Luthra and Luthra
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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, Insolvency and Criminal Law. Accordingly, we have covered key judgments passed by the Hon'ble Supreme Court and High Court(s) for the period of October-November 2023. We hope you enjoy reading our newsletter.

SUPREME COURT

HOMEBUYERS WHO HAVE SECURED RERA DECREES CANNOT BE TREATED DIFFERENTLY FROM OTHER FINANCIAL CREDITORS UNDER IBC[1]

The Supreme Court bench comprising of Justices S. Ravindra Bhat and Aravind Kumar has held that homebuyers cannot be treated differently from other financial creditors under the Insolvency and Bankruptcy Code, 2016 ("**IBC**") just because they have secured orders from the authority under the Real Estate (Regulation and Development) Act, 2016 ("**RERA**").

Initially, homebuyers were not covered within financial creditor or operational creditor under IBC. However, in the year 2017, the National Company Law Appellate Tribunal ("**NCLAT**") held in *Nikhil Mehta and Sons (HUF) v. AMR Infrastructure*[2] held that the amounts collected from homebuyers under assured return schemes had the "*commercial effect of a borrowing*". Thereto, homebuyers were held to be financial creditors under the Code. Since this judgement, individuals who had been given real estate properties ('allottee' as defined under RERA) i.e., homebuyers, were now considered financial creditors under the IBC.

In the instant case, the Supreme Court set aside an order of the NCLAT which held that beneficiary of orders of the RERA Authority should be treated differently from other homebuyers. Homebuyers who did not approach authorities under RERA were given the benefit of 50% better terms than that given to those who had approached RERA or who were decree holders.

The Supreme Court noted from a plain reading of Section 5(8)(f) of the IBC, no distinction is *per se* made out between different classes of financial creditors for the purposes of drawing a resolution plan. Regarding Section 18 of the RERA, the Court said that the Resolution Professional's view appeared to be that once an allottee seeks remedies under RERA and opts for return of money in terms of the order made

[1] *Vishal Chelani v. Debashis Nanda*, 2023 SCC OnLine SC 1324.

[2] 2017 SCC OnLine NCLAT 219.

in her favour, it is not open for her to be treated in the class of home buyer.

ED MUST FURNISH GROUNDS OF ARREST TO THE ACCUSED IN WRITING[3]

The Supreme Court through Justices AS Bopanna and PV Sanjay Kumar held that Directorate of Enforcement ("**ED"**) is not expected to be *"vindictive in its conduct"* and that it should ensure that its actions are *"transparent, above board and conforming to the pristine standards of fair play in action"*.

This judgement provided a much-needed balance to the powers of the ED since the controversial judgment delivered by the Supreme Court in 2022 in *Vijay Madanlal Choudhary v. Union of India*[4], which upheld the drastic powers of the agency/ED for arrest and seizure under the Prevention of Money Laundering Act, 2002.

The Court held that the ED should inform the grounds of arrest to the accused in writing at the time of the arrest and mere oral reading out of such grounds will not suffice. It further stated that the ED cannot arrest a person citing mere non-cooperation to the summons. Moreover, if arrest is invalid, then the subsequent remand order will also fail as judicial order of remand can't validate an illegal arrest.

The Court came down heavily on the central agency for its approach taken in the instant case by which the grounds of arrest were not furnished to the accused in written form. Noticing that the ED officer merely read out the grounds of arrest, the Court held that such a conduct will not fulfil the mandate of Article 22(1) of the Constitution and Section 19(1) of the Prevention of Money Laundering Act.

UNILATERAL REVISION OF FEE BY AN ARBITRAL TRIBUNAL WILL NOT TERMINATE ITS MANDATE ON GROUNDS INELIGIBILITY[5]

The dispute in this case arose from an ongoing arbitration proceeding. The origin of this litigation arose when the Arbitral Tribunal revised its fees from a sum of Rs. 1,00,000/- to a sum of Rs. 2,00,000/- per session per Arbitrator. While the fee was remitted by the respondent, the same was objected to by the appellant.

Aggrieved by the same, the appellant challenged the mandate of the tribunal before the Madras High Court. It was argued that

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[3] *Pankaj Bansal v. UOI***,** 2023 SCC OnLine SC 1244.

[4] [2022] 6 SCR 382.

[5] *Chennai Metro Rail Ltd. Administrative Bldg. v. Transtonnelstroy & Anr. 2023 SCC OnLine SC 1370.*

there is reasonable apprehension of prejudice/bias that would operate against the appellant. Therefore, the mandate of the Tribunal is liable to be terminated on the ground that it is *de jure* and is unable to perform its function as required. However, the High Court dismissed the same resulting in the present appeal.

The primary issue at hand was whether the unilateral increase of fees by the Arbitral Tribunal could render the arbitrator ineligible under Section 12 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") thereby terminating the mandate of the tribunal. The appellant argued that such a fee revision created a reasonable apprehension of prejudice or bias, making the tribunal *de jure* ineligible and unable to fulfil its function as required.

In this notable judgment, the Supreme Court has held that unilateral revision of fee by an arbitral tribunal, though not permissible, will not terminate its mandate on the ground of ineligibility as per Section 12 of the Arbitration Act.

The bench categorically held that only the grounds specified in the fifth and seventh schedule of the Arbitration Act can be considered to determine the ineligibility of an arbitrator. The ineligibility of the arbitrator must be something *"going to the root of the jurisdiction, divesting the authority of the tribunal, thus terminating the mandate of the arbitrator*".

DOCTRINE OF ELECTION CANNOT PREVENT A FINANCIAL CREDITOR FROM INITIATING CORPORATE INSOLVENCY RESOLUTION PROCESS AGAINST A CORPORATE DEBTOR[6]

The Supreme Court held that the Doctrine of Election cannot prevent a Financial Creditor from initiating CIRP against a Corporate Debtor and that a question of election between enforcement of debt under the Recovery of Debts and Bankruptcy Act, 1993 ("**RDB Act**") and initiation of CIRP, under IBC, arises only after a recovery certificate is issued.

In this case, the Corporate Debtor had taken credit facilities from many institutions, one of which was SBI. On failure of the Corporate Debtor to repay the loans, three recovery procedures were initiated against it before the Debt Recovery Tribunal ("**DRT**"). The DRT issued a recovery certificate against the debtor in 2015 and subsequently two more in 2017, in favour of SBI. Subsequently, in 2019, SBI filed an application under Section 7 of IBC seeking the initiation of CIRP against the Corporate Debtor, which was allowed by NCLT. The

[6] *Tottempudi Salalith v. State Bank of India & Ors.*, 2023 SCC OnLine SC 1357.

Appellant before NCLAT *inter alia* contended that banks having approached the DRT, were barred under the doctrine of election from approaching the NCLT for recovery of same set of debts. The NCLAT dismissed the appeal and consequently, the Appellant filed an appeal before the Supreme Court.

On the issue of Doctrine of Election, the Supreme Court observed that the concept was inherent in the law of evidence, which prohibits the prosecution of the same right in two distinct fora based on the same cause of action. However, in this instance, the DRT recovery process began in 2014, before IBC had even been formed. The court ruled that the notion of election could not be used to preclude Financial Creditors from approaching the NCLT for the initiation of CIRP.

The Supreme Court went on to observe that the relief under RDB Act and the IBC are different and once CIRP results in declaration of moratorium, the enforcement mechanism under the RDB Act gets suspended. In such a circumstance, the financial creditor ought to have the option for enforcing recovery through a new forum instead of sticking on to the mechanism through which the recovery certificate was issued. Thus, the doctrine cannot be applied.

AWARDING CLAIM FOR LOSS OF PROFIT WITHOUT SUBSTANTIAL PROOF IS IN CONFLICT WITH PUBLIC POLICY OF INDIA[7]

The bench of the Supreme Court comprising of Justice Ravindra Bhat and Justice Dipankar Dutta, while rendering an arbitral award as patently illegal and in conflict with public policy of India held that a claim for damages cannot result in an arbitral award unless there is substantial proof of the claimant having suffered injury.

The Appellant (M/s Unibros) was awarded a work contract by the Respondents (All India Radio) which was delayed. This resulted in disputes between the parties which were referred to arbitration. The Appellants made a claim for compensation for the loss of profit and the same was allowed by the Arbitrator. The claim was allowed on the grounds that the Respondent caused the delay and retained the Appellant for a period of 3.5 years as against the stipulated contract period of 12 months. This was challenged in the High Court and the Court directed the Arbitrator to reconsider while setting aside the award. The arbitrator while reconsidering maintained the earlier award. However, in a subsequent challenge before the High Court, the Ld. Single Judge rejected the Appellant's claim for compensation. The said decision was not

[7] *M/s Unibros v. All India Radio*, 2023 SCC OnLine SC 1366.

interfered by the Division Bench of the High Court, resultantly, the Appellant approached the Supreme Court.

The Supreme Court in the matter observed that while making a claim for loss of profit arising out of a delayed contract, the claimant has to substantiate the presence of another opportunity elsewhere through compelling evidence. The Court went on to observe that while adjudging such claims, the courts may not make a guess in the dark and rely only on evidence.

The Court established certain conditions which have to be established to make a valid claim for loss of profit, which are as follows:

- There was a delay in the completion of the contract.
- Such delay is not attributable to the Claimant.
- The Claimant's status as an established contractor, handling substantial projects;
- Credible evidence to substantiate the claim of loss of profit.

Owing to the lack of evidence provided by the Appellant, the Court dismissed the appeal.

CONSUMERS CANNOT BE COMPELLED INTO ARBITRATE[8]

A Supreme Court bench comprising Justice Sanjay Kishan Kaul and Justice Sudhanshu Dhulia observed that consumers cannot be compelled to arbitrate a dispute just because they are a signatory to an arbitration agreement.

In the present matter, a consumer complaint was filed by a home buyer against a builder. The Telangana High Court, refused to appoint arbitrators. The builder filed an application, before the consumer forum, under Section 8 of the Arbitration Act seeking reference of the disputes to arbitration. However, the consumer forum dismissed the application on the grounds that the dispute was not arbitrable.

The bench went on to observe that the Consumer Protection Act's primary purpose is protecting the interest of a consumer and legislatively assign disputes to the public fora. Therefore, such disputes should be kept away from a private fora like arbitration unless both parties opt for arbitration over the remedy before the public fora. The Court also observed that even if a consumer in dispute is a signatory to a contract which provides for arbitration, when a party seeks redressal under welfare legislation, the arbitrability of the dispute needs to be considered. However, a party cannot be compelled to resort to arbitration

[8] *M. Hemalatha Devi & Ors. V. B. Udayasri*, Civil Appeal Number 6501 of 2023 (Supreme Court).

merely because the contract provides for it. It was further observed that merely because the builder moved to initiate proceedings under the Arbitration Act, the jurisdiction of Consumer Courts cannot be ousted.

HIGH COURT

NO STAMP DUTY PAYABLE ON WORK ORDER EXECUTED ON BEHALF OF GOVERNMENT[9]

In April this year, a Constitution Bench of the Supreme Court in the case of *NN Global Mercantile v. Indo Unique Flame Ltd*.[10] held that an arbitration agreement as well as an instrument containing an arbitration agreement, which attracts stamp duty and which is unstamped or is insufficiently stamped, cannot be acted upon, as such a document cannot be said to be a contract enforceable in law within the meaning of Section 2(h) read with Section 2(g) of the Indian Contract Act, 1872.

The Delhi High Court, through Justice Rekha Palli, while expounding apposite provisions of the Indian Stamp Act, 1899 (as applicable to Delhi) held that *NN Global Mercantile (supra)* shall not apply to the agreements executed by or on behalf of the government. Therefore, it was held that no stamp duty is payable on an instrument which is executed by, or on behalf of or in favor of the government. It held that the Court exercising powers under Section 11 of the Arbitration Act would not refuse to appoint arbitrator once it is ascertained that instrument falls within the exception created by the stamps act for government [*see* Section 3 of Indian Stamp Act, 1899].

The arbitration saga unfolded in this matter when Petitioner sought the appointment of an arbitrator to address disputes stemming from a work order issued on February 15, 2016. The pivotal question in the case revolved around the unstamped status of the work order. The respondent argued that an agreement executed in Delhi without specific stamp duty provisions in Clause 5(c) of Schedule IA of the Indian Stamp Act, 1899 required a stamp duty of Rs 50. The absence of such duty, according to the respondent, rendered the arbitration clause within the Work Order unenforceable. In response, the petitioner invoked proviso (1) to Section 3 of the Indian Stamp Act, which carves out an exemption for instruments executed by or on behalf of the Government from stamp duty. The Petitioner contended that the Work Order was executed on behalf of the government and hence, no stamp duty was payable rendering the arbitration clause valid. The court, after careful examination of both provisions, concluded that the Work Order was not inadequately stamped. It emphasized that the exemption for government-executed

[9] *SVK Infrastructures v. Delhi Tourism & Transportation Development Corp. Ltd*. 2023SCC OnLineDel 6460.

[10] (2021) 4 SCC 379.

instruments applied, rendering the *M/s. N.N. Global Mercantile* case inapplicable.

The Court also held that once the entity which had executed the agreement containing arbitration clause has been acquired by another entity, the acquiring party would step in the shoes of the executing party, therefore, it can invoke the arbitration clause.

NO FRESH ADJUDICATION CAN TAKE PLACE FOR ANY CLAIM THAT WAS MADE PART OF THE RESOLUTION PLAN[11]

Dismissing a petition filed by Indian Oil Corporation Limited (IOCL) against Arcelor Mittal Nippon Steel Limited (AMNS) to appoint an arbitrator to adjudicate a claim pertaining to Essar Steel India Limited (ESIL), the Delhi High Court held that once a resolution plan is approved by the CoC and the Adjudicating Authority (NCLT), it results in the extinguishment of all the existing claims that any party may have against the Corporate Debtor and no fresh adjudication can take place for any claim that was made part of the resolution plan.

The Court observed that the doctrine of clean slate demands that the successful resolution applicant begins on a clean slate and is only bound to meet the claims that formed part of the resolution plan and cannot be burdened with the duty to defend or oppose claims which are either not factored in the Resolution Plan nor can it be left to fend off actions that may be brought with respect to alleged or asserted dues of the corporate debtor which were not admitted.

The dispute arose out of a Gas Supply Agreement (GSA) executed by the parties in 2009, which was terminated by ESIL in 2017. However, IOCL objected to the termination on the ground that it had not committed any breach of its contractual obligations. IOCL alleged that the termination notice was liable to be viewed as ineffective. It also called upon ESIL to participate in the amicable settlement procedure as per the GSA. Since ESIL did not respond, IOCL invoked arbitration in terms of the Gas Supply Agreement.

However, during this dispute, the NCLT, Ahmedabad admitted ESIL into CIRP and appointed a Resolution Professional (RP). IOCL lodged a claim of over Rs 3,500 crore with the RP, the RP admitted the claim for a notional value of Rs 1. This notional value featured in the resolution plan, which was given a go ahead by the Supreme Court in 2019. The resolution plan was implemented and AMNS took over the company. However, IOCL approached the Delhi High Court in

[11] *IOCL v. Arcelor Mittal Nippon Steel India Limited*, 2023 SCC OnLine Del 6318.

2022 for the appointment of an arbitrator to adjudicate its dispute, which had already been put to rest by the resolution plan.

The bench, comprising Justice Yashwant Varma held that IBC does not contemplate matters being left inchoate but presses one to accept the seal of finality and quietude which stands attached to the approval of a Resolution Plan. It was held that once the Supreme Court has granted the seal of approval to the plan submitted by the respondent, therefore, the constitution of the arbitral tribunal for the same claims would mean the reopening of the resolution plan which is not permissible and the claims that were part of the resolution plan becomes non-arbitrable after the plan is approved.

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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