Luthra and Luthra
LAW OFFICES INDIA

# DISPUTE RESOLUTION NEWSLETTER

MARCH 2024

## INSIDE

It gives us immense pleasure to circulate the March 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, High Court(s), National Company Law Appellate Tribunal and National Company Law Tribunal for the period of January – February 2024. We hope you enjoy reading our newsletter.

# SUPREME COURT

## Interim stay orders in pending cases not to be automatically vacated.[1]

A five-judge Constitution Bench of the Hon'ble Supreme Court unanimously held that stay orders operating in all pending cases do not automatically lapse. The Constitution Bench was reconsidering its earlier decision in the case of *Asian Resurfacing*[2], wherein it was held that stay order granted by High Courts in pending cases would automatically be vacated after six months.

Justice A.S. Oka pronounced the majority opinion on behalf of himself, CJI Chandrachud, Justice(s) J.B. Pardiwala and Manoj Misra. The majority disagreed with the ratio laid down in *Asian Resurfacing* and observed that automatic vacation of interim relief/stay without hearing the beneficiary is against the basic tenets of justice. It also observed that if the lapse of time is due to the fault of court, then the litigant must not suffer on account of the same. The Apex Court further remarked that even if the legislature were to come out with a provision for automatic vacation of stay, the same may not stand judicial scrutiny as it may suffer from manifest arbitrariness.

The majority opinion also clarified that the Supreme Court could not declare an automatic vacation of orders by High Courts under Article 142 of the Constitution. It observed that although the powers under Article 142 are very wide, in exercising such power the court cannot ignore the substantive rights of the litigants. The Court further held that the power of the High Court under Article 227 of the Constitution to have judicial superintendence over the courts within its jurisdiction cannot be constrained by Article 142 as both Supreme Court and High Courts are Constitutional Courts, and the latter is not judicially subordinate to the former.

Justice Pankaj Mithal authored a concurring opinion and observed that it is in interest of justice that reasoned stay order should persist unless the same is time-bound or modified or

[1] *High Court Bar Assocation, Allahbad v State of UP,* 2024 INSC 150.
[2] *Asian Resurfacing of Road Agency (P) Ltd. v. CBI*, (2018) 16 SCC 299.

vacated by the concerned Court. Justice Mithal added that if an interim order does not specify a date of automatic vacation, the stay would remain in effect until the case is decided or till an application is moved for its vacation/disposal.

The Apex Court has also clarified that in the cases wherein trials have been concluded as a result of the automatic vacation of stay based only on the decision in the case of *Asian Resurfacing*, the orders of automatic vacation of stay shall remain valid.

# HIGH COURT

## Fraud being non-arbitrable due to complexity is an obsolete and archaic position, the practice as it stands today has evolved[3]

The Bombay High Court in a Petition under Section 11 of the Arbitration Act, 1996 ("**Arbitration Act**") seeking appointment of Arbitrator has observed that due to evolution in contemporary arbitration practices the earlier belief disputes involving fraud were unsuitable for arbitration, on account of complexities and voluminous materials, has become obsolete. The Court observed that today arbitral tribunals routinely navigate through voluminous material in various dispute types. Thus, it held that the previous notion of fraud being non-arbitrable due to complexity is archaic and no longer applicable.

The Respondent in the case had terminated the services of the Petitioner and had also filed a criminal complaint against the Petitioner under Section 409, 420 and 477A of the Indian Penal Code, 1860. Accordingly, the Respondent opposed the appointment of arbitrator contending that the dispute, involved allegations of fraud and collusion resulting in financial losses for the company, was not arbitrable.

The High Court noted that while certain categories of disputes are unsuitable for arbitration due to their public nature, disputes falling within the private realm constituted by the consent of parties are typically arbitrable. The Court referred to the case of *A. Ayyasamy v. Paramasivam*[4], wherein the Supreme Court laid down a twin test to be followed: *whether the plea of fraud renders the arbitration agreement void or whether the fraud allegations concern internal party affairs with no public implications*. The High Court also laid emphasis on the distinction between *rights in rem*, which are adjudicated by courts or statutory tribunals as they pertain to rights exercisable against the world at large and it creates a legal status, and actions in *personem*, which determine the rights and interests of parties to the subject matter of disputes and are arbitrable.

[3] *Nilesh Shejwal v. Agrowon Agrotech Industries Pvt. Ltd*., Commercial Arbitration Petition No. 14 of 2022 (High Court of Bombay).
[4] *A. Ayyasamy v. Paramasivam*, (2016) 10 SCC 386.

The High Court held that the dispute primarily concerned the Petitioner's employment contract and termination, which fell within the realm of arbitrable claims. Further, the High Court dismissed concerns about the Respondent's disclosure obligations in arbitration, highlighting that the criminal proceedings' pendency did not vitiate the arbitration agreement. Moreover, the Court observed that the criminal aspect of fraud, forgery or fabrication may be visited with criminal consequences, but a claim for salary/remuneration arising out of Employment Agreement is definitely an arbitrable claim. Accordingly, the Court allowed the Petition and appointed an arbitrator to adjudicate the dispute between the parties.

## Arbitration clause is not hit by Section 29 of Contract Act for stipulating multiple choices of seats.[5]

Delhi High Court in a Petition under Section 11 of Arbitration Act seeking appointment of Arbitrator has held that if an arbitration agreement stipulates multiple seats of arbitration, thereby, offering a choice to the parties is not void under Section 29 of the Indian Contract Act, 1872 ("**ICA**") declares agreements uncertain in meaning or incapable of being made certain as void.

The notable factor about the arbitration clause being that it provided for three (3) seats, relevant portion of the arbitration clause is as under below:

> *"(ii) The language of the mediation and arbitration proceedings shall be English. The seat of arbitration shall be [Local Jurisdiction in Goa / Local Jurisdiction Karnataka /Delhi], India."*

The High Court held that the above clause is not hit by Section 29 of ICA as the same clearly stipulated that the seat of arbitration could be Goa, Karnataka, or Delhi, offering a choice to the parties. The High Court found no ambiguity in the clause, and observed that the clause is certain or is capable of being made certain as it provided clear options for jurisdiction.

The High Court referred to the judgment of the Supreme Court in *Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd.*[6], and held that designating the seat of arbitration is akin to an exclusive jurisdiction clause. It clarified that once the seat is determined, it vests exclusive jurisdiction with the courts of that seat for regulating arbitral proceedings arising from the agreement between the parties. Hence, considering that the arbitration clause specified three potential seats, the High Court upheld its jurisdiction to entertain and decide the Petition under Section 11 of the Arbitration Act.

[5] *Vedanta Limited v. Shreeji Shipping*, Arb. P. 342/2023.
[6] (2017) 7 SCC 678.

## No requirement for notice to initiate new arbitration in cases where analogous arbitral proceedings going on.[7]

Delhi High Court has observed that it is unnecessary to commence new arbitration by issuing a notice under Section 21 of the Arbitration Act when analogous arbitration proceedings are already underway for other agreements. The Court also ruled that issuing a fresh notice is not required under Section 11(6) of the Arbitration Act.

The dispute between the Petitioner and Respondent stemmed from the two (2) Franchise Agreements, which formed part of various Agreements executed between the parties including Master Franchise Agreement and 14 Franchise Agreements. The Petitioner filed a petition under Section 11(6) of the Arbitration Act seeking appointment of a Sole Arbitrator. However, the Respondent challenged the admissibility of the Petition on the grounds that it failed to meet a mandatory requirement of reference of dispute under Section 21 of the Arbitration Act.

In the case at hand, the issues originating from the Master Franchise Agreement and other 12 Franchise Agreement had previously been submitted to the Arbitral Tribunal, for adjudication. Moreover, the Court also observed that the Petitioner in 2019 vide notice had referred dispute pertaining to all the Agreements to arbitration.

The primary question which fell for consideration of the Hon'ble Court was if the Petitioner was required to formally initiate arbitration again by issuing a notice under Section 21 of the Arbitration Act before filing a petition under Section 11(6) of the Act. The court examined the ruling in *Zion Promoters and Developers Pvt. Ltd. v. Ferrous Infrastructure Pvt. Ltd*.[8], which made a clear distinction between Sections 11(5) and 11(6) of the Arbitration Act. The court pointed out that Section 11(6) allows a "party" to request the court to appoint an arbitrator without issuing a notice, provided certain conditions are met.

The High Court observed that the present issue is covered by *Zion Promoters* and was governed by Section 11(6)(c) rather than Section 11(5) of the Arbitration Act. Accordingly, the Court held there was no requirement for issuing a fresh notice in terms of Section 21 of the Arbitration Act.

[7] *Prime Interglobe Private Ltd. v. Super Milk Products Private Ltd*., Arb. P. 337/2023.
[8] 2016 SCC OnLine Del 1668.

# NCLAT

## Persons who were in management and control of the Corporate Debtor and failed to clear its debts at the time of submission of Resolution Plan are ineligible to submit resolution plan [9]

National Company Law Appellate Tribunal ("**NCLAT**") has held that Section 29A© not only disqualifies those who were in the management and control of the Corporate Debtor ("**CD**") at the time when its account was declared Non Performing Asset ("**NPA**"), but also disqualifies those, who were in management and control of the Corporate Debtor and in close proximity of time, before the submission of Resolution Plan, who failed to clear the debts of the Corporate Debtor.

The Appellant entered into a Memorandum of Understanding ("**MoU**") with the Corporate Debtor, whereby the Appellant undertook to infuse equity capital into the CD. Further, the Appellant through its 100% owned subsidiary also made investments in the CD. On 31.05.2013, the CD's account was declared NPA. Subsequently, another MoU was executed *inter alia* between the Appellant and CD, wherein it was stated the Appellant would invest so as become 51% shareholder in the CD

The Corporate Insolvency Resolution Process ("**CIRP**") commenced against the CD vide Order passed by Adjudicating Authority on 28.09.2017. The Appellant submitted a Resolution Plan. However, the CoC in its meeting opined that Appellant was not eligible to submit a Resolution Plan under section 29A of IBC 2016. Shortly thereafter, the RP sent an email to the Appellant, detailing reasons for his disqualification under Section 29A of the IBC 2016. The Appellant Application before the Adjudicating Authority against its disqualification, which was dismissed vide order dated 26.05.2023.

The Appellant preferred an Appeal against the said order before the NCLAT, wherein the Appellant contended that on the date when CD's account was declared as NPA, the Appellant was neither in management nor was in control nor was Promoter of the CD. It was also contended that Appellant was not exercising any control or management over the CD through its subsidiary for having transferred its entire shareholding in its subsidiary. Thus, asserting that it is not ineligible in terms of Section 29 of the IBC.

The NCLAT relied on the Judgment of the Hon'ble Supreme Court in *Arcelor Mittal*[10] and noted that if the Appellant's submissions are accepted, Section 29A© of IBC will operate in a very narrow field, which is not in line with the object and purpose of the amendment as brought out in 2018. Thus, the NCLAT observed that a CD whose account has been declared

[9] *Navayuga Engineering Company Limited v Mr. Umesh Garg*, NCLAT (New Delhi) Company Appeal (AT) (Insolvency) No. 783 of 2023.
[10] *Arcelor Mittal India Pvt Ltd v Satish Kumar Gupta*, (2019) 2 SCC 1.

as NPA, even at previous point of time, those who were managing the affairs of the CD and arranged the affairs, who did not take any steps to clear the NPA and regularize the account, also are in the net of Section 29A. The NCLAT observed that if such persons are held to be eligible to submit a Resolution Plan the same shall not be as per the Scheme of the IBC.

# NCLT

## Maintainability of CIRP application upheld despite PMLA attachment.[11]

In an application filed under Section 7 of the IBC seeking initiation of the CIRP against the Corporate Debtor, the main issue that came up for consideration was whether the attachment of the Corporate Debtor's property by the Enforcement Directorate ("**ED**") under the Prevention of Money Laundering Act, 2002 ("**PMLA**") prior to the filing of the Section 7 application would bar admission of application seeking initiation of CIRP.

The Kolkata Bench of the National Company Law Tribunal ("**NCLT**"), while considering the issue, has held that application under Section 7 of the IBC are maintainable and ordered initiation of CIRP against the Corporate Debtor. The bench observed that properties attached under the PMLA prior to the initiation of the CIRP, should still became available to fulfil objects of the IBC. The object of the PMLA is to prevent the suspected from enjoying the fruits of a 'tainted property' or 'proceeds of crime', and not to allow the Government to don the hat of a creditor. Juxtaposed to the above, the object of the IBC essentially is to pay off the creditors of a corporate debtor by way of insolvency resolution or liquidation in a time bound manner maximizing the value of the assets of the corporate debtor and balancing the interest of all the stakeholders. The NCLT also observed that that PMLA and IBC subserve completely different, divergent and distinct purpose.

[11] *State Bank of India v. R.P. Info Systems Ltd.*, Company Petition (IB) No. 652/KB/2019.

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