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It gives us immense pleasure to circulate this edition of the Luthra and Luthra Law Offices India's Dispute Resolution Newsletter. In this edition, we have primarily focused on the recent legal developments in the field of Arbitration and Insolvency Law. Accordingly, we have covered key judgments passed by the Hon'ble Supreme Court, High Court, NCLAT and NCLT for the period of August-September, 2023.

We hope you enjoy reading our newsletter.

SUPREME COURT

ONCE THE BANK PUBLISHES THE AUCTION NOTICE FOR THE SECURED ASSET, THE BORROWER'S RIGHT TO REDEEM THE MORTGAGE TERMINATES.[1]

The Supreme Court while dealing with provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) observed that a borrower cannot seek redemption of his mortgaged property if he fails to pay the debts owed to financial institutions (FIs) prior to the publication of the auction notice. The bench comprising of Chief Justice DY Chandrachud and Justice JB Pardiwala highlighted the sanctity of the auction process and observed as follows -

> *"It is the duty of the courts to zealously protect the sanctity of any auction conducted. The courts ought to be loath in interfering with auctions, otherwise it would frustrate the very object and purpose behind auctions and deter public confidence and participation in the same."*

The Supreme Court while setting aside the Order of the Bombay High Court also observed that it was improper for the High Court to use its writ jurisdiction, especially when the borrowers had already availed the alternative remedy provided under the SARFAESI Act. The Hon'ble Court in its 111 page verdict observed -

> *"To read it (section 13(8)) otherwise in a strict manner as to only stipulating a restriction upon the secured creditor and not on the borrower's right of redemption would lead to a very chilling effect, where no auction conducted under the SARFAESI Act would have any form of sanctity, and in such a situation no person would be willing to come forward and participate in any auction due to the fear and apprehension that despite being declared a successful bidder, the borrower could still at any time come and*

[1] *Celir Motors v. Bafna Motors (Mumbai) Pvt. Ltd. and Ors.*, 2023 SCC Online SC 1209.

redeem the mortgage and thereby thwart the very auction process.

We hold that as per the amended Section 13(8) of the SARFAESI Act, once the borrower fails to tender the entire amount of dues with all cost & charges to the secured creditor before the publication of auction notice, his right of redemption of mortgage shall stand extinguished/waived on the date of publication of the auction notice in the newspaper in accordance with Rule 8 of the Rules of 2002."

The bench described the situation in which a borrower could redeem the mortgage at any time as "more worrisome", noting that general public who participate in such auctions are often neither aware nor informed by the secured creditors conducting the auctions, that as long as the sale certificate is not issued, they will not have a right in the said asset and that the borrower whose asset is being auctioned could sweep-in and redeem the mortgage any time, and thereby thwart their rights and the very auction process.

EPFO MUST ADHERE TO THE IBC TIMELINE FOR FILING CLAIMS; OFFICERS IN DEFAULT WILL BE HELD ACCOUNTABLE.[2]

The Employees' Provident Fund Organisation (EPFO) is required to make sure that they adhere to the deadlines set forth in the Insolvency and Bankruptcy Code 2016 (IBC). Additionally, the Apex Court ruled that employees of EPFO must face action if deadlines are not met. The bench comprising Justice Sanjiv Khanna and Justice SV Bhatti's made the following observations:

"...we are of the view that the Commissioner and employees of the EPFO must take steps to ensure that there is compliance with the timelines provided under the Insolvency and Bankruptcy Code, 2016. Failure may have legal consequences. The employees of the EPFO must be aware of the consequences in order to ensure compliance. In case there is dereliction of duty, action should be taken against erring employees in accordance with law."

The Hon'ble Supreme Court refused to interfere with the judgment[3] of the National Company Law Appellate Tribunal (NCLAT). The EPFO had filed an appeal before Supreme Court against the judgment passed by NCLAT that had dismissed EPFO's appeal contesting the denial of its claim by the Adjudicating Authority and the Resolution Professional. NCLAT rejected the appeal due to the EPFO's

[2] *Employees Provident Fund Organization V. Fanendra Harakchand Munot*, Civil Appeal No. 5424 of 2023 (Supreme Court).

[3] *Employees Provident Fund Organization v. Fanendra Harakchand Munot & Anr.*, Company Appeal (AT) (Insolvency) No. 427 of 2023 [NCLAT, Delhi].

inordinate delay in submitting its claim, while observing that:

> *"From the facts which has been brought on record it does appear that there was inordinate delay in filing the claim by the Appellant. The Application ... came to be rejected by the Adjudicating Authority observing that Resolution Plan having been approved, no claim can survive."*

HIGH COURT

IT IS MANDATORY TO IMPOUND UNSTAMPED / INSUFFICIENTLY STAMPED AGREEMENTS UNDER SECTION 11 OF ARBITRATION AND CONCILIATION ACT; THE COURT CAN RECEIVE THE INSUFFICIENT / REQUISITE STAMP DUTY ITSELF.[4]

The Delhi High Court reiterated that it is mandatory for the Court exercising power under Section 11 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) to impound the non-stamped or insufficiently stamped agreement. The High Court held that the Court can itself collect the deficient/requisite stamp duty under Section 35 of the Stamps Act, 1899 (Stamp Act) and enable deposit of the requisite stamp duty along with penalty as contemplated by proviso (a) to Section 35 of the Stamps Act.

With this Judgment the High Court has provided the much-needed clarity regarding the process to be followed after the impounding of the unstamped/inadequately stamped agreement. It was observed that the Court would have two choices after impounding the agreement:

> (i) Sending the impounded document to the Stamps Collector in accordance with Sections 40–42 of the Stamp Act.
> (ii) Take recourse to Section 35 of the Stamp Act to deposit the necessary stamp duty and penalty as provided for in Proviso (a) of Section 35 of the Stamp Act.

The Court determined that it would be preferable for the Court to use Section 35 in appropriate circumstances, particularly when the amount of stamp duty that must be paid is not in dispute, to enable the deposit of the necessary stamp duty in Court and then to act on the basis of the instrument containing the arbitration agreement without sending it to the Collector of Stamps.

The High Court has also observed that in cases wherein the Court does not take recourse of Section 35 of the Stamp Act, the High Court in exercise of its inherent power can issue time bound direction to the concerned Collector

[4] *Splendor Landbase Ltd v. Aparna Ashram Society*, 2023 SCC OnLine Del 5148.

(Stamps), to ensure that the statutory mandate under Section 11(13) of the Act is not defeated.

The Court pointed out that such a procedure would not only be in accordance with *N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd and Other*[5]*, but would also carry out the requirements of Section 11(13) of the Act and ensure that disposal of petitions under Section 11 of the Act is not unduly delayed due to the adjudicatory process to be carried out by the Collector of Stamps.

SENDING A SCANNED COPY OF A SIGNED ARBITRAL AWARD THROUGH EMAIL CONSTITUTES A VALID DELIVERY UNDER SECTION 31(5) OF THE A&C ACT[6]

The Delhi High Court recently held that an email sent by the arbitral tribunal to the parties with a scanned copy of the signed award attached constitutes a valid delivery of the award under section 31(5) of the Arbitration Act.

According to the bench comprising Justice Mini Pushkarna, the fact that the award was physically received at a later time is irrelevant regarding the statute of limitation, which begins on the date of the subject email and applies to challenges to arbitral awards under Section 34 of the Arbitration Act. Any subsequent communication by the tribunal would not be considered as a new cause of action taking the same as the beginning point of limitation after the tribunal has resolved an application under Section 33 of the Arbitration Act.

According to the Court, the commencement date for limitation for challenging an arbitral award under Section 34 of the Arbitration Act is the date of the relevant email, and the fact that the award was physically obtained at a later time is irrelevant for purposes of the limitation. The Court observed:

> "*The law has to keep its pace in tandem with the developing technology. When service by email is an accepted mode of service, then sending scanned signed copy of the award/order of the Arbitral Tribunal to the parties would be a valid delivery as envisaged under Section 31(5) of the Arbitration Act.*"

IF THE HEAD OF THE FAMILY SIGNS THE ARBITRATION AGREEMENT ALONG WITH OTHERS, THE ARBITRATION CLAUSE IS BINDING ON EVERYONE.[7]

[5] 2023 SCC Online SC 495.

* Judgement has been referred to larger bench for reconsideration of issues pertaining stamping of instrument containing Arbitration Clause.

[6] *Ministry of Youth Affairs and Sports v. Ernst and Young Pvt Ltd*, 2023 SCC OnLine Del 5182

[7] *Mrs. Vinnu Goel vs. Mr. Satish Goel and Ors, 2023* SCC Online Del 4758.

The dispute in this case concerned the members of a joint family, which consisted of two groups, which divided the family assets they jointly owned. A Memorandum of Understanding (MoU) was executed between the parties in November 2014 to show unanimity within the family. Several other family members endorsed the MoU by signing each page and annexure.

Following that it was alleged that one of the family members violated the terms of the MoU. As a result, one of the family member invoked the arbitration clause contained in the MoU.

However, the one of the family members sued the other members of the family, claiming that the MoU was void and unenforceable. It was claimed that the member who initiated the proceedings was neither a party to the MoU nor had the same been signed by him, and that the defendants were attempting to divide and sell the self-acquired property of such party through the MoU. The other members of the family filed an application under Section 8 of the Arbitration Act claiming that the MoU binds all the members and that any dispute originating from the MoU must be referred to arbitration.

The High Court noted that the MoU's objective was diversion of the properties owned by the members of the two families, and that each member of the two families had signed the MoU individually on each page. The Court noted that a coordinate bench had already examined and dismissed the claims of fraud and non-signatory to MoU.

The Court observed that if the heads of the two branches of the families signed a settlement agreement pertaining to the assets they possessed, then all of the members of the families would be subject to its terms and conditions. The Court further held that any party signing an MoU must abide by all of its terms and circumstances, including the arbitration clause. It was decided that a party cannot refuse to be bound by an agreement solely because it was not expressly added as a party.

The Court reaffirmed that the scope of judicial examination under Section 8 of the A&C Act is confined to forming a *prima facie* opinion, and that if the arbitration agreement is found to exist, the Court is obligated to refer the parties to arbitration.

NCLAT

DIFFERENTIAL PAYMENTS CAN BE MADE TO ASSENTING AND DISSENTING UNSECURED FINANCIAL CREDITOR.[8]

[8] *Peter Beck and Partner Vermoegensverwaltung GMBH v. Sharon Bio-medicine Limited & Ors*, 2023 SCC Online NCLAT 464.

The NCLAT, New Delhi Bench has held that differential payments can be made between the unsecured financial creditors who voted in favour of the plan and the ones who voted against it.

The Corporate Debtor was admitted into the Corporate Insolvency Resolution Process (CIRP). A Resolution Plan for the Corporate Debtor was approved by the Committee of Creditors with 79.28% of the voting shares. Unsecured financial creditor of the corporate debtor known as the Dissenting Financial Creditor/Appellant did not cast a vote in favour of the Resolution Plan.

On 17.05.2023, the Adjudicating Authority[9] approved the Resolution Plan. The computation for distribution of monies to financial creditors was mentioned in an email addressed to the dissenting financial creditor and was allotted NIL amount. The dissenting financial creditor's liquidation value was also zero. This was appealed by the Dissenting Financial Creditor to NCLAT.

The Bench relied on Section 30(2)(b) of the IBC and noted that the amount payable to financial creditors who do not vote in favour of the Resolution Plan shall not be less than the amount to be paid to such creditors in accordance with Section 53(1) in the event of the corporate debtor's liquidation. NCLAT held that:

> *"we are of the view that assenting financial creditors entitled for payment as proposed in the plan and dissenting financial creditor is entitled as per the minimum entitlement as per Section 30(2)(b)."*

Regulation 38 (a) & (b) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) also provide that financial creditors who did not vote in favour of the Resolution Plan will be paid ahead of those who did.

It was stated that the amount to which the creditor who does not vote in favour of the plan is entitled is a different matter from precedence in payment. The IBBI is authorised to create regulations that are compliant with Section 240 of the IBC. As a result, Regulation 38 must be interpreted in consonance with the IBC. A dissenting financial creditor is entitled for payment as contemplated by IBC.

The argument that there cannot be any distinction between the amount paid to unsecured financial creditors who voted in

[9] *Culross Oppuortunies SP Peter Beck and Partner v. Sharon Bio-Medicine Limited*, I.A. No. 3698 of 2022 IN C.P. No. 246 of 2017 (NCLT, Mumbai).

favour of the plan and those who did not was rejected by the Bench and observed –

> *"... There is no dispute that liquidation value of the Appellant in the present case is nil. The submission of the Appellant that there is a discrimination between the payment of assenting unsecured financial creditor and dissenting unsecured financial creditor cannot be accepted and on the ground, as urged by the Appellant in this Appeal, the Resolution Plan approved by the Adjudicating Authority cannot be held to be discriminatory."*

NCLT

CIRP CANNOT BE INITIATED BY A STOCK BROKER COMPANY, IT IS A FINANCIAL SERVICE PROVIDER UNDER IBC[10]

A stock broker company is a financial service provider under IBC, according to the National Company Law Tribunal (NCLT), New Delhi.

In this case, the applicant submitted an application under Section 10 of the IBC, 2016, seeking for the initiation of CIRP) against it. In accordance with the Securities and Exchange Board of India's (SEBI) Act and SEBI (Stockbrokers and Sub-Brokers) Regulations, 1992, the Applicant Company is a stock broker registered with SEBI.

The Company stated that owing to its current financial situation, it was unable to carry on with business as usual. The Company was also designated a defaulter and expelled from membership in the National Stock Exchange. The petition was contested by SEBI, which argued that the company is not a "Corporate Person" as defined under Section 3(7) of the IBC but rather a "Financial Service Provider" under the IBC.

The main issue that was considered by NCLT was whether a Stock Broker Company is a Financial Service Provider?

The Bench held that CIRP under IBC Sections 7, 9, and 10 can be initiated only against a "Corporate Debtor". A "Corporate Debtor" is a "corporate person who owes a debt to any person," according to Section 3(8) of the IBC. Any financial service provider is not included in the definition of "Corporate Person" as stated in Section 3(7) of the IBC. As a result, no CIRP can be started against the Company if it is determined to be a "financial service provider" because it is neither a corporate person nor a corporate debtor under IBC.

The Bench stated that because the Company is a stock broker, it is necessary to determine whether a stock broker business can be

[10] *M/s Bezel Stockbrokers Private Limited v. Security Exchange Board of India & Anr*. SCC Online NCLAT 400.

regarded as a financial service provider. The Bench observed:

> *"Since Corporate Applicant, being a stock broker, was dealing in the activities of buying, selling, or dealing in securities etc., which in terms of Section 3(15) of IBC 2016 are a "Financial Product" belonging to another person. Hence, in terms of Section 3(16) of IBC 2016, the Corporate Applicant was providing "Financial Service" or in other words, it was a "Financial Service Provider"*

In view of the above, the Bench has rejected a stock broker company's application to initiate the CIRP against itself under Section 10 of the IBC.

This newsletter is only for general informational purposes, and nothing in this newsletter could possibly constitute legal advice (which can only be given after being formally engaged and familiarizing ourselves with all the relevant facts). However, should you have any queries, require any assistance, or clarifications with regard to anything contained in this newsletter (or Dispute Resolution in general), please feel free to contact the Dispute Resolution team at any of the contacts listed below.

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