



Luthra *and* Luthra
LAW OFFICES INDIA

DISPUTE RESOLUTION NEWSLETTER

FEBRUARY 2024

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It gives us immense pleasure to circulate the February 2024 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 Law, Civil and Commercial Laws. Accordingly, we have covered key judgments passed by the Hon'ble Supreme Court and High Court(s) for the period of December 2023 - January 2024. We hope you enjoy reading our newsletter.

SUPREME COURT

Cancellation of Deed is Arbitrable being an action *in personum*¹

A Division Bench comprising of Justice Aniruddha Bose and Justice Sudhanshu Dhulia has held that the cancellation of conveyance deed is an action in *personum*, and hence, arbitrable.

In the case at hand, the Appellant had filed a suit seeking annulment of Conveyance Deed and termination of Development Agreements. The Respondent (Defendant in the Suit) invoked Section 8 of the Arbitration and Conciliation Act, 1996 [**"Arbitration Act"**] relying on the arbitral clause contained in the Tripartite Agreement executed between the parties. The Appellant raised challenge to the aforesaid *inter alia* on the ground that challenge to Conveyance Deed is an action *in rem* and thus, the dispute is non-arbitrable.

The Bench held that the first pre-requisite for an application under Section 8 of the Arbitration Act is the existence of an "arbitration clause". The Bench emphasized that the role of a 'Court' is extremely limited in arbitration matters and after the 2015 Amendment to the Arbitration Act, primarily the court has to only see that a valid arbitration agreement exists.

The Apex Court referred to *Booz Allen*², wherein, circumstances were laid down which renders a dispute non – arbitrable, such as guardianship disputes, matrimonial disputes, or disputes relating to consumers. Further, the Court referred to its judgment is *Vidya Drolia*,³ wherein it was held that Court will only decline reference under Section 8 / 11 of the Arbitration Act in rare cases, where the Court is certain that either the arbitration agreement is non-existent, or the dispute is itself "manifestly non-arbitrable".

Finally, the Court relying upon *Deccan Paper Mills*⁴, wherein it was held that suit for cancellation of a deed or a declaration of rights arising from the deed would only be an

¹ Sushma Shivkumar Daga v. Madhurkumar Ramkrishmaji Patel 2023 SCC OnLine SC 1683

² Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others, (2011) 5 SCC 532

³ Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1.

⁴ Deccan Paper Mills v. Regency Mahavir Properties, (2021) 4 SCC 786



action *in personum* and not *in rem*, rejected the contention that cancellation of deed is an action *in rem* and hence, not arbitrable. Thus, the Apex Court has held cancellation of conveyance deed is an action *in personum* and arbitrable, thereby expanding the scope of arbitration with respect to property dispute.

Properties of Corporate Debtor sold prior to declaration of moratorium though auction sale cannot be treated as liquidation asset⁵

The Hon'ble Supreme Court recently while setting aside an Order passed by National Company Law Appellate Tribunal ["NCLAT"] has held that properties of a defaulting borrower/Corporate Debtor sold in an auction sale, prior to the declaration of moratorium under Insolvency and Bankruptcy Code, 2016 ["IBC"], cannot be treated as liquidation assets.

The Appellant had bought the properties of the Corporate Debtor in an Auction Sale and had made payment towards such sale prior to admission of Corporate Debtor into Corporate Insolvency Resolution Process ["CIRP"] as well as the declaration of moratorium. The Adjudicating Authority ["NCLT"] found the issuance of sale certificate and handing over of the property to be illegal. Further, NCLT held that subject properties were to remain the properties of the Corporate Debtor. Thus, while commencing the liquidation process, the NCLT directed the Liquidator to take possession of the subject properties. The said order was impugned before the NCLAT in an appeal. However, the Appellate Tribunal dismissed the Appeal.

Thereafter, the Appellant preferred a Civil Appeal before the Hon'ble Supreme Court. The Apex Court observed that no reason was cited by the Respondents to demonstrate as to why the sale certificate would be held illegal. Further, the Hon'ble Bench held that Respondents had not made any case pertaining to defect or default in forwarding the sale certificate in terms of Section 89(4) of the Registration Act, 1908. Moreover, the Court noted that all the Respondents concurred that the sale of subject properties stood concluded prior to declaration of moratorium. Further, the court relied on *Esjaypee Impex*⁶, to hold that the certificates issued were valid. In view of the aforesaid, the Hon'ble Supreme Court allowed the appeal and held that the subject properties cannot be treated as liquidation assets.

⁵ Haldiram Incorporation Pvt. Ltd. Vs. Amrit Hatcheries Pvt. Ltd, Civil Appeal No. 1733 of 2022. (Supreme Court).

⁶ Esjaypee Impex Private Limited vs. Assistant General Manager and Authorised Officer, Canara Bank, (2021) 11 SCC 537.



When objection to maintainability of the suit is raised while deciding to grant interim relief, the court must *prima facie* form an opinion that suit is maintainable prior to granting such interim relief.

The Apex Court in the case of *Asma Lateef & Anr. V. Shabbir Ahmad & Ors.*⁷ has held that if the maintainability of a civil suit is questioned and the grant of interim relief is opposed on that ground, then, grant of relief in whatever form, if at all, ought to be preceded by formation and recording of at least a *prima facie* satisfaction that the suit is maintainable or that it is not barred by law.

The Court also observed that such satisfaction must rest upon appreciation of the averments in the plaint, the application for interim relief and the written objection thereto, as well as the relevant law as cited in support of the objection. Further, the aforesaid appreciation should form part of the court's reasoning for grant of interim relief.

It was further observed that if the court is of the opinion at the stage of hearing the application for interim relief, the suit is barred by law or is otherwise not maintainable, it cannot dismiss it without framing a preliminary issue after the written statement is filed but can most certainly assign such opinion for refusing interim relief. However, if an extraordinary situation arises where it could take time to decide the point of maintainability of the suit and non-grant of protection *pro-tem* pending such decision could lead to irreversible consequences, the court may proceed to make an appropriate order justifying the course of action it adopts.

Statutory set-off or insolvency set-off is inapplicable to CIRP under IBC⁸

In a recent judgement, the Hon'ble Bench presided over by Mr. Justice Sanjiv Khanna and Mr. Justice S.V.N. Bhatti has held that the creditors are not entitled to claim set off during the CIRP.

The primary issue before the Apex Court was regarding the right to claim set-off in the CIRP, when the Resolution Professional proceeds in terms of clause (a) to sub-section (2) of Section 25 of IBC to take custody and control of all the assets of the corporate debtor.

The Court in the judgment has discussed in detail the principles relating to contractual set-off, statutory set-off, equitable set-off and insolvency set-off, and have analysed their applicability during the CIRP of Corporate Debtor. The Court noted that IBC, during the course of CIRP, does not provide the indebted creditors the right to set off against the

⁷ *Asma Lateef & Anr. V. Shabbir Ahmad & Ors.*, Civil Appeal No. 9695 of 2013 (Supreme Court)

⁸ *Bharti Airtel Limited and Anr. v. Vijaykumar V. Iyer and Ors.*, Civil Appeal No. 3088-3089 of 2020 (Supreme Court).



corporate debtor, however, the previous enactments, the Companies Act, 1956 and the Companies Act, 2013 (provision now omitted), did permit set off.

Further, the Court also noted that Section 173 of IBC permits set-off in case of partnership and individual bankruptcies. Moreover, Regulation 29 of the IBBI (Liquidation Process) Regulations, 2016 also provides for mutual credits and set-off. However, the Court opined that Liquidation Regulations are not applicable to Chapter II Part II of IBC, which pertains to CIRP.

Referring to Section 238 of IBC, which states that provisions of the Code would override other laws, the Court held that the provisions of statutory set off in terms of Code of Civil Procedure, 1908 or insolvency set-off as permitted by Regulation 29 of the Liquidation Regulations are not applicable to CIRP. However, the aforesaid rule has been held to have two exceptions:

1. Firstly, where a party is entitled to a 'contractual set-off' on the date which is effective before or on the date the CIRP is put into motion or commences. In this regard the Court has observed that during the moratorium period with initiation of CIRP the recovery, legal proceedings etc. cannot be initiated, enforced or remain in abeyance. Besides the moratorium effect, the terms of the contract remain binding and are not altered or modified. The Court with respect of Contractual set-off has also observed that the right to set-off may be explicit in the words of the agreement or can be gathered by the existence of an oral or implied agreement to set-off, reflecting an understanding to that effect.
2. The second exception will be in the case of 'equitable set-off' when the claim and counter claim in the form of set-off are linked and connected on account of one or more transactions that can be treated as one. In other words, claim for an equitable set-off must have a connection between the plaintiff's claim for the debt and the defendant's claim to set-off, which would make it inequitable to drive the defendant to a separate suit. The claim for set-off should arise out of the same transaction, or transactions which can be regarded as one transaction.

This judgment provides for valuable insights into the applicability of different principles of set off during the CIRP of a Corporate Debtor, and will serve as a guiding light for Resolution Professional as well as the Adjudicating Authority as to how set-off will be dealt by them under the ambit of IBC.



DELHI HIGH COURT

A signed copy of Arbitral Award must be delivered to each party to constitute a valid service u/s 34(3) of A & C Act⁹

The Division Bench of Delhi High Court comprising of Rajiv Shakti and Tara Vitasta Ganju, JJ., has held that every arbitral award and any corrigendum must be served upon all the parties and not to their agent or lawyer to constitute a valid service.

The Court relied on *Benarsi Krishna*,¹⁰ wherein the Apex Court had held that the expression 'party' as defined in Section 2(1)(h) of the Act, indicates a person who is a 'party' to an Arbitration Agreement and in no way includes the agent of the party to such agreement.

The court made the following observations:

1. A signed copy of Arbitral Award is to be delivered to each party.
2. The delivery should be to a party who is competent to take a decision as to whether or not the Award was to be challenged.
3. The expression 'party' did not include an agent or a lawyer of such party.
4. The limitation under Section 34(3) of the Act begins when the party making the application had received the Award.
5. In the case for correction of typographical, clerical, or computational errors under Section 33 of the Act, the limitation will be calculated from the date on which the application was disposed of.

It may be noted that the Court also observed that the Arbitral Award must be served on all parties to constitute valid service for the purpose of Section 34(3) of the Arbitration Act.

BOMBAY HIGH COURT

One Partner cannot refer a dispute to arbitration in the absence of the other Partners joining¹¹

The High Court of Bombay through Justice Manish Pitale has held that business-related dispute of a partnership firm cannot be referred to arbitration solely by one partner, in

⁹ Ministry of Health & Family Welfare v. Hosmac Projects Division of Hosmac India (P) Ltd., 2023 SCC OnLine Del 8296

¹⁰ Benarsi Krishna Committee v. Karmyogi Shelters (P) Ltd, (2012) 9 SCC 496.

¹¹ Shailesh Ranka v. Wndor Machines Limited 2023 SCC OnLine Bom 2704.



absence of the other partner's consent. The Court observed that the partner's implied authority does not extend to refer the dispute to arbitration as per Section 19(2)(a) of the Partnership Act, 1932 [**"Partnership Act"**].

In other words, one set of partners cannot submit a business dispute of the partnership firm to arbitration, in the absence of other partners joining them, unless there is an agreement between the parties to the contrary. The Court clarified that implied authority bestowed on the partners under the Partnership Act cannot be invoked to refer a dispute to the Arbitration in absence of consent from remaining partners. The Court also held that an arbitration notice issued by one of the partners without the consent of the remaining partners is invalid which renders the petition for the appointment of the arbitrator also invalid.



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. © Luthra & Luthra Law Offices India 2023. All rights reserved.

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