tribunal and confirmed the regularisation of the 32 workers with back wages. Against this the appellant was before the Supreme Court.

Decision: Dismissed.

Reason:

We are also not impressed with the artificial distinction which the appellant sought to bring about between the 19 workers who were regularized and the 13 workers who were left out. The evidence on record discloses that, of the total 32 workmen, 19 workers worked in the bunker, 6 worked in the Coal Handling Plant, and 7 worked on the railway siding. However, of the 19 workers who were regularized, 16 worked in the bunker, and 3 worked in the Coal Handling Plant. However, 3 workers from the same bunker, 3 workers from the same Coal Handling Plant and again 7 workers from the same railway siding were not regularized.

The above-referred facts speak for themselves, and that is the reason why the Tribunal has come to a conclusion that the denial of regularization of the 13 workmen is wholly unjustified. As stated previously, we do not find any grounds in the artificial distinction asserted by the appellant. However, as the case was argued at length we thought it appropriate to give reasons for rejecting the appeals. What we have referred to hereinabove are all findings of fact by the Tribunal as affirmed by the High Court. In view of the concurrent findings of fact on the issue of nature of work, the continuing nature of work, continuous working of the workmen, we are of the opinion that there is no merit in the appeals filed by the appellant.

This is a case of wrongful denial of employment and regularization, for no fault of the workmen and therefore, there will be no order restricting their wages. With respect to payment of back wages, we are of the opinion that the workmen will be entitled to back wages as observed by the Industrial Tribunal. However, taking into account, the long- drawn litigation affecting the workmen as well as the appellant in equal measure and taking into account the public interest, we confine the back wages to be calculated from the decision of the Tribunal dated 23.05.2002. This is the only modification in the order of the Tribunal, and as was affirmed by the judgment of the High Court.

For the reasons stated above, the appeals arising out of the final judgment and order of the High Court in W.P. (C) No. 2002/2002 and order in Review Petition No. 77/2017 are dismissed with the direction that the concerned workmen shall be entitled to back wages with effect from 23.05.2002. There shall be no order as to costs.

LW 31:04:2024

THE DIRECTOR GENERAL, DELHI DOORDARSHAN KENDRA v. MOHD SHAHBAZ KHAN[DEL]

LPA No. 242 of 2024 with connected appeals

Rekha Palli & Sudhir Kumar Jain, JJ. [Decided on 22/03/2024]

Engagement of contract labour- contractor did not have the license under the CLRA ACT- whether workers to be regularised with back wages-Held, Yes.

Brief facts:

The present batch of appeals assailed five similar orders, all dated 12.12.2023 passed by the learned Single Judge in a batch of writ petitions. Vide the impugned order, the learned Single Judge has rejected the appellant's challenge to the award dated 15.10.2007 passed by the learned Industrial Tribunal (Tribunal), wherein the learned tribunal after holding that the termination of the respondents' service by the appellant was illegal, has directed the appellant to reinstate them with 25% back wages.

Decision: Dismissed.

Reason:

Now coming to the merits of the appeal, we may begin by noting the relevant extracts of the impugned award dated 15.10.2007 wherein the learned Tribunal has given its findings regarding the existing factual position by appreciating the evidence lead by both sides.

From a perusal of the aforesaid, we find that the learned Tribunal as also the learned Single Judge, after taking into account the gate passes issued to the respondents by the appellant in the years 1996, 1997 & 1999 as also experience letter dated 13.07.1999 issued by the appellant to one of the respondents, which categorically states that he was engaged with the appellant since 1997, have come to a conclusion that the respondents were employed with the appellant/ organisation and had been illegally terminated. Further both the learned Single Judge as also the learned Tribunal found upon appreciation of evidence that the purported contract by the appellant in favour of M/s Navnidh Carriers was sham and an attempt to conceal the engagement of the respondents with the appellant.

In fact, at the insistence of the learned senior counsel for the respondent we have also perused the experience letter dated 13.07.1999 and find that the same clearly shows that the respondents were directly employed with the appellant much before the date when the contract with M/s Navnidh was entered into, i.e. 31.07.1998. Despite her best efforts, learned counsel for the appellant has not been able to give any explanation whatsoever for the issuance of the said experience certificate if the respondent namely Mohd. Shahbaz Khan was not their employee. We also find merit in the respondents' plea that since the appellant did not have any licence, as mandated under the CLRA Act, 1970, to engage workmen through a contractor, it is evident that they were directly engaged by the appellant.

In the light of these categoric factual findings by the learned Tribunal, which cannot, in any manner, said to be perverse or contrary to the evidence lead before the learned Tribunal, we

are of the view that it was neither open for the learned Single Judge to interfere with these findings in exercise of its writ jurisdiction nor is it open for this Court to examine these questions of fact. In this regard it may be apposite to refer to a recent decision of a co- ordinate Bench in Dinesh Kumar v. Central Public Works Department, 2023 SCC OnLine Del 6518, wherein the co-ordinate Bench after examining various decisions of the Apex Court held that writ Court can interfere with the factual findings of fact recorded in the industrial award only if the same are perverse or are entirely unsupported by evidence.

In the light of the aforesaid, we find absolutely no reason to interfere with the concurrent findings of fact arrived at by the learned Tribunal and the learned Single Judge to hold that the respondents were engaged by the appellant and were illegally terminated. The appeals being meritless are, along with all pending applications, dismissed.

Arbitration Law

LW 32:04:2024

RANI CONSTRUCTIONS PVT. LTD v. UNION OF INDIA [DEL]

ARB.P. No. 1011 of 2023

Sachin Datta,JJ. [Decided on 22/03/2024]

Arbitration and Conciliation Act,1996- Section 11- appointment of arbitrator- contract provided for institutional arbitrator- institution made it mandatory for the party to be a member to avail its arbitration facilities- petitioner approached the court to appoint the arbitrator- whether correct- Held, Yes.

Brief facts:

The disputes between the parties have arisen in the context of an EPC agreement dated 16.11.2017. The disputes between the parties have arisen on various counts, inter- alia, the alleged failure on the part of the respondent to pay the legitimate dues of the petitioner against the executed quantities of work, alleged inability of the respondent in making available 90% of the land free from encumbrances at the time of declaration of the appointed date, the deduction of substantial amount from the bills of the petitioner towards liquidated damages, alleged losses sustained by the petitioner on account of prolongation of the work etc.

The arbitration clause provided for resolving the disputes in accordance with the rules of arbitration of the Society For Affordable Redressal Of Disputes (SAROD). The rules of SAROD provided for the primary members of the Society to avail the arbitration facility. Admittedly the petitioner was not a member of the Society and therefore, it invoked the provisions of the Arbitration and Conciliation Act,1996 and issued the arbitration notice to the Respondent requesting it to appoint its nominee arbitrator. The Respondent refused to appoint its nominee and insisted that the arbitration could be made through SAROD only. The Petitioner filed the present petition for the appointment of arbitrator.

Decision: Allowed.

Reason:

In the aforesaid conspectus, the question that arises for consideration is whether an arbitral institution, whose rules have been adopted by the parties, and which has been entrusted with the task of constituting the arbitral tribunal, can insist that the parties to the arbitration agreement must take membership of the said institution, as a pre-condition for taking requisite steps in terms of the agreement between the parties.

In the present case, the petitioner is willing to pay the applicable fee/ charges to SAROD for the purpose of functions to be discharged by SAROD in terms of the arbitration agreement between the parties, however, it is not willing to take primary membership of SAROD.

I find merit in the contention of the petitioner that an arbitration agreement under which the parties agree on conducting arbitration as per rules of a particular arbitral institution, cannot be construed as subsuming within it, an additional obligation to become member/s of that arbitral institution. Becoming a member of an arbitral institution, which is a society registered under the Societies Registration Act, 1860, carries with it additional obligation/s which has nothing to do with the agreement between the parties to arbitrate. Such an obligation cannot be insisted as a pre-requisite for taking recourse to arbitration.

In the present case, insistence on the part of the SAROD that the parties must take membership of SAROD as a pre-condition for taking necessary steps to constitute an arbitral tribunal as per its rules, impinges on the validity of the appointment procedure; amounts to failure to perform the function entrusted to the concerned institute under the procedure agreed to by the parties, and consequently attracts Section 11(6)(c) of the A&C Act, 1996 and making it incumbent on this Court to take requisite steps to constitute the arbitral tribunal.

Since SAROD rules cannot be applied to conduct of the arbitration between the parties in the present case for the aforesaid reason, and since the parties have not arrived at an agreement for constitution of three-member arbitral tribunal as proposed by the petitioner in notice dated 15.02.2023, it is incumbent on this Court to appoint a sole arbitrator to adjudicate the disputes between the parties.

The Supreme Court in *Sime Darby Engg. SDN. BHD. v. Engineers India Ltd., (2009) 7 SCC 545*, has held, as per Section 10(2) of the A&C Act, that where the number of arbitrators is not determined, the Arbitral Tribunal shall consist of a sole arbitrator.

Accordingly, Mr. Justice (Retd.) S. Ravindra Bhat, Former Judge, Supreme Court of India, is appointed as the Sole Arbitrator to adjudicate the disputes between the parties. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability, which shall be decided by the learned arbitrator, in accordance with law.