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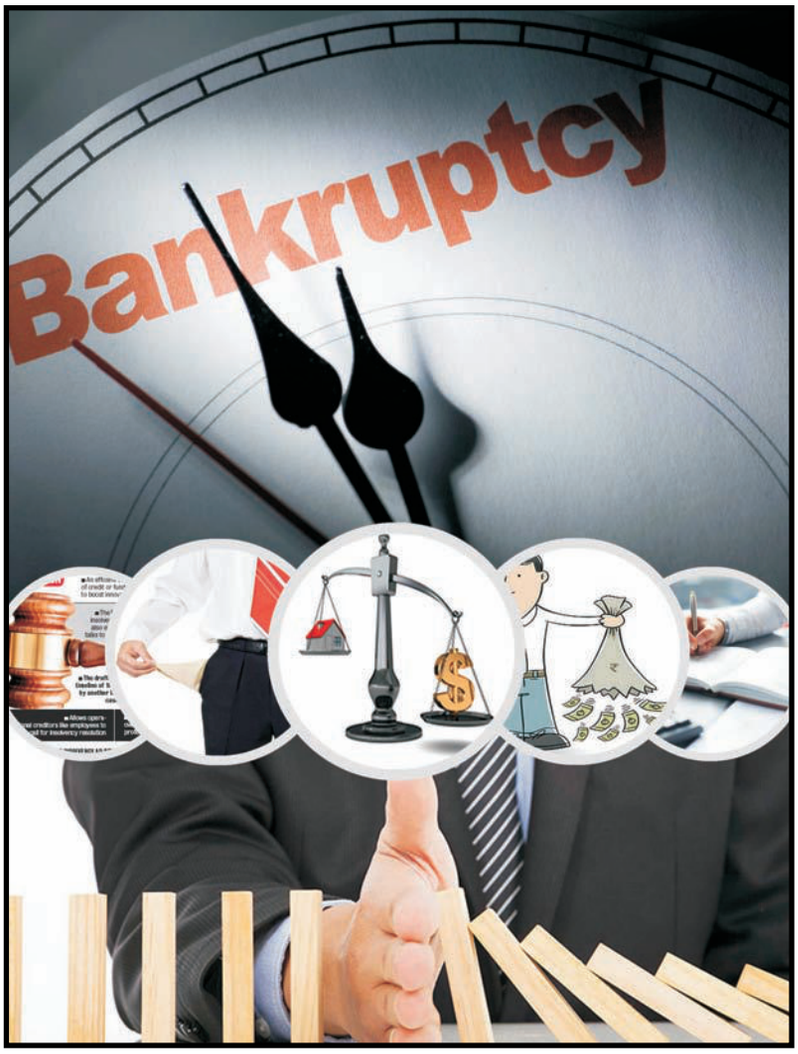

EDITORIAL

Manoj K. Singh
Founding Partner

Someone has rightly said - "***knowledge is most useful when liberated and shared***". Singh & Associates has always been proactive in sharing knowledge with its readers. Once again it's the time for a new monthly newsletter, covering various articles to discuss latest developments in the legal arena. With immense pleasure, we would like to introduce the latest edition "June, 2017" of our monthly newsletter "*Indian Legal Impetus*". The entire Singh & Associates family would like thank to its readers for their overwhelming response towards *Indian legal Impetus*.

The present edition starts with the article on "**Competition Commission of India negates challenge to WhatsApp contravening provisions of Section 4 of the Competition Act, 2002**" in which the author analyses the case of Shri Vinod Gupta v. WhatsApp Inc. and presents the view of CCI in a very precise manner. Moving forward, we have an article "**The disputed "Dispute" under The Insolvency & Bankruptcy Code, 2016**" wherein the author tries to explain the views of different adjudicating authorities on the term "dispute" defined under Section 5 of the Code.

The next article deals with the real estate sector in "**Real Estate (Regulation & development) Act, 2016: - A step ahead from existing regime**" in which authors explain how the developer and allottees have rights and duties to perform after entering into a contract and which door to knock on for seeking justice in case any dispute arises. Then, there is an article titled "**Does a valid Arbitration Agreement exclude the jurisdiction of the Competition Commission of India**" in which the authors explain that even when there is an anti-competitive agreement and there is an arbitration clause, regardless of that Competition Commission of India will have jurisdiction to try and adjudicate the matter.

In the Arbitration section, there is an article on "**Two tier arbitration in India: In the light of M/s Centrotrade Minerals & Metal Inc. vs. Hindustan Copper Ltd**." which discusses the landmark decision of the Hon'ble Supreme Court of India on the issue of two-tier arbitration, passed by Hon'ble Justice Madan B. Lokur, Jutice R.K. Agrawal and Justice D.Y. Chandrachud. It is followed by the article "**Delhi High Court Disregards The Procedure For Appointment Limiting A Party's Choice To a Restricted Pool of Retired/Serving Employees**" wherein the author tries to explain the Hon'ble Delhi High Court's views on restricted choice to appoint an arbitrator on the other party. Then we have an article titled "**Arbitrability of Fraud: A Missed Opportunity**" wherein the author explains how court has missed the opportunity to include fraud under the ambit of Arbitral Tribunal and it has just included mere allegation of fraud.

Our next article titled "**Benami Property Liable To Confiscation Under New Law**" explain that how *benami* property is now liable to confiscation under the new act The Benami Transactions (Prohibition) Act, 1988. Our last article is on "**Discounting and tie-in policy led Hyundai in hardship**" in which the author discusses with the help of case laws that how discounting policy and tie in arrangements lead Hyundai motors to pay a penalty of Rs. 87 Crore.

Lastly, we have a **Newsbyte** section for our readers.

It has always been our endeavor to bring forth the latest development in the field of law to our esteemed readers and we hope that readers find useful information shared through this edition. We welcome all suggestions and comments for our newsletter and hope that the valuable insights provided by our readers would make "Indian Legal Impetus" a valuable reference point and possession for all. You may send your suggestions, opinions, queries or comments to newsletter@singhassociates.in.

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COMPETITION COMMISSION OF INDIA NEGATES CHALLENGE TO WHATSAPP CONTRAVENING PROVISIONS OF SECTION 4 OF THE COMPETITION ACT, 2002.

Puneet Sharma

The Competition Commission of India (Hereafter "CCI"), in the matter of Shri Vinod Gupta v. WhatsApp Inc.[1] negated a challenge made under section 19(1)(a)[2] of the Competition Act, 2002, (Hereafter the "Act") against WhatsApp Inc. (Hereafter "WhatsApp,") alleging contravention of Section 4[3] of the Act.[4]

The Informant, Mr. Vinod Gupta, filed an information, under section 19(1)(a) of the Act, alleging that about 95% of smart phones in India have WhatsApp installed, and with more than 70 million users,[5] WhatsApp holds a substantial market share, which has further increased from 450 million to 1 billion, due to WhatsApp decision to dispense charging fees from its users.[6]

The Informant's grievance was that WhatsApp on being acquired by the Facebook on 19.02.2014, changed its privacy policy in August, 2016, as per which WhatsApp is sharing its data with Facebook, which is thereafter used by the latter for targeted advertisements.[7] The informant alleged that the new privacy policy enables copying, downloading, and extracting of the database, and other information for the commercial benefits of WhatsApp/Facebook in violation of the provisions of the Information Technology Act, 2000.[8]

The Informant therefore prayed for prohibiting WhatsApp from; i) sharing users' information with Facebook; and ii) a direction to WhatsApp, not to discontinue its services to users, who did not opt for the change in the privacy policy.[9]

Per Contra WhatsApp contended that all types of messages, and calls made through WhatsApp are protected by end to end encryption, thereby making the same immune from being read either by the third parties, or even WhatsApp itself, except for the intended recipient.[10]

CCI FINDS WHATSAPP IS IN DOMINANT POSITION IN THE RELEVANT MARKET[11];

1 *MANU/CO/0036/2017.*

2 *19. (1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on— (a) 29[receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or*

3 *Section 4 prohibits abuse of dominant position*

4 *Ibid., at p. 6, Para 20.*

5 *Ibid., at p. 1, Para 4.*

6 *Ibid., at p. 2, Para 5.*

7 *Ibid., at p. 2, Para 9.*

8 *Ibid., at p. 2, Para 6.*

9 *Ibid., at p. 2, Para 7.*

10 *Ibid., at p. 4, Para 15.*

11 *Qua the "relevant product market," the CCI, in para 11 noted that Whatsapp was unlike the traditional electronic communication(s) such as text messaging, voice calls etc. since it was an instant communication application, which provides a platform for communication through texting, group chats, voice, and video calls using the internet, and other functionalities. Additionally, the CCI also noted that whereas the traditional electronic communication services could be used through any mobile phone, the instant communication apps could only be used through Smart phones. Furthermore, the CCI noted the while the Whatsapp didn't charge any fee from its users, which was no so in case of traditional communication services. Lastly, the instant messaging services require the users to use the same communication application platform, whereas the traditional electronic communication could be effected between people who did not use the mobile service of the same provider. In this view of the matter, the CCI held that the relevant product market in the case could be considered as "the market for instant messaging services using consumer communications Apps through smart phones." (Emphasis supplied).*
Qua the "relevant geographic market," the CCI, in para 12 noted that the functionality provided by consumer communication apps through smart phones was inherently cross-border, with consumers free to install any app they want, without any geographical limitations, and the functionality of apps differing from either region to region or country to country either in terms of price fluctuations, functionalities, platforms, or operating systems. However, in view of the fact that the allegations of the informant pertained to "anti-competitive" conduct of WhatsApp

The CCI apart from cited sources, relied on information available in public domain, and noted that a number of other players such as Apple with iMessage, Blackberry with BBM, Samsung with ChatOn, Google with Google Hangouts, and Micosoft with Skype provide consumer communication apps, and other communication apps such as Hike, Viber, We Chat are also active in the market. However, WhatsApp within India has 160 million monthly active users, with 97% of the smart phone users in the country using some communication apps daily of which the most popular is WhatsApp, being installed on 96% of devices i.e. 2.3 times more devices than other messaging applications,[12] and 56%, and 51% of internet users in India use WhatsApp, and Facebook respectively,[13] therefore WhatsApp is in the dominant position in the relevant market.[14]

CCI FINDS ALLEGATIONS OF BREACH OF THE INFORMATION TECHNOLOGY ACT, 2002, DO NOT FALL WITHIN THE AMBIT OF THE COMPETITION ACT;

The CCI noted that the WhatsApp privacy policy had been updated in relation to the sharing of users' data, and information with Facebook (including with "Facebook Family of Companies,") for the purpose of improving infrastructure, delivery systems, securing system, online advertisements, and product experiences available to the users on their Facebook pages, fighting spams, abuse, and infringements.[15] Additionally, WhatsApp also provides the users with an option to opt out of sharing information with Facebook within 30 days of agreeing to the updated terms of service, and privacy policy.[16] The CCI also accepted WhatsApp's submission that all messages, and calls are protected by end-to-end encryption so that the third parties, and even WhatsApp itself cannot read them, and the messages can only be decrypted by the intended recipient.[17] Additionally, CCI also noted that nothing that a user shares on WhatsApp is shared on Facebook, or any other apps of "Facebook Family of Companies," for an third party to see.[18]

The CCI relied upon the judgment of Hon'ble Delhi High court in Karmanya Singh Sareen & ors v. Union of India & ors,[19] wherein it had been inter alia held that it was open to existing users of WhatsApp, who did not want their information to be shared on Facebook, to opt for deletion of their account.[20] In these circumstances, the CCI observed that the examination of the allegations of the breach of the Information Technology Act, 2002, did not fall within the ambit of the Act.[21]

CCI FINDS WHATSAPP IS NOT INDULGING IN PREDATORY PRICING;

The allegation that WhatsApp is indulging in predatory pricing was negated for the following reasons; i) the standard practice in the market is to provide services without charging the users (as a matter of fact, apart from WhatsApp, good many other apps like Hike, messenger, etc also do not levy any charge);[22] ii) the revenue model of WhatsApp is similar to other competitors in the market;[23] iii) users can shift from one communication app to another without incurring any costs since;[24] (a) all consumer communication apps are either free of cost, or minimally priced;[25] (b) all consumer

view of the fact that the allegations of the informant pertained to "anti-competitive" conduct of WhatsApp within the geographic boundary of India, and the competition conditions for instant messaging services using such apps through smart phones was homogenous throughout the country, hence the geographic area of India was considered to be the relevant geographic area. (Emphasis supplied).
Having considered the relevant product market, & relevant geographic market, the CCI was of the view that the relevant market, in the facts of the case, may be considered as "the market for instant messaging services using consumer communications applications through smart phones in India"

12 *Ibid., at p. 4, Para 14 relying upon Jana and mCent.*
13 *Id., relying upon TNS/TNC Connected Life Study, 2015.*
14 *Ibid., at p. 4, Para 14.*
15 *Ibid., at p. 4, Para 15.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *233 (2016) DLT 456 (DB) = MANU/DE/2607/2016. The Hon'ble DB inter alia opined that the legal position regarding the existence of the fundamental right to privacy is yet to be authoritatively decided (referring to K.S. Puttaswamy (Retired) and Anr. v. Union of India. (2015) 8 SCC 735). The three judge bench in K.S. Puttaswamy had referred the matter to a larger bench, and the reference is currently pending adjudication.*
20 *Ibid., at p. 5, Para 17.*
21 *Id.*
22 *Ibid., at p. 5, Para 19.*
23 *Id.*
24 *Id.*
25 *Id.*

communication apps are easily downloadable on smart phones, and can co-exist on the same handset without taxing much system capacity;[26] (c) once consumer communication apps are installed on a device, users can change its competitor apps for e.g. uninstalling, or otherwise deactivating the similar apps;[27] (d) the user interfaces of all such consumer communication apps being simplistic, the costs of switching to a new app are minimalistic;[28] and (e) information about new apps is easily accessible because of the number of reviews of consumer communication apps on apps store. There being no significant barriers for the entry of new communication apps, and the consumers being price sensitive.[29]

In the light of aforesaid, the CCI closed the information under section 26(2)[30] of the Act, observing that while the WhatsApp is in a dominant position, nevertheless it has not resorted to any predatory pricing, and thus not flouted the provisions of Section 4 of the Act.

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26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*
30 *Section 26(2) reads "Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be."*

THE DISPUTED "DISPUTE" UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Aayush Mitruka

The Mumbai and Delhi Benches of the Adjudicating Authority[31] were seen to be at loggerheads when it came to the interpretation of the term "dispute" under the recently notified, The Insolvency and Bankruptcy Code, 2016 ("The Code").

The Code provides that an operational creditor may serve a demand notice on occurrence of a default on operational credit. Subsequently, if the corporate debtor fails to make the payment within 10 days or fails to notify the creditor '*the existence of a dispute*' in relation to the requested payment, the operational creditor can make an application for initiation of corporate insolvency resolution process to the Adjudicating Authority under the Code in the prescribed format therein.

Under sub section 6 of section 5[32] of the Code, '*dispute*' has been defined as follows:

"*dispute includes a suit or arbitration proceedings relating to-*

(a) the existence of the amount of debt;
b) the quality of goods or service; or
(c) the breach of a representation or warranty;"

The Adjudicating Authority (Mumbai Bench) was called to interpret the expression "dispute" under the Code in the case of *Essar Projects India Ltd.*("Essar") *v. MCL Global Steel Private Limited*[33] . The controversy arose in the background of a contract wherein Essar was appointed to execute certain civil work and other related works. After completion of the work, Essar raised certain invoices and the same remained unpaid despite repeated reminders. Having left with no choice, the creditor issued a demand notice under section 8[34] of the Code. The debtor disputed the contents and the amount stated in the said notice due to disagreement regarding the quality of construction, timeline, etc. and enforceability of contract. A revised notice was thereafter sent by the creditor and consequently an insolvency petition was filed under section 9 of the Code. The debtor argued before the Adjudicating Authority that there was a 'dispute' in existence and therefore a petition under section 9[35] of the Code cannot be maintained.

The creditor was quick to point out there were no proceedings pending before any authority and it was for the first time that the debtor raised a dispute in reply to the notice sent by the Creditor under section 8 of the Code. Rejecting the defense, the Hon'ble Bench categorically held that the term dispute in existence means and include "*raising dispute in a court of law or arbitral tribunal before receipt of notice under section 8.*" Accordingly the Hon'ble Bench admitted the petition. This was a welcome decision since it clarified that a dispute cannot be raised post section 8 notice as an afterthought.

The confusion ensued when in insolvency application filed by the operational creditor *M/s Annapurna Infrastructure Pvt. Ltd.* ("Annapurna") against the debtor *SORIL Infra Resources Ltd.*("SORIL") before the Principal Bench[36]. The dispute related to payment of rent coupled with damages/ interest between the parties was subjected to arbitral proceedings. The Sole Arbitrator passed an award in favor of the Applicant, Annapurna. SORIL challenged the award under sections 34[37] of the Arbitration and Conciliation Act, 1996 ("The Act") and the challenge was rejected by the Court. Annapurna issued a demand notice under

31 *Adjudicating authorities in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal. (See Section 60 of the Code)*
32 *Section 5 provides for Definitions.*
33 *CP No. 20/1 & BP/NCLT/MAH/2017.*
34 *Insolvency resolution by operational creditor*
35 *Application for initiation of corporate insolvency resolution process by operational creditor.*
36 *CP No. (IB) 22(PB)/2017.*
37 *The provision relates to application for setting aside an arbitral award.*

section 8 of the Code to the debtors on 13.01.2017. In its reply dated 27.01.2017, SORIL contended that the existence of debt is disputed and an appeal has also been preferred under Section 37[38] of The Act against the order passed by the Court while dismissing the challenge under Section 34 of The Act. Pertinently, execution proceedings to recover the award amount were also pending. It will be beneficial to note that on the date of service of the demand notice (i.e., on 13.01.2017) no appeal under Section 37 of The Act was filed or pending.

The debtor disputed the debt before the Adjudicating Authority on the pretext of a pending appeal and contended that the arbitral award did not attain finality in view of the pending appeal. The Authority upheld the Respondent's argument and refused to entertain the petition even in the absence of any pending appeal on the date of Section 8 notice. The Authority reasoned that the Respondent had time to prefer an appeal and chose to depart from a literal interpretation because "*extreme technicality would result in nullifying the remedy of appeal within 30 days by section 37 of the Arbitration and Conciliation Act, 1996.*"

The Authority further opined that a party cannot be allowed to invoke more than one proceeding simultaneously. The issue of whether rent related debts would fall within the definition of 'operational debt' under the Code was also raised. However, since this piece does not aim to address that question; I will refrain from delving into that issue.

In other words, the Bench rejected the application despite no pending dispute 'before' the receipt of a demand notice under section 8 of the Code. The ruling further assumes significance as it noted that if a party has already invoked an effective remedy, it should not be allowed to indulge in the practice of forum shopping. While the Mumbai Bench in Essar dispute adopted a text oriented approach, the Principal Bench in the Annapurna ruling chose to depart from the text and emphasized the spirit of law.

Quite recently, the National Company Law Appellate Tribunal (NCLAT) in *Kirusa Software Private Limited v. Mobilox Innovations Private Limited*[39] discussed this important issue of "*dispute*" and "*existence of dispute*" under the Code. The NCLAT discussed the issue at length and remitted the case back to the Tribunal.
In the instance case, the creditor raised certain invoices related to software services it provided to the debtor and subsequently on non-payment a demand notice under section 8 of the Code was sent. The debtor disputed the debt in its reply.

The Hon'ble Appellate Tribunal, in light of the Legislative intent, upon reading of the code, opined that the term "dispute" ought to be given its natural and ordinary meaning. The width of the expression "dispute" should cover all disputes on debt, default etc. and not be limited to only two ways of disputing a demand made by the operational creditor, i.e. either by showing a record of pending suit or by showing a record of a pending arbitration. The Hon'ble Appellate Tribunal further reasoned that once parties are already before any judicial forum/authority for adjudication of disputes, notice becomes irrelevant and such an interpretation renders the expression 'existence of a dispute, if any, in sub-section (2) of Section 8, otiose.
It was held that the definition of dispute is not exhaustive but illustrative and the same ought to be given a wide and broad interpretation. The Hon'ble Appellate Tribunal noted:

"In view of the aforesaid discussions, we hold that the dispute as defined in sub-section (6) of Section 5 cannot be limited to a pending proceedings or lis, within the limited ambit of suit or arbitration proceedings, the word 'includes' ought to be read as "means and includes" including the proceedings initiated or pending before consumer court, tribunal, labour court or mediation, conciliation etc. If any action is taken by corporate debtor under any act or law including while replying to a notice under section 80 of CPC, 1908 or to a notice issued under Section 433 of the Companies Act or Section 59 of the Sales and Goods Act or regarding quality of goods or services provided by 'operational creditor' will come within the ambit of dispute, raised and pending within the meaning of sub-section (6) of Section 5 read with sub-section (2) of Section 8 of I&B code, 2016."

Significantly, the Hon'ble Appellate Authority also ruled that the Adjudicating Authority, before admitting an application, ought to examine whether the notice of dispute actually raises a dispute qua the terms 'debt' and 'dispute' as used under the Code. This observation has raised some concerns in view of the fact that the expression 'prima facie' or any related expression does

38 The provision relates to Appealable orders.
39 Company Appeal (AT) (Insolvency) 6 of 2017.

not find a mention in Sections 8 or 9 of the Code. To appreciate this in a better manner it will be helpful to reproduce the relevant provision of the Code.
Sub clause 5 of section 9 of the Code states:

"(9) Application for initiation of corporate insolvency resolution process by operational creditor.
.....
(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, —

(a) *the application made under sub-section (2) is complete;*

(b) *there is no repayment of the unpaid operational debt;*

(c) *the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*

(d) *no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and*

(e) *there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.*

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if —

(a) *the application made under sub-section (2) is incomplete;*

(b) *there has been repayment of the unpaid operational debt;*

(c) *the creditor has not delivered the invoice or notice for payment to the corporate debtor;*

(d) *notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or*

(e) *any disciplinary proceeding is pending against any proposed resolution professional:*

Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority."

The importance of this authoritative pronouncement from the Hon'ble Appellate Tribunal can hardly be under stated since it enlarged the scope of the expression "dispute." It has largely clarified the dispute conundrum and should ideally put the issue to rest for some time. This could also be seen as an attempt to protect the genuine debtors from the savage provisions of the Code having far reaching consequences. At the same time this decision could be misused by raising illusory and colorable 'disputes'.

The Code provides that an appeal against the order of the Hon'ble Appellate Tribunal can be preferred before the Hon'ble Supreme Court of India[40]. It will be very interesting to see how the Hon'ble Apex Court deals with this question when faced with a similar issue.

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40 Section 62 of the Code.

REAL ESTATE (REGULATION AND DEVELOPMENT) ACT: A STEP AHEAD FROM EXISTING REGIME

Gyanendra Kumar and Harsimran Singh

In continuation to our earlier write up on Real Estate (Regulation and Development) Act 2016 or RERA, covered in May 2017 issue (Volume X Issue V) of the *Indian Legal Impetus*, we hereby further discuss other crucial aspects of RERA which make this piece of legislation very important in the current times.

It is not wrong to state that the real estate sector was in a state of limbo since very long until the coming up of RERA as there were no authority who kept supervisory and administrative control on this industry. As a result, in most of the cases, the builders got undue benefits against the customers who held a very weak ground due to weak bargaining power and entanglement in onerous contractual documentation.

As discussed in the preceding article on RERA, the main object of this law is to establish a regulatory authority for promoting the real estate sector and ensure the sale of plot, apartment or building in efficient and transparent manner and also, protect the interest of the consumers.

Prior to RERA, the customers were confused firstly about investing in a project and thereafter, if any disputes arose then which door to knock on for seeking justice. Now consumers have no need to worry and they can invest in projects which are registered with the authority and if any disputes arises in future then they can approach the authority[41] or adjudicating officer[42] for speedy dispute redressal.

The Act makes it mandatory that every residential and commercial project should be registered with the RERA before launching it in market - if the area of the land exceeds five hundred square meter or the number of apartments exceeds eight.[43] The promoter has to apply for registration of the real estate project supported by an affidavit stating that he has a legal title of the land, land is free from all encumbrances, time period for completion of project, and 70% of the amounts collected from the allottees shall be deposited in a separate account maintained in a scheduled bank.[44] Thereafter, within a period of 30 days the Authority shall grant or reject the application for registration of the project.[45] And extension of registration can be possible on the ground of force majeure only.

So, the promoter/builder has to strictly comply with the time frame otherwise it leads to revocation of registration or penalty. And not only the promoter but Real Estate agents also have to obtain registration from the concerned authority established under the provisions of RERA, otherwise they can't facilitate in any manner for sale or purchase of any plot, apartment or building.[46]After registration the promoter will get a Login Id and password for creating a webpage on the website of authority for public viewing and he has to upload all the details of the project on the website and also that he has obtained all the certificates and clearances from relevant authorities including details of registration granted by the authority and status of the project and the obligations will be on promoter regarding veracity of the advertisement or prospectus.

The other most important feature of RERA is that the consumer is not required to pay more than 10% of the cost of the apartment, plot or building as an advance payment without first entering into a written agreement for sale.[47] It is normally seen that the developers never execute the builder buyer agreement with the customers and keep prolonging the same even after receiving the 40-50% of amount and delay in giving the possession of property on time. Now the developer cannot delay in executing the agreement after receiving 10% of total amount nor deviate from the sanctioned plans, layout plans and specifications as approved by the competent authorities and if the promoter fails to complete or is unable to give

41 *Real Estate Regulatory Authority as established u/s 20 of the Act, 2016.*
42 *Judicial officer, who is or has been a District Judge appointed under sub section (1) 0f Section 71.*
43 *Section 3, RERA*
44 *Section 4, RERA*
45 *Section 5, RERA*
46 *Section 9, RERA*
47 *Section 13*

possession of an apartment then he shall be liable to return the amount with interest if customer wishes to withdraw from the project; otherwise if customer does not intend to withdraw then promoter will pay interest for every month of delay till the handing over of the possession.[48] But it is important to note that this act not only talks about the rights of the allottees but also describe the duties of the allottees.

According to section 19(6) RERA, "every allottee who has entered into an agreement for sale to take an apartment shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place and tax, if any." And allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges.[49] So, allottee too has to strictly comply with the provisions of the agreement entered into with the builder otherwise any default on the part of the allottee (including non-fulfillment of duties enshrined under section 19 of RERA) may result in adverse effect on the rights available to an allottee under RERA.

Earlier, there was no exclusive authority or court or tribunal where aggrieved allottees could approach and seek justice within short time frame and they had to run from one forum to other. The allottees used to file the complaint before Hon'ble Consumer Dispute Redressal Forum or winding up petition before the Hon'ble High Court of respective jurisdiction and they had to wait for longer periods as large numbers of cases were pending before the Courts. Now according to section 31 of RERA "any aggrieved person may file a complaint with the Authority or the adjudicating officer for any violation or contravention of the provisions of this Act against any promoter or real estate agent." The authority has a power to issue interim orders until the conclusion of the inquiry without giving notice to such party and also has powers to impose penalty or interest in regard to any contravention cast upon the promoters, the allottees and real estate agents.[50] However, if any person aggrieved by any direction or order or decision of the authority or adjudicating officer may prefer an appeal to the Appellate Tribunal[51] under section 44 of the Act within 60 days from receiving the copy of the order. Furthermore, any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within a period of 60 days from the date of communication of the order.[52]

In essence, this act has been a step forward from the existing laws in real estate industry and it will increase transparency in the real estate market. The developers, in absence of specific real estate laws, had misused their dominant position and availed large scale benefits. Large numbers of pending litigations are still going on in different fora. RERA has also laid down the provisions of compounding of offences where party can settle their dispute on such terms and on payment of such sums as may be prescribed provided the sum prescribed shall not exceed the maximum amount of the fine. It is important to note that if any pending litigation is going on before the Consumer Disputes Redressal Forum on or before the commencement of RERA, the aggrieved may with the permission of such forum or commission withdraw the complaint pending before it and file an application before the adjudicating officer under RERA.[53]

Note: The above write-up is the personal views of the authors and the same should not be construed as legal advice. In case of queries, please feel free to write at newsletter@singhassociates.in. More write-ups on RERA will be included in subsequent issues of India Legal Impetus.

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48 *Section 18*
49 *Section 19(7)*
50 *Section 38*
51 *Real Estate Appellate Tribunal established under section 43 of the Act,2016*
52 *Section 58*
53 *Section 71*

DOES A VALID ARBITRATION AGREEMENT EXCLUDE THE JURISDICTION OF THE COMPETITION COMMISSION OF INDIA?

Satwik Singh & Adhip Ray

Arbitration has become an immensely popular method of alternative dispute resolution in India. The fact that almost every contract nowadays has an arbitration clause is testament to the popularity of arbitration. Section 28 of the Indian Contract Act, 1872 gives parties a right to enter into contracts for arbitration (to the exclusion of the jurisdiction of the courts) and accordingly, parties can decide to refer their disputes to arbitration rather than initiate court proceedings. The process of arbitration in India is regulated by the Arbitration and Conciliation Act, 1996 (hereinafter, "the Arbitration Act"). Section 5 of the Arbitration Act lays down the principle of minimal judicial intervention and states that a judicial authority cannot interfere in any manner with the arbitration proceedings other than under the Arbitration Act. The Competition Act, 2002 (hereinafter, "the Competition Act") was enacted with the purpose of preventing anti-competitive practices that have an appreciable adverse effect on competition and abuse of dominant position. Under the scheme of the Competition Act, the Competition Commission was established and given extensive powers to ensure fulfilment of this objective.

Thus, in light of the minimal judicial intervention principle crystallised under Section 5 of the Arbitration Act, the important question that arises is – Would an arbitration clause in a contract exclude the jurisdiction of the CCI, even when a party is acting in an anti-competitive manner and abusing its dominance?

This question was examined by Hon'ble Delhi High Court in the case of *Union of India v Competition Commission of India and Ors*[54]. In this case, it was contended that the Ministry of Railways was abusing its dominant position by increasing rates for various services; by not providing access to infrastructure such as rail terminals; by imposing several restrictions on the transport of certain categories of goods that the Complainant was dealing in. The Complainant filed a complaint before the CCI alleging that these practices were in contravention of abuse of dominant position contravening Section 4 of the Competition Act. The CCI found *prima facie* evidence of abuse of dominant position and ordered the DG to investigate. Against this order, a writ petition was preferred with the High Court of Delhi. The main contention of the Railways was that there was a valid and binding arbitration clause between itself and the Complainant and thus, the CCI would not have jurisdiction over the dispute and the same had to be referred to Arbitration under Section 8 of the Arbitration Act.

The Delhi High Court however, rejected this contention. The Court held that the scope and focus of CCI's inquiry was very different from the scope of dispute raised before an Arbitral Tribunal. It was observed that the Arbitral Tribunal's main focus would be on questions arising out of a breach of contractual obligations whereas the focus of the CCI would be to uphold the mandate under Section 3 (Anti-Competitive Agreements) and Section 4 (Abuse of Dominant Position) of the Competition Act. The Court also relied on Section 60 read with Section 62 of the Competition Act to say that because the provisions of the Competition Act have an overriding effect on other laws and have to be read in addition to, and not in derogation of, the provisions of any other law for the time being in force, the existence of an arbitration clause could not oust the jurisdiction of the CCI to rule on issues of anti-competitive agreements and abuse of dominance.

Therefore, in accordance with the ratio of the *Union of India v Competition Commission of India*, the aforementioned question of whether a valid arbitration clause will exclude the jurisdiction of the CCI has to be answered in the negative. Consequently, the CCI has jurisdiction on disputes that involve questions of anti-competitive agreements and abuse of dominance.

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54 [2012] AIR 66 (DelHC)

TWO-TIER ARBITRATION IN INDIA: IN THE LIGHT OF M/S. CENTROTRADE MINERALS AND METAL INC. V. HINDUSTAN COPPER LTD.[55]

Bornali Roy

55 2016 SCC Online SC 1482

The Supreme Court of India, after a long drawn dispute, has firmly established that two-tier arbitration clauses are valid and are not against public policy in India. The landmark judgment in this regard is the M/s. Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd.

FACTS:

The case has an extensive history and it had begun when the parties had entered into a contract for sale of copper concentrate. Dispute between the two parties arose regarding the dry weight of the goods and M/s. Centrotrade had invoked the arbitration clause. The arbitration clause read as such:

> *"All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration.*
>
> *If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in effect on the date hereof and the results of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any court in jurisdiction."*

Vide award dated 15th June, 1999 of Arbitral Tribunal under the Indian Council of Arbitration (ICA) rules had given a NIL award. Subsequently, M/s. Centrotrade had invoked the second arbitration before the International Chamber of Commerce on February 22, 2000. The arbitral tribunal comprising of sole arbitrator had passed its award on 29th September, 2001, upholding the validity of the arbitration clause and Centrotrade's claims.

Resultantly, M/s. Centrotrade had moved an application for enforcement of foreign award under Section 48 of Arbitration and Conciliation Act, 1996. The same was allowed by a single bench of the Calcutta High Court vide its order dated 10th March, 2004. Hindustan Copper Limited filed an appeal against this decision before the division bench and on 28th July, 2004 the division bench declared that the award of International Chamber of Commerce was non-executable as long as award of Indian Council of Arbitration stood. This judgment was again challenged before a two bench in Supreme Court, however, due to difference in opinion, it was referred to a three-judges bench.

ISSUES:

1. Whether a settlement of disputes or differences through a two-tier arbitration procedure is permissible under the laws of India?

2. Whether the award rendered in the appellate arbitration being a 'foreign award' is liable to be enforced under the provisions of Section 48 of the Arbitration and Conciliation Act, 1996?

The Hon'ble Supreme Court had heard the first question and directed to list the appeal again for consideration of the second question which is related to enforcement of the appellate award.

DECISION:

The Hon'ble Supreme Court had held that the Arbitration and Conciliation Act, 1996 does not prevent, either explicitly or implicitly, the parties' autonomy to agree to a procedure for arbitration of the dispute between them. The party autonomy is upheld to the extent that they may agree to a procedure whereby the arbitral award might be reconsidered by another arbitrator or panel of arbitrators by way of an appeal.

Further, the Hon'ble Supreme Court has made it clear that the arbitration at the first instance i.e. Indian Council of Arbitration had passed an "arbitration result" as per the contract, however, irrespective to the nomenclature it would amount to arbitral award.

OBSERVATION:

The Hon'ble Supreme Court has accepted two-tier arbitration as an integral part of arbitration in India; however, there still remain open loops in this regime. Some of them being:

1. Time frame between which appeal should be filed against the first arbitral award.

2. Procedure for appointment of appellate tribunal.

3. Whether appellate tribunal can remand back the matter to the arbitral tribunal.

4. Way forward in case the appellate tribunal award is set aside by the seat of arbitration.

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DELHI HIGH COURT DISREGARDS THE PROCEDURE FOR APPOINTMENT LIMITING A PARTY'S CHOICE TO A RESTRICTED POOL OF RETIRED/SERVING EMPLOYEES."

Puneet Sharma

The Hon'ble High Court of judicature of Delhi, in the matter of **AFCONS Infrastructure LTD. v. Rail Vikas Nigam Ltd.**[56] has held that the procedure for appointment of an arbitrator, which restricted the AFCON'S (Hereafter "petitioner,") choice of its nominee arbitrator to a select group, who were all former/ serving employees of the Rail Vikas Nigam Ltd. (Hereafter "respondent"), or its controlling body (Hereafter "Railways,") with power vested in the General Manager of the respondent to withdraw future work, on an apprehension of want of fairness on arbitrator's part, failed the test of judicial scrutiny, warranting appointment of an arbitrator, disregarding the procedure agreed between the parties.

The facts in nutshell were: A contract for infrastructure development was entered into between the AFCONS Infrastructure LTD and Rail Vikas Nigam Ltd on 12.12.2011. Clause 17.3 of the contract contained an arbitration clause. **Sub-clause (i)**, whereof provided for three arbitrators, whereas **Sub-clause (ii)**, provided for the procedure for appointment of arbitrators, namely (a) the petitioner was to consent to any one of five names in the panel forwarded by the respondent; (b) the respondent would decide on second arbitrator from the remaining four names in the panel; & (c) the third presiding arbitrator would be chosen by the two arbitrators, within 30 days, failing which the said arbitrator would be appointed by the respondent's Managing Director. **Sub-clause (iii)**, provided for qualification, and experience of arbitrators, and inter alia specified that one member shall be working, or retired officer of Indian Railway Accounts Service, having experience in financial matters related to construction contracts. Another member shall be a technical person (working or retired) having knowledge, and experience of railway working. The presiding arbitrator was to be a serving officer having the qualification, and experience of either of the two arbitrators. Additionally, out of the three arbitrators, not more than one was to be retired.

56 MANU/DE/1557/2017.

Disputes having arisen between the parties, the petitioner vide letter dated 17.11.2016, wrote to respondent stating that the procedure for appointment of the arbitral tribunal had been rendered ultra vires the provisions of the amendment act, which required the arbitrators to be appointed in terms of the restrictions imposed by the Fifth, and Seventh Schedules to the Act. The petitioner also nominated a retired judge of the Calcutta High Court, as its nominee arbitrator, and requested the respondent to appoint its nominee arbitrator within a period of 30 days from receipt of the letter.

The respondent vide letter dated 15.12.2016 responded by proposing a panel of five arbitrators, which included names of retired officers of the Railways, and requested the petitioner to select its arbitrator from the said panel.

The parties having reached a stalemate, the petitioner filed a petition under section 11(6) for appointment of an arbitrator, on respondent's behalf, assailing the appointment procedure inter alia on the grounds that; a) the arbitration clause was ultra vires Section 12(5) of the Act; b) in view of the preceding argument, the respondent could not unilaterally insist on appointing retired officers of respondent/railways, since the same would tantamount to rewriting the contract; c) the railways exercised an all pervasive control over the respondent; & d) relationship with former employees, fell within the ambit of past business relationship, and was thus within prohibited category of entry 1 of schedule 7 of the act.

The Hon'ble court noted that there was a consensus ad idem between the parties that in view of section 12(5)[57], read with seventh schedule, the serving officers

57 Sub-section (5) of Section 12 reads "Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be

of the respondent/railways were not eligible to be appointed as arbitrators. However, rather than striking out the entire arbitration clause, as specified in Clause 17.3, the Hon'ble court invoked the Blue Pencil Doctrine to severe Sub-clause (iii) of Clause 17.3, which prescribed the qualification of the members of the arbitral tribunal, while leaving out Sub-clause (ii) of Clause 17.3, which dealt with the procedure for appointment of the arbitrators, on the grounds that while the serving officers of the respondent could not be appointed as arbitrators, the same by itself would not render nugatory, the procedure for the constitution of the arbitral tribunal.

Having held the procedure for appointment of arbitrators to be valid, the Hon'ble court proceeded to scrutinize, whether the former employees of the respondent/railways were ineligible to be appointed as arbitrators by virtue of Section 12(5), read with Entry-1[58] of the Seventh schedule of the act. Answering this question **per se** in negative, the court, rejected the petitioner's contention that the relationship of former employee is within the ambit of business relationship, and observed that the prohibition under Entry-1 of the Seventh Schedule was restricted to a person who was related to a party as an employee, consultant, advisor, or who had any other past, or present business relationship. The word "any other" was interpreted to indicate a relationship other than as an employee, consultant, or an advisor, and a business relationship could not be understood to include an employee-employer relationship.

Having rejected the per se argument, the Hon'ble court proceeded to scrutinize the above argument, in the peculiar facts of the case, and noticed that; a) the respondent is an arm of the railways, with the former being a "Special Purpose Vehicle," constituted to undertake project development, mobilize financial resources, and implement railway infrastructure projects. A deeper scrutiny revealed an all pervasive control of the railways over the respondent, leading court to observe that for the purpose of the act, no distinction could be drawn between former employees of the respondent, and the former employees of the Railways; b) the procedure for appointment of arbitrators, which restricted the petitioner to select only one out of the five names suggested by the respondent, consisting of former, or serving employees of the respondent/railway was not sufficiently broad-based, and failed to instil any confidence in the arbitral process. A similar clause which restricted a party to choose one out of the panel of five members to be appointed as an arbitrator had been disapproved by the Hon'ble Apex Court in M/s. Voestalpine Schienen Gmbh v. Delhi-Metro-Rail-Corporation;[59] c) the guidelines issued by the railway board for appointment of retired railways officers as arbitrators, which were followed by the respondent, (required the General Manager to keep a watch on the performance of an arbitrator, and to consider deleting the arbitrator's name for subsequent period, if he found the arbitrator "did not appear to be fair,") gave an impression to the other party to arbitration that the impartiality of the arbitrator had been compromised.

In this view of the matter, the Hon'ble High Court disposed of the petition observing that the procedure under clause 17.3(ii) be disregarded, and issued a direction to the respondent to appoint a retired judge of the Supreme Court as an arbitrator on behalf of the petitioner, and nominate an arbitrator on its behalf, with a further direction that the two arbitrators shall nominate the third arbitrator, failing which the petitioner shall be at liberty to approach the court for appointment of the third arbitrator.

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appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

58 *Entry 1 of the Seventh Schedule reads "The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party."*

59 *(2017) 4 SCC 665 at 690, pp. 29-30.*

ARBITRABILITY OF FRAUD: A MISSED OPPORTUNITY?

Lalit Ajmani

INTRODUCTION

Arbitration is one of the means to settle disputes. But all kinds of disputes cannot be entertained by arbitral tribunal[60]. Thus, the matter must be arbitrable to attract the jurisdiction of arbitral tribunal.

The Arbitration & Conciliation Act, 1996 ('the Act') is silent on the issue of arbitrability and it does not provide any list of matters which can be referred to arbitration. To remove this confusion and ambiguity, Indian judiciary had given a two-fold test to determine whether the issue is fit for arbitration or not.

Two-Fold Test

RIGHT IN REM OR RIGHT IN PERSONAM

In the case of *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Ltd. and Ors.*[61] it was held that the matters which attract right in personam are amenable to arbitration. And the matters which are right in rem in nature are not amenable to arbitration. However, the court also stipulated that the said rule is not a rigid rule.

MATTER EXCLUSIVELY RESERVED FOR PUBLIC FORA

In the case of *Kingfisher Airlines Limited* v. *Prithvi Malhotra Instructor*[62], the court held that the test would be whether adjudication of such disputes is reserved exclusively for public fora as a matter of public policy. Because even an action-in-personam, if reserved for public fora as a matter of public policy, would be non-arbitrable.

It is submitted that the scope of this piece of writing is limited to the issue of arbitrability of fraud and we will discuss it in the following part.

60 *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and Ors; (2011) 5 SCC 532 –*
(Criminal matters, Matrimonial Disputes, Guardianship matters, insolvency and winding up matters, etc)
61 *(2011) 5 SCC 532*
62 *2013 (7) BomCR 738*

ARBITRABILITY OF FRAUD

The aforementioned two-fold test came into existence only after the case of Booz Allen which was decided in 2011. But the debate on arbitrability of fraud by itself, is more than half a century old. Therefore, the cases pertaining to this issue haven't been tested by the aforementioned two-fold test and the fate of arbitrability of fraud has been discussed in isolation.

It can be said that the debate started with the case of *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak*[63]. In this case, the apex court said that where serious allegations of fraud are made against a party; and the party who is charged with fraud desires that the matter should be tried in open court, then court will have sufficient cause under section 20 of the Arbitration Act, 1940 to refrain from referring the matter to the arbitral tribunal.

Just a few years back, a similar issue came up before the hon'ble Supreme Court in the (in)famous case of *N. Radhakrishnan* v. *Maestro Engineers and Ors.*[64] where the court followed the lines of Abdul Kadir's case and decided that the case will be non-arbitrable if it involves allegations of fraud and serious malpractices.

It is said that the debates are hardly completed without a non - conformist approach and this one is no exception. In the case of *Swiss Timing Limited* v. *Organising Committee, Commonwealth Games 2010*[65], the hon'ble apex court opined that the principle formulated in the case of N. Radhakrishnan is *'per incuriam'*. One interesting fact about this judgment is it is delivered by a single bench whereas the judgment of N. Radhakrishna flowed from a two-judge bench.

Taking a different route i.e., foreign awards under New York Convention, the Supreme Court in the case of *World Sport Group (Mauritius) Ltd.* v. *MSM Satellite (Singapore) Pte. Ltd.*[66] held that where the arbitration

63 *AIR SC 1962 406*
64 *(2010) 1 SCC 72*
65 *(2014) 6 SCC 677*
66 *AIR 2014 SC 968*

agreement is null and void, inoperative or incapable of being performed, only then the court may refuse to refer the matter to arbitral tribunal. But merely because the case involves allegation of fraud doesn't empower the court to refuse to refer it for arbitration under section 45 of the Act.

Coming back to the domestic arbitration, in the controversy recently addressed by the apex court in the case of *A. Ayyasamy* v. *A. Paramasivam and Ors.*[67], the court discussed the precedents in detail. The court finally said that the serious allegations of fraud are non-arbitrable but mere allegations of fraud fall within the jurisdiction of the arbitral tribunal. Moreover, the court held that the case of Swiss Timings can't be deemed to have overruled the judgment of N. Radhakrishnan.

STAND OF LAW COMMISSION

Asunder from judiciary, the law commission has also delivered its opinion on the issue of arbitrability of fraud. In its 246th report, the law commission has said the following:-

> *"The Commission believes that it is important to set this entire controversy to a rest and make issues of fraud expressly arbitrable and to this end has proposed amendments to section 16."*

But the present form of section 16 tells us a different picture. Section 16 of the Act remained unchanged even after the amendments brought to the Act in 2016 and the issue of arbitrability of fraud was kept open for judicial interpretation.

CONCLUSION

It is submitted that the apex court has missed the golden chance. As we are a witness to the growth of arbitration in today's world, the need of the hour is to make arbitration more powerful rather than keeping it as a toothless tiger. Legally speaking, it can be said that the tribunal is empowered under the Act to deal with the issue of serious allegations of fraud. Close reading of Sections 16, 17, 26, and 27 make the aforementioned statement logical and sustainable and by keeping the serious allegations of fraud outside the scope of arbitration, our judicial body has curtailed the powers of arbitral tribunal.

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67 AIR 2016 SC 4675

BENAMI PROPERTY LIABLE TO CONFISCATION UNDER NEW LAW

Vijay K. Singh

The Benami Transactions (Prohibition) Act, 1988 was enacted and has been a part of law for the last of 28 years. It was enacted to deal with black money in the country. However, it never came into force for some unknown reasons.

The Government introduced an amendment bill in the year 2015 which was passed by the Parliament. The amended Act, i.e. "The Benami Transactions (Prohibition) Amended Act, 2016" (**Act**) received the assent of the President on 10th August 2016. Pursuant thereto, it came into force effective 1st November 2016.

Under the Act, the definition of '*benami* transaction' was amended with certain exceptions created. The Adjudicating Authority and Appellate Tribunal were established to deal with attachment and confiscation of '*benami* property'. The '*benami* transaction' has been made an offence punishable with rigorous imprisonment for the term which shall not be less than one year, which may extend to 7 years and shall also be liable to fine which may extend to 25 per cent of the fair market value of the '*benami* property'.

The Act gives power to the Authority under the Act to attach *benami* property, if such Authority has reason to believe, based on the material in possession, that a person is *benamidar* in respect of such property. Post the enquiries, the matter is referred to the Adjudicating Authority appointed under the Act to confirm the attachment of such property.
If the Adjudicating Authority, after conducting enquiries and taking into account all the relevant material, holds such property to be a *benami property*, the attachment is confirmed and the *benami property* is ordered to be confiscated. There is provision for appeal before the Appellate Tribunal constituted for such purpose and to the High Court against the order passed by the Appellate Tribunal.

The Act has given wide powers to the Authority under the Act to summon, enforce attendance, discovery and inspection, compelling any person to produce books of accounts and other documents, receive evidence on affidavit etc.

The provisions related to the attachment of the '*benami* property' are akin to the provisions of attachment under the Prevention of Money Laundering Act, 2002 (PMLA). Under the PMLA, the enforcement officer has similar powers to provisionally attach the property and then refer for conformation of attachment before the Adjudicating Authority under the PMLA, if it was revealed during enquiry that such property has been acquired by ill-gotten money (proceeds of crime). The PMLA also provides for confiscation of the property.

The Act has in-built mechanism to conclude adjudication and confirm attachment of *benami* property within a time-bound manner, i.e. within a period of one year from the date when the Authority specifies the property being held by *benamidar*. Further, there is specific provision to conclude the criminal trial for the offence under the Act within a period of six months from the date of filing of the complaint. The Act provides for constitution of a Special Court for trying offence under the Act.

The Act gives wide power to the Authority to deal with *benami* transactions firmly and enable the confiscation of *benami* property.

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DISCOUNTING AND TIE-IN POLICY LED HYUNDAI IN HARDSHIP

Palash Jain

On June 15, 2017, the Competition Commission of India (hereinafter referred as'CCI') consisting of its chairperson Devendra Kumar Sikri and 5 others, after taking Director General's (hereinafter referred as 'DG') report in consideration, imposed a penalty of Rs. 87 cr. on Hyundai Motors India Limited (hereinafter referred as 'HMIL').

BACKGROUND

The above ruling arises out of a proceeding involving an alleged contravention of Section 3(4)(e) read with Section 3(1) of the Competition Act, 2002 (hereinafter referred as 'Act') through arrangements which resulted into Resale Price Maintenance and arrangements which includes monitoring of the maximum permissible discount levels through a Discount Control Mechanism and further held for the contravention of Section 3(4)(a) read with Section 3(1) of the Act in mandating its dealers to use recommended lubricants/ oils and penalizing them for use of non-recommended lubricants and oils.

ANALYSIS

In the present cases[68] the final order was passed based on the information filed by the dealers of HMIL *viz*. Fx Enterprise Solutions India Pvt. Ltd. and St. Antony's Cars Pvt. Ltd.[69] (hereinafter referred as 'INF') made the following submissions before DG:

- HMIL enters into exclusive dealership arrangements with its dealers, and dealers are required to obtain prior consent of the HMIL before taking up dealerships of another

  Brand which amounts to "refusal to deal" in contravention of the provisions Section 3(4)(d) of the Act; whereas HMIL contended that there is no exclusive supply arrangement as they have allowed various dealers to take dealership of other competing manufacturers.

- INF are bound to purchase their accessories & lubricant , CNG kit and insurance policy either directly from the HMIL or the vendors approved from HMIL. The DG found that these actions also amount to abuse of dominance which are in contravention of Section 4 of the Act whereas HMIL contended that there was no obligation to purchase lubricant from other vendors but then HMIL does not guarantee originality; further there was no mandate to purchase CNG kit from Hyundai and insurance from Aditya Birla Insurance Brokers Limited (hereinafter referred as 'ABIBL'), further HMIL provided data that 50% cars sold pan India do not have insurance from 'ABIBL'.

- INF alleged that HMIL operates a discount policy on its dealers, whereby no dealer is allowed to give more than a specific percentage of discount which amounts to resale price maintenance in contravention of section 3(4)(e) of the Act whereas Hyundai submitted that maintaining the financial health of the dealers is an extremely important factor to ensure a robust and healthy dealership network for HMIL, so that the dealers have the ability to invest in sales, services, and promotion of new and existing products and also to avoid providing discounts of a predatory nature which are detrimental to their finances.

- INF further contended that HMIL has control over the sources of supply for the dealer's products and ties the purchase of desired cars to the sale of high-priced and unwanted cars to its dealers and HMIL designates sources of supply for complementary goods for dealers as well as, which result in a "tie-in" arrangement in violation of section 3(4)(a) of the act whereas HMIL said that there is no such mechanism followed by them.

68 *FX Enterprise Solution India Pvt. Ltd. v. Hyundai Motors India Ltd. & In Re. St. Antony's Cars Pvt. Ltd. v. Hyundai Motors India Ltd.*

69 *Case Nos. 36 & 82 of 2014, order dated 14.06.2017.*

The DG thereby conducted investigation on all the above mentioned charges and submitted their report on April 21, 2016, thereby the CCI held HMIL liable for monitoring of the maximum permissible discount levels through a Discount Control Mechanism and mandating its dealers to use recommended lubricants/ oils and penalizing them for use of non recommended lubricants and oil.

CONCLUSION

This is the highest penalty ever imposed individually on an automobile company. This order may lead to change in discounting scheme and will further give autonomy to dealers pertaining to the pricing scheme and will further develop the market for auto industries though competition appellate tribunal views are still awaited as HMIL has filed an appeal.

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NEWSBYTE

INTERNATIONAL WORKER UNDER EPF SCHEME 1952

The Employee's Provident Fund Organization ('EPFO'), Ministry of Labour & Employment, Govt. of India, vide its recent Circular being File No. IWU/7/(25)/2017/ Clarification reg. Para 83/5366[70] dated June 08 2017, issued to all central and regional provident fund commissioners notified a clarification regarding definition of the term "International Worker" as given in Para 83(2)(ja)(a) of Employee Provident Fund Scheme 1952 (the 'Scheme') and Para 43A(1)(viii)(a) of the Employees' Pension Scheme 1995.

The Government of India, through its initiative for the benefit of both the employers and employees, has entered into Agreement with several countries to ensure that the employees of home country who do not remit contribution in that country, get the benefit of totalization period for deciding the eligibility for pension, may get the pension in the country where they choose to live, and the employers are saved from making double social security contributions for the same set of employees. The EPFO accordingly, has been authorized to issue the Certificate of Coverage to the employees posted to the countries having signed Agreement with the Government of India.

As per Para 83(2)(ja)(a) of the Scheme an "International Worker" means an Indian employee having worked or going to work in a foreign country with which India has entered into a security agreement and being eligible to avail the benefit under a social security agreement (SSA) of that country, by virtue of the eligibility gained or going to gain, under the said SSA.

The EPFO noted that Indian international worker on coming back to India are continued to be considered as International Worker and PF deductions are made accordingly by certain offices. However, in view of the definition stated above, an Indian employee will be treated as International Worker only when

(i) he has worked or going to work in a foreign country with which India has entered into SSA, and

(ii) he is eligible to avail the benefits under a social security programme of the said foreign country.

Hence, it was clarified by the EPFO that Indian expatriate employees who do not fulfill the aforesaid two conditions and who come back to work in India after having worked in a foreign country will fall under the definition of employee as given in section 2(f) of the Employees' Provident Fund & Miscellaneous Provisions Act and not of the definition of an International Worker provided in Para 83(2)(ja)(a) of the Scheme.

70 http://www.epfindia.com/site_docs/PDFs/Circulars/Y2017-2018/IWU_Def_IntWorkers_5366.pdf

EXEMPTIONS GIVEN TO START-UP COMPANIES BY MINISTRY OF CORPORATE AFFAIRS

Akanksha Tomar

An exemption notification for private companies has been notified on 13th June 2016 by the Ministry of Corporate Affairs (New Notification). With these exemptions, it is expected that many Start Up companies would be able to carry on their businesses with ease.

A new concept for start-up companies has been introduced. As per the new notification a proviso is added in the old notification related to clause 40 of Section 2 of the Companies Act 2013.
Section 2 Clause 40 of the Companies Act 2013 defines the financial statement in relation to a Company which includes Cash Flow Statement. Now, pursuant to the current notification, a Startup Company is exempt from preparing a Cash Flow Statement under the Companies Act 2013.

The reason for this exemption is that, a start-up company is set up by taking funds from outsiders or investors or the government so there is no such Flow of Cash or Cash equivalents initially to prepare Cash Flow Statements. Further, a start-up Company will take time to receive such investments; therefore, to carry out business with ease various compliances have been simplified to save time and money of the start-up entrepreneurs.

Further, the startup companies are also not required to hold minimum number of four meetings of its board of directors in a year. As per the new notification, Sub section 5 of section 173 of the Companies Act has been substituted as one-person Company, Small Company, Dormant Company and private company (if such private company is a start-up) shall be deemed to have complied with the provisions of this section if at least one meeting of the board of directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days.
For the purpose of Companies Act 2013, the term "start-up" or "start-up company" means a private company incorporated under the Companies Act 2013 or Companies Act 1956 and recognized as a start-up in accordance with the notification issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry.

MINISTRY OF CORPORATE AFFAIRS NOTIFIES COMPANIES (AUDIT AND AUDITORS) RULES, 2017

Ministry of Corporate Affairs (MCA) vide notification [F. No. 1/33/2013-CL-V (Vol.I)] & G.S.R. 621(E) dated 22nd June 2017 has notified Companies (Audit and Auditors) Second Amendment Rules, 2017.

The Central Government in exercise of powers conferred by Section 139 read with Sub-section (1) and (2) of section 469 of Companies Act, 2013 (18 of 2013) has made the Amendments in furtherance of Companies (Audit and Auditors) Rules, 2014.

Section 139 sub section (2) of the Companies Act, 2013 read with Rule 5 of Companies (Audit & Auditors) Rules, 2014 provides that No listed company or a company belonging to such class or classes of companies as may be prescribed, shall appoint or re-appoint –

i. An individual as auditor for more than one term of five consecutive years; and

ii. An audit firm as auditor for more than two terms of five consecutive years

Rule 5 of Companies (Audit & Auditors) Rules, 2014 provided that for the purposes of sub-section (2) of section 139, the class of companies shall mean the following classes of companies excluding one person companies and small companies:-

(a) all unlisted public companies having paid up share capital of Rupees ten crores or more;

(b) all private limited companies having paid up share capital of Rupees twenty crores or more;

(c) all companies having paid up share capital below the threshold limit mentioned in (a) and (b) above, but having public borrowings from financial institutions, banks or public deposits of Rupees fifty crores or more.

Now vide the notification [F. No. 1/33/2013-CL-V (Vol.I)] dated 22.06.2017 the central government has made following changes in clause (b) of Rule 5 of Companies (Audit and Auditors) Rules, 2014: –

a) all unlisted public companies having paid up share capital of Rupees ten crores or more

b) all private limited companies having paid up share capital of Rupees **fifty crores** or more.

c) all companies having paid up share capital below the threshold limit mentioned in (a) and (b) above, but having public borrowings from financial institutions, banks or public deposits of Rupees fifty crores or more.

CONCLUSION:-

Meaning thereby after, the notification has exempted all private limited companies having paid up share capital of less than Rupees fifty crores from the above rule and the companies with capital of less than Rupees fifty crores can appoint an individual as auditor for more than one term of five consecutive years and an audit firm as auditor for more than two terms of five consecutive years.

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