



Luthra and Luthra
LAW OFFICES INDIA

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It gives us immense pleasure to circulate the June 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, Criminal and Consumer Law. Accordingly, we have covered key judgments passed by the Hon'ble Supreme Court, High Court(s) and National Company Law Appellate Tribunal during April-May 2024. We hope you enjoy reading our newsletter.

SUPREME COURT

Accused can be exempted from personal appearance before grant of bail¹

The Hon'ble Supreme Court, in a significant ruling, through the bench comprising of Justice Sanjiv Khanna and Justice SVN Bhatti has held that the accused can be granted exemption from personal appearance before the grant of bail.

The accused filed an application under Section 205 of the Code of Criminal Procedure, 1973 ("CrPC") seeking exemption from personal appearance prior to grant of bail. The said application was rejected by the trial court on the ground that there is no provision for granting exemption from personal appearance prior to the grant of bail. Further, non-bailable warrants were also issued against the accused. The accused had also filed a Petition under Section 482 of the CrPC before the High Court seeking quashing of criminal proceedings against him. The said petition was dismissed by the High Court, which was challenged before the Supreme Court.

The Supreme Court while quashing the summoning order and the non-bailable warrants, directed the trial court to re-examine the entire matter in accordance with law.

The Hon'ble Supreme Court on the issue of exemption from personal appearance opined that the observation of the lower court that there is no provision for granting exemption from personal appearance prior to obtaining bail is incorrect. The Court observed that power to grant bail should not be read in a restrictive manner as applicable only after the accused has been granted bail.

¹ *Sharif Ahmed & Anr. v. State of Uttar Pradesh and Anr.*, 2024 SCC OnLine SC 726.



Offences under IBC will have to be tried by the Sessions Court despite Companies Act Amendment²

The Supreme Court through the bench comprising of Justice BR Gavai and Justice Sandeep Mehta held that the power to try offences under the Insolvency & Bankruptcy Code, 2016 (“**IBC**”) would lie with Sessions Courts constituted under Section 435 of the Companies Act, 2013 (“**CA**”), and the Sessions Court would have the power to issue process against the accused.

The Appellant i.e., Insolvency and Bankruptcy Board of India (“**IBBI**”), had filed a complaint against certain accused persons u/s 236 of IBC read with Sections 190, 193 and 200 of the Code of Criminal Procedure, 1973 (“**CrPC**”) for offences punishable under IBC (prescribing punishment of imprisonment of up to 2 years). The Sessions Court issued process / summons against the accused persons basis the complaint filed by the IBBI. The accused persons impugned the issuance of summons before the High Court, which quashed the summons on the ground that post amendment to Section 435 of CA in the year 2018, only the magistrate had the power to issue process / summons for offences prescribing imprisonment of up to 2 years. Being aggrieved, IBBI impugned the said order before the Supreme Court. IBBI contended that the Sessions Court had rightly issued summons as such power said power was specifically incorporated, in Section 236 of IBC since the enactment of IBC. Thus, any subsequent amendment to CA would not have the effect of taking away power of Sessions Judge to try the offences or to issue summons.

The Supreme Court agreed with the contentions advanced on behalf of IBBI and observed that the present case falls within the ambit of ‘legislation by incorporation’ and not ‘legislation by reference’, whereby the effect would be that the provision with regard to Special Court has been bodily lifted from Section 435 of the CA and incorporated in Section 236(1) of the IBC. In other words, the provision of Section 435 of CA with regard to Special Court / Sessions Court would become a part of Section 236(1) of IBC as on the date of its enactment. Accordingly, any amendment to Section 435 of CA, after the date on which the IBC came into effect would not have any effect on the provisions of Section 236(1) of the IBC. In view of the above findings, the Supreme Court allowed the appeal of IBBI and set aside the order passed by the High Court.

² *IBBI v. Satyanarayan Bankatlal Malu*, 2024 SCC OnLine SC 560.



Onus to prove that the service was obtained for Commercial Purpose is on the Service Provider³

The Supreme Court through the bench comprising of Justice P.S. Narasimha and Justice Aravind Kumar has observed that a service provider cannot dispute the maintainability of a consumer complaint unless he proves that the goods / services were obtained for commercial purpose.

In the case at hand, a consumer complaint was filed against the Appellant, a chit fund company, before District Consumer Disputes Redressal Forum ("**DCDRC**"), alleging that the illegal termination of the chit fund business and consequent non-refund of the subscription amount resulted in deficiency of services. This was contested on the ground that the Complaint was not maintainable, since the claimant did not qualify as a 'consumer' under the provisions of the Consumer Protection Act, 1986 ("**CPA**") as the goods / services were obtained for 'commercial purpose'. The District Forum ruled in favour of the consumer and held that there was a 'deficiency of service'. Being aggrieved, the company preferred appeals before the State Consumer Disputes Redressal Forum ("**SCDRC**") and National Consumer Disputes Redressal Forum ("**NCDRC**"), both of which were rejected and ultimately was challenged before the Supreme Court.

The Supreme Court held that the DCDRC incorrectly addressed the objection on maintainability, which the appellate forums also failed to grasp. The Supreme Court thus took it upon itself to decide the question of maintainability, which flowed from the objection raised by the Appellant that the services were obtained for 'commercial purpose'. To answer the question, the Supreme Court thoroughly examined Section 2(7) of the CPA, which provides for the definition of 'consumer'. The Apex Court deconstructed the definition in three parts to explain on whom onus to prove each part lies. Accordingly, the Supreme Court noted as follows:

1. The first part sets out the jurisdictional prerequisites for a person to qualify as a consumer i.e., there must be purchase of goods/services, for consideration. The Court observed that the onus to prove this part lies on the consumer/complainant.
2. The second part is the 'exclusion clause' ['carve out'] which has the effect of excluding the person from the definition of a consumer. The carve-out applies if the person has obtained goods for the purpose of 'resale' or for a 'commercial purpose' and in case of service for a 'commercial purpose'. The Court also observed

³ *Shriram Chits (India) Private Limited v. Raghachand Associates*, 2024 SCC OnLine SC 851.



that this clause is used by service providers to exclude benefits under CPA. Thus, the onus to prove that goods / service was availed for 'commercial purpose' or 'carve out' must necessarily fall upon the service provider. Furthermore, the Apex Court noted that the above observation is in sync with the general principle embodied in Sections 101 and 102 of the Evidence Act, 1872 that '*one who pleads must prove*'.

3. The third part is an exception to the exclusion clause – it relates to Explanation (a) to Section 2(7) which limits the scope of 'commercial purpose'. The Court observed that only when the service provider has discharged its onus of showing that the services were vailed for 'commercial purpose', the onus shift back to the complainant to bring its case within the third part to show that the service was obtained exclusively for the purpose of earning its livelihood by means of self-employment.

With the above observations and in view of the concurrent findings of the NCDRC, SCDRC and DCDRC on the issue of 'deficiency of service' as well as no evidence to support the Appellant's objection on maintainability of the consumer complaint, the Supreme Court dismissed the appeal.

NCLAT

Liquidator has no authority to decide claims and counterclaims⁴

The NCLAT, Chennai Bench, comprising of Shri Justice Venugopal M. (Judicial Member) and Shri Jatindranath Swain (Technical Member) held that when claims and counters claims are involved, the Liquidator cannot decide the same.

In the facts of the case, the Corporate Debtor ("**CD**") had issued a purchase order on the Appellant / Operational Creditor ("**OC**") for the supply of certain systems and had also awarded a Work Order to the OC, for a total sum of INR 95.17 crores. While the OC was engaged in executing the contract, the CD did not open an irrevocable letter of credit equivalent to Rs. 73.602 crores, and did not take delivery of supplies and did not issue clearance for materials dispatched of the manufactured items under various pretexts. In the interregnum, the CD was admitted to the Corporate Insolvency Resolution Process ("**CIRP**") and the OC filed a claim before Interim Resolution Professional ("**IRP**") for a sum of IRN 71.09

⁴ *M/s FLSmidth Private Limited v. Lanco Infratech Ltd.*, 2024 SCC OnLine NCLAT 631.



crores. Upon examination, IRP confirmed that a sum of INR 13.47 crores is payable and asked the CD to provide sufficient corroborating documents for the remaining claim. Later, the claim was rejected by RP. The OC challenged the said decision of RP before the Adjudicating Authority. Meanwhile, the CD went into liquidation and the OC filed its claim before the Liquidator for the sum of INR 31.71 crores. The said claim was also rejected by the Liquidator, which was challenged by the OC before the Adjudicating Authority by filing an application. The Adjudicating Authority rejected the Application. Accordingly, the Appellant approached NCLAT.

The OC *inter alia* contended that the CD, since inception, did not perform its part of the contracts. Moreover, it was submitted that the Respondent failed in its duty as Liquidator for it is not open to the Liquidator to reject the claim after accepting the claim in part (in her capacity as RP). The OC also contended that the Adjudicating Authority overlooked the initial acknowledgement to the tune of INR 13.47 crores merely on the basis of the statements made that the dues were disputed and that there were claims and counter claims. This was objected to by the Liquidator while submitting that it had acted and performed duties in accordance with provisions of IBC and the IBBI (Liquidation Process) Regulations, 2016 ("**Regulations**"). Further, as per the provision of IBC and Regulations, Liquidator is required to only verify the claims based on the information available and does not sit in adjudication of the disputes which may be pending between the CD and the OC, and that adjudication of a dispute is not within the scope and ambit of the powers of the Liquidator.

The NCLAT held that when claims and counterclaims are involved, the Liquidator cannot decide the same and therefore the Liquidator rightly had rejected the claim.

HIGH COURT

Notice under Section 21 of the Arbitration Act is a pre-requisite for proceedings under Section 84 of the Multi State Cooperative Societies Act⁵

The High Court of Delhi through Justice Dinesh Kumar Sharma has held that provisions of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") will apply to arbitrations under the Multi-State Cooperative Societies Act, 2002 ("**MSCSA**") except in the case of power

⁵ *Purvanchal Hathkargha Sahakari Sangha Ltd. v. All India Handloom Fabrics Society*, Arbitration Petition No. 75 of 2024 (High Court of Delhi).



conferred to the Central Registrar for appointment of an Arbitrator. Thus, the Hon'ble Court has observed that notice under Section 21 of the Arbitration Act is a pre-requisite for initiating proceedings under Section 84 of MSCSA.

In the facts of the case, the Petitioner who was a member of a Cooperative Society, for 30 years, was aggrieved by the society to have withheld payment of dues on trivial excuses and grounds. The Petitioner claimed a sum of INR 1.83 crores against the Society and, accordingly, filed representation(s) before Central Registrar of the Society for appointment of Arbitrator in terms of Section 84 of MSCSA. On there being no response, to the representations and since the process of arbitration was not initiated, the Petitioner approached the High Court under Section 11(6) of the Arbitration Act seeking directions to the Central Registrar for appointment of an Arbitrator.

The High Court held that Section 84 of the MSCSA prescribes arbitration as the mode to settle any disagreement between a member and the multi-state cooperative society, its board, or any officer, agent, or employee that relates to the organization's management, operations, or constitution. The Hon'ble Court also observed that the allegations/dispute against the Society regarding management failures, corruption, and non-payment of dues fell under the purview of arbitration as outlined in Section 84 of the MSCSA. Further, the Hon'ble Court while relying on the Judgment in *Appolo Handloom*⁶ observed that in the event of failure of the Central Registrar to appoint the arbitrator, the High Court has the authority to intervene and direct the Central Registrar to appoint the arbitrator.

The High Court also addressed the procedural objection raised by the Society regarding the service of notice under Section 21 of the Arbitration Act. It was held that, *firstly* the notice under Section 21 of the Arbitration Act is essential for commencing arbitration proceedings, as Rule 30 of the Multi-State Cooperative Societies Rules, 2002 provides that except the power conferred to the Central Registrar for appointment of an Arbitrator, the other provisions of the Arbitration and Conciliation Act, 1996 shall remain in operation. Moreover, the Hon'ble Court also observed that there is no specific proforma prescribed under law for the service of notice under Section 21 of the Arbitration Act, thus, it would be sufficient if the petitioner in case of a dispute having arisen as envisaged under Section 84 of MSCSA informed the Central Registrar for appointment of the arbitrator and disclosed the dispute.

⁶ *Appolo Handloom Manufacturing Co-op Society Ltd. v. All India Handloom Fabrics Society & Ors*, 2024 SCC OnLine Del 2723.



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 2024. All rights reserved.

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