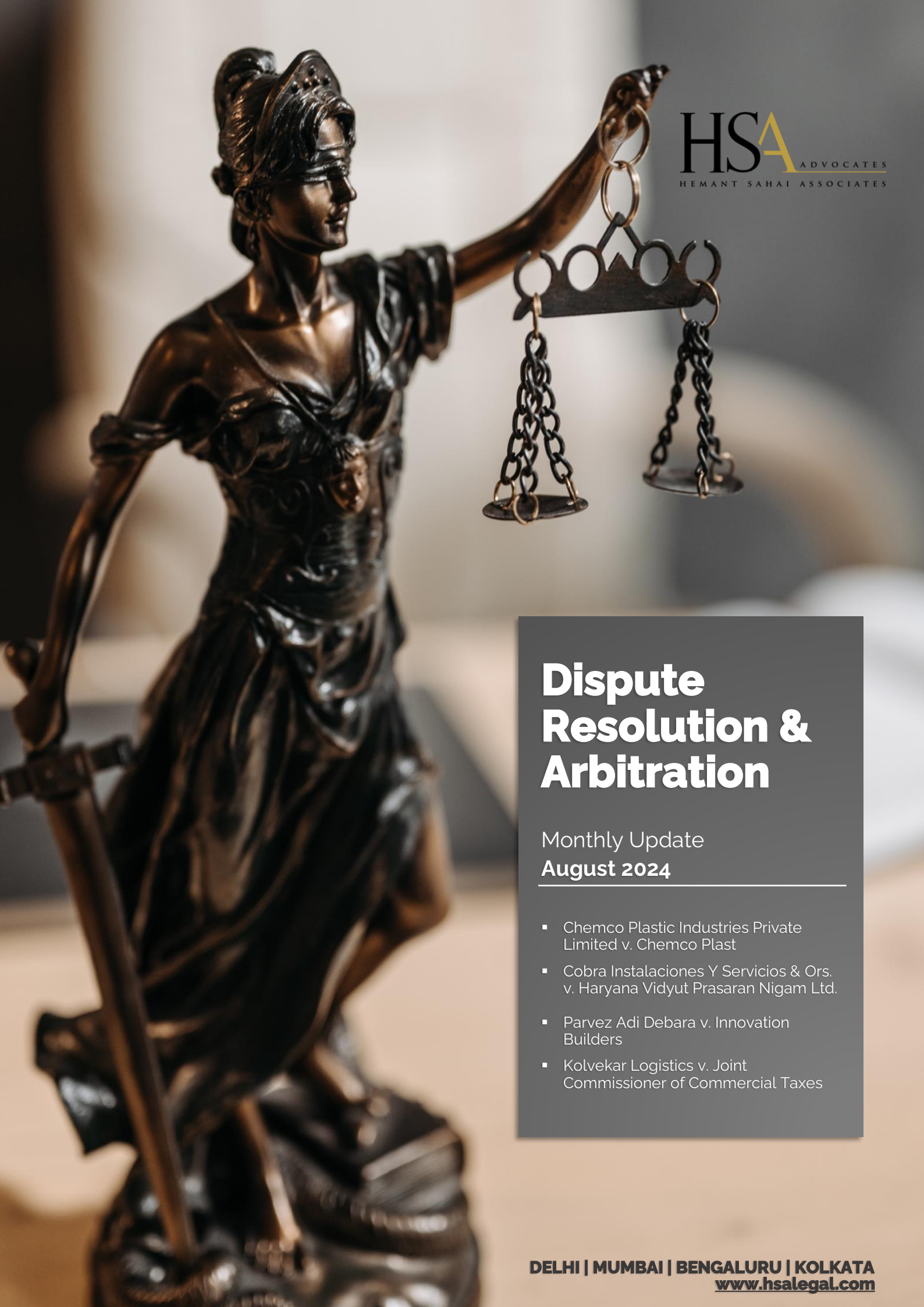

HSA ADVOCATES
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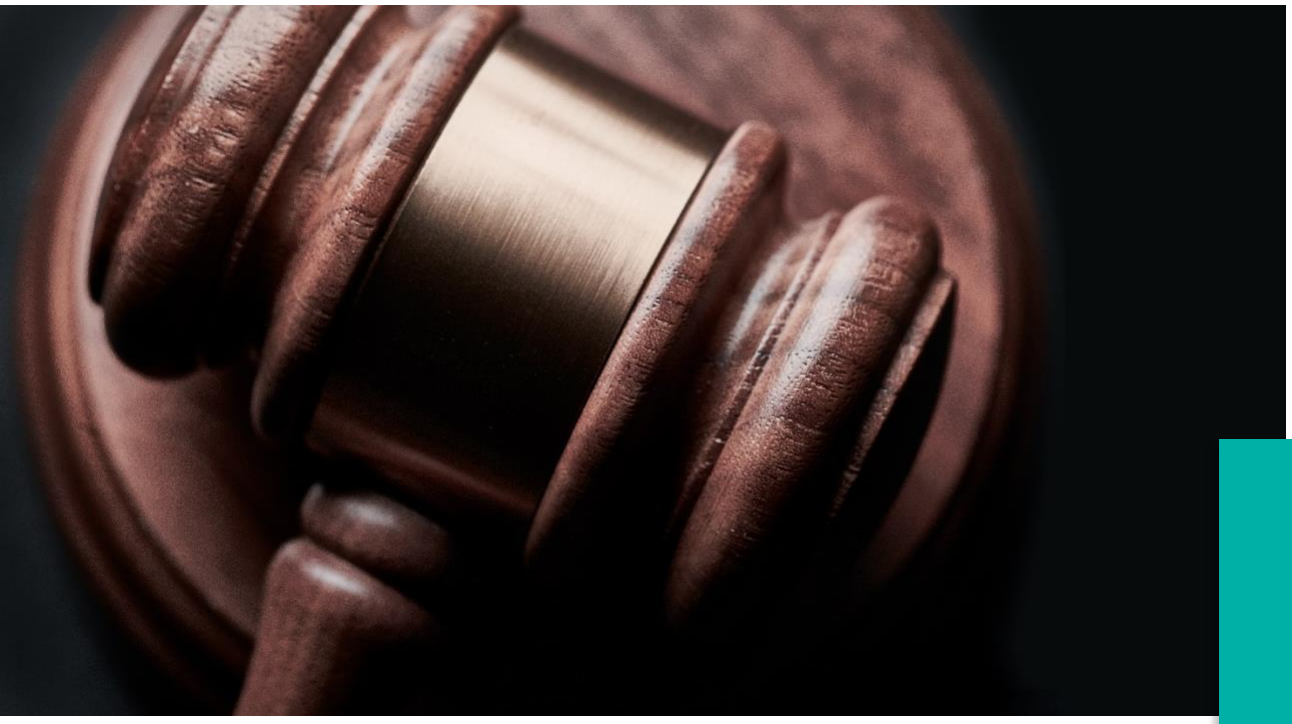
Dispute Resolution & Arbitration

Monthly Update
August 2024

- Chemco Plastic Industries Private Limited v. Chemco Plast
- Cobra Instalaciones Y Servicios & Ors. v. Haryana Vidyut Prasaran Nigam Ltd.
- Parvez Adi Debara v. Innovation Builders
- Kolvekar Logistics v. Joint Commissioner of Commercial Taxes

DISPUTE RESOLUTION AND ARBITRATION UPDATE



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Chemco Plastic Industries Pvt Ltd v. Chemco Plast

Supreme Court of India | 2024 SCC OnLine Bom 1607

Background facts

- Chemco Plastic Industries Pvt Ltd (**Respondent**) filed a Commercial Intellectual Property Suit, seeking an injunction to prevent Chemco Plast (**Applicant**) from infringing its registered trademark and misrepresenting its goods as that of Respondent (**Suit**). Additionally, the Respondent filed an Interim Application seeking an urgent interim relief.
- In furtherance of the same, the Applicant filed an Interim Application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (**CPC**) before the Bombay High Court (**HC**)**,** seeking rejection of the plaint on the grounds of non-compliance of Section 12-A of the Commercial Courts Act, 2015 (**Act**) which mandates pre-suit mediation, on the part of the Respondent (**Interim Application**).
- The Applicant contended that the Suit did not contemplate any urgent interim relief as the same was filed 8 years after the Respondent became aware of the cause of action and the Respondent ought to have first exhausted the remedy of pre-institution mediation as per section 12-A of the said Act, before instituting the Suit. On the other hand, the Respondent argued that the requirement of section 12-A of the said Act is mandatory in nature and hence, the Interim Application ought to be allowed, thereby rejecting the plaint.

Issue at hand?

- Whether the plaint ought to be dismissed for being barred due to non-compliance with Section 12-A of the Commercial Courts Act, 2015?

Decision of the Court

- At the outset, the HC examined Section 12-A of the Commercial Courts Act, 2015 and noted that the Supreme Court of India in the case of ***Patil Automation Private Limited and Ors v. Rakheja Engineers Private Limited***[1] held that the purpose of inserting section 12-A in the said Act, by way of amendment in the year 2018, was to compulsorily require parties to explore settlement through mediation, even before instituting the suit in cases where urgent interim relief was not

[1] (2022) 10 SCC 1

contemplated. The HC noted that the Supreme Court of India in the said judgment did not consider it necessary to interpret the word "contemplate" used in section 12-A of the said Act.

- The HC then analyzed various judgments passed by different High Courts, particularly ***Bolt Technology OU v. Ujoy Technology Pvt Ltd and Ors***.[2], wherein in the context of alleged infringement of intellectual property rights, it was held that even though the plaintiff had not exhausted the remedy of pre-institution mediation, the plaint could not be rejected under section 12-A of the said Act. Further, the HC relied on the case of ***Yamini Manohar v. TKD Keerthi***, wherein it was held that the limited exercise to be carried out by the commercial courts is to peruse the plaint, documents and the facts to examine as to whether the suit does "contemplate" urgent interim relief.
- The HC observed that the Respondent has detailed the manner in which the Applicant has refuted the rights of the Respondent despite registered trademark of "Chemco" in favour of the Respondent. In this context, the Respondent has contemplated urgent interim relief while filing the Suit and the same cannot be rejected as being barred by Section 12-A of the Commercial Courts Act.
- The HC further held that the question of delay and the related question of acquiescence on the part of the Respondent are matters concerning the merits for the grant or refusal of interim relief. Thus, the court is not expected to enter into the merits of the matter at this stage and in cases pertaining to IPR infringement, the cause of action arises on each occasion that the impugned mark is used by the defendant.
- In view of the above, the HC held that the Respondent has made out enough grounds to demonstrate that it does contemplate urgent interim reliefs, thereby showing that the plaint in the instant case cannot be rejected as being barred by section 12-A of the said Act and accordingly, dismissed the Interim Application.

HSA
Viewpoint

This ruling of the Bombay High Court reinforces the criticality of clearly establishing urgency in intellectual property disputes to secure an interim relief. This judgment illuminates the judicial interpretation of Section 12-A of the Commercial Courts Act, indicating that the courts may permit bypass of pre-institution mediation when the grant of urgent relief is imperative and justified. It further accentuates the essentiality of the point that delays in filing suits do not inherently negate the necessity for urgent interim relief, particularly in cases related to intellectual property rights which involve ongoing harm and issues related to consumer protection.

Cobra Instalaciones Y Servicios & Ors v. Haryana Vidyut Prasaran Nigam Ltd.

Delhi High Court | MANU/DE/2796/2024

Background facts

- Cobra Instalaciones Y Servicios, S.A. & Shyam Indus Power Solution Pvt. Ltd. (JV) **(Appellant)** and Haryana Vidyut Prasaran Nigam Ltd. [**HVPNL**] (**Respondent**) had entered various contracts. Subsequently, a dispute arose in relation to a contract having project number G09.
- Due to a delay on part of the Appellant in executing the project, the Respondent stated that it would impose 80% as liquidated damages upon the Appellant without prejudice to the Respondents rights under the contract. The Appellant challenged the same stating that liquidated damages could not be imposed as the Respondent did not suffer any losses.
- The Appellant invoked arbitration in terms of Clause 46.5(b) of General Conditions of the Contract (**GCC**) and Clause 26 of Particular Condition (**PC**). As the parties were not able to appoint an arbitrator, an arbitrator was appointed by the Delhi High Court as per Section 11 of the Arbitration and Conciliation Act, 1996 (**the Act**).
- Upon hearing the parties, the arbitrator awarded a refund of 50% of the liquidated damages along with interest back to Appellant, stating that the appellant incurred loss as well, even though it could not precisely quantify the loss incurred. The award was calculated using a "*rough and ready*" method to award damages.
- Both parties filed cross-petitions under Section 34 of the Act. Both the petitions were disposed of by a Single Bench of the Delhi High Court. The Single judge set aside the award to the extent that it related to the award for liquidated damages and interest payable.
- Aggrieved by the judgment of the Single Bench, the Appellant filed an appeal under Section 37 of the Act.

Issues at hand?

- Whether an arbitrator can employ a "*rough and ready method*" to award liquidated damages when ascertaining the exact sum of damages.
- Whether the court has the power to refer issues back to an arbitral tribunal for reconsideration.

HSA
Viewpoint

This case underscores the effectiveness of arbitration in commercial disputes, particularly in passing / granting of awards. It clearly sets out that an arbitrator has the same power as a judge of the High Court and the Supreme Court in awarding liquidated damages by using a rough and ready method of calculation. In cases where an entity has suffered damages that cannot be quantified or calculated, the adjudicator can reward damages based on "guesswork" regarding the quantum of compensation. This ensures that aggrieved party receives adequate reliefs.

[2] CS (Comm) No. 582 of 2022

Decision of the Court

- The court held that the arbitrator was well within the bounds of law to employ a "*rough and ready method*" for awarding a reasonable compensation towards losses/legal injury suffered. The Court also relied on the Supreme Court judgment in ***Construction and Design Services v. Delhi Development Authority***[3], wherein it was held that a "*rough and ready method*" could be applied for awarding Liquidated Damages.
- The court further clarified that the Single Judge's decision wrongly concluded that because the Construction and Design Services case used the expression "guesswork", such methodology could not be adopted by courts other than the Supreme Court.
- Lastly, the court held that the Single Judge erred in directing the parties to agitate the issue of liquidated damages afresh before the arbitral tribunal. Under Section 34 of the Act, a court has the authority to either uphold the award in its entirety or set it aside; it cannot refer issues back to the arbitral tribunal for reconsideration.

Dani Wooltex Corporation & Ors v. Sheil Properties Pvt. Ltd. & Anr

Telangana High Court | Civil Miscellaneous Appeal No. 289 of 2023

Background facts

- Innovation Builders (**Respondent**) constructed an apartment known as Innovation Residency.
- Sri Parvez Adi Debara (**Appellant**) claimed ownership of Flat No. 305 in the apartment Innovation Residency (**said flat**) through inheritance, being the legal heir of late Mr. Rashid Debara who had allegedly purchased the said flat.
- The Respondent claimed that their firm was earlier managed by late Mr. T N Khambati till his demise on October 12, 2017. Thereafter, the Respondent on going through their records found that said flat was left unsold. Upon further verification, the Respondent found that the said flat was currently being illegally occupied by the Appellant.
- In view of the same, the Respondent issued a legal notice dated February 02, 2019 calling upon the Appellant to handover the possession of the said flat to the Respondent.
- Upon the refusal of the Appellant to handover the possession, the Respondent filed a Suit for recovery of the possession of the said flat.
- The Appellant after causing appearance in the Suit filed by the Respondent, filed a Petition under Section 8 of the Arbitration and Conciliation Act, 1996 (**Act**) for resolving the said dispute through arbitration as was stipulated in the Agreement of Sale entered by late Mr. Rashid Debara for purchasing the said flat.
- The Additional Chief Judge of City Civil Court, vide an order dated March 28, 2023 (**said order**), dismissed the petition filed by the Appellant on the ground that the Agreement of Sale was not entered into between the Appellant and the Respondent.
- Aggrieved by the said order, the Appellant filed the preset Appeal.

Issue at hand?

- Whether the objection under Section 8 of the Act would have been sustainable through a legal heir / legal representative of late Mr. Rashid Debara?

Decision of the Tribunal

- At the outset, the court referred to Section 40 of the Act and held that a bare perusal of the Section makes it clear that mere death of a party would not extinguish the right of a party seeking resolution of disputes through arbitration.
- Further, the Court stated that term "legal representative" has been defined under Section 2(1)(g) of the Act and held that a legal representative includes a person who intermeddles with the estate of the deceased as well as a person on whom the estate dissolves on the death of the party so acting.
- The court relied on the judgement in the case of ***Ravi Prakash Goel v. Chandra Prakash Goel and Another***[4] and held that a legal representative is bound by and also entitled to enforce an arbitration agreement.

HSA
Viewpoint

The Court's decision underscores that the death of a party to an arbitration agreement does not invalidate the arbitration agreement or the right of a legal representative to invoke it. This judgment clarifies that a legal heir or representative can invoke arbitration if a binding agreement exists. This reaffirms that arbitration agreements survive the death of a party and that legal representatives are entitled to enforce or challenge such agreements based on their legal standing.

This judgment removes ambiguity concerning the applicability of arbitration agreements post-death and reinforces the principle that legal representatives are bound by and can invoke such agreements, ensuring continuity and enforcement of dispute resolution mechanisms as per the agreed terms.

[3] (2015) 14 SCC 263
[4] (2008) 13 Supreme Court Cases 667

- Thereafter, the court relied on the judgement in the case of ***Sundaram Finance Ltd v. T. Thankam***[5] whereby it was held that once an application filed in due compliance of Section 8 of Act, then the approach of the Civil Court should not be to see whether the court has jurisdiction but to see whether the jurisdiction has been ousted.
- Further, the court stated that the Agreement of Sale has neither been disputed and the late Mr. Rashid Debara was occupying the premises during his lifetime. The court also found that said flat stands in the name of late Mr. Rashid Debara in the revenue records as well as in the records of GHMC. Additionally, the court noted that maintenance charges as well as other charges in respect of the said flat had been borne by late Mr. Rashid Debara.
- In view of the above legal position and the factual backdrop, the court held that dismissal of the petition filed by the Appellant on the grounds that the Appellant is not a party to the Agreement of Sale and hence the same was not binding upon him is not proper, legal and justified.
- Further, the court held that the question whether the Appellant is a legal representative of late Mr. Rashid Debara is an issue which can be dealt in the arbitration proceedings.
- In view of the same, the court set aside the said order.

Kolvekar Logistics v. Joint Commissioner of Commercial Taxes

Karnataka High Court I Writ Petition No. 100347/2022 (T-RES)

Background facts

- Kolvekar Logistics (**Petitioner**), a partnership firm, was engaged in the business of transporting bitumen (**goods**) for subsequent sale. While the goods were being transported by the Petitioner via a transport vehicle, the same was intercepted by an officer of the Commercial Tax division. The officer of the Commercial Tax Division inspected the transport vehicle and found that original tax invoice for the goods, was not being carried in the transport vehicle and accordingly held the Petitioner liable for penalty.
- In view of the same, the enforcement authority passed an order dated October 01, 2021, wherein the tax and penalty on the Petitioner was determined. Aggrieved by the said order, the Petitioner paid the tax and penalty demanded and preferred an appeal before the Assistant Commissioner of Commercial Tax, being the first appellate authority.
- After considering the facts of the matter, the Assistant Commissioner of Commercial Tax passed an order (**Impugned Order**), thereby upholding the order dated October 1, 2021, and noted that the original outward supply tax invoice as specified under Section 68 of the Central Goods and Services Act, 2017 (**CGST Act**) was not tendered by the driver but only Xerox copy of the invoice was produced.
- Aggrieved by the aforesaid, the Petitioner challenged the impugned order in the High Court of Karnataka, Dharwad Bench (**Court**), hence the present appeal.

Issue at hand?

- Whether the order dated October 1, 2021, and the impugned order, had correctly held that transporters are obligated to carry the original tax invoice under the CSGT Act and the State Goods and Services Tax Act (**SGST Act**)?

Decision of the Court

- The primary contention raised by the Advocate for the Petitioner was that none of the provisions of either the CGST Act or the SGST Act mandated transporters to carry original tax invoices, and accordingly carrying a copy of the same would suffice.
- Additionally, the Advocate for the Petitioner submitted that Rule 48 of the CGST Act stipulates that tax invoices are required to be prepared in triplicate in case of supply of goods, as the original tax invoice is meant for recipient or purchaser of the consignment and therefore, same has to be directly sent to the purchaser, while the transporter is required to carry the duplicate. Furthermore, every supplier is required to upload relevant tax invoices in the official portal and therefore, the officials from the department of the Respondent could have downloaded the original tax invoice from the said portal.
- Keeping the aforementioned submissions in mind, the Court noted that the only contention raised by the Respondent and the concerned department was that the transporter was not carrying the original tax invoice while transporting the goods.

HSA
Viewpoint

The judgment of the Karnataka High Court's ruling in favour of Kolvekar Logistics serves as an essential clarification for businesses involved in the transportation of goods. It reinforces the legal sufficiency of duplicate invoices during transport, thus providing relief to transporters and ensuring compliance with the GST framework. The decision also emphasizes the judiciary's role in correcting administrative misapplications of tax laws.

[5] (2015) 14 Supreme Court Cases 444

- Further, the Court observed that the provisions of the CGST Act & SGST Act referred by the Respondent while confirming the tax & penalty on the Petitioner (namely Rule 138 A of the SGST Act and Section 68 of the CGST Act), did not make any reference to carrying of the original tax invoice by transporters.
- The Court, while relying on the decision held in the case of ***Divya Jyothi Petrochemicals Co. v. The Joint Commissioner of Commercial Taxes***[6] held that as per Rule 48(1)(b) of the CGST, it is only the duplicate copy which is meant for transporter and the triplicate copy is meant for supplier as per clause (c). Accordingly, the Court held that not only is a transporter not required to carry the original tax invoice, but the law mandates him to carry only the duplicate copy of tax invoices of the goods being transported.
- In view of the aforesaid, the Court set aside the impugned order and the order dated October 1, 2021, and also directed the Respondent and the concerned department to refund the tax and the penalty paid in excess to the Petitioner.

[6] W.P.No.100378/2022 D.D.28.02.2024

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