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INDIAN LEGAL IMPETUS®

EDITORIAL

Manoj K. Singh
Founding Partner

Dear Friends,

It gives us immense pleasure to present this March 2018 edition of *Indian Legal Impetus*.

At first, we discuss the key highlights of the new framework on resolution of stressed assets as introduced under I&B Code. It is surely interesting to see how the new framework will play out in comparison to a number of interim schemes for the resolution of stressed assets promulgated earlier by RBI.

Thereafter, we analyze corporate frauds identified under the Companies Act 2013 and discuss types of these white collar crimes, their adjudication and penalties provided under the said Act. Also, a scrutiny into pronouncements settling issue of invoking guarantee during moratorium period initiated under the I&B Code has been included herein.

Going forward, we discuss a crucial issue of globalization of legal services in light of the recent judgment by the Hon'ble Supreme Court holding held that foreign law firms cannot 'practice' or open offices in the country, but allowed foreign lawyers to visit India on a 'fly in and fly out' basis for rendering legal advice to their clients on foreign law. This should shape the future course for the Indian legal market for some more time to come.

We critically appraise the recent judgment of the Hon'ble Supreme Court in the matter *Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd.* wherein the apex court settled the question whether the amended section 36 would apply to the pending applications for setting aside the arbitral awards under section 34 as on the date of coming into force of the Amendment Act in view of the interpretation of the section 26 of the Amended Act or not!

Next, we look into the decision of the CCI penalizing domestic airlines regarding their non-competitive practices for colluding in fixing of fuel surcharge rates for cargo transportation.

In addition to the above, the edition envisages a write-up on evolution of inherent powers of court enshrined under section 482 of the criminal procedure code and analyze landmark judgments on the issue.

As the Hon'ble Supreme Court held that the limitation period under section 24A of the Consumer Protection Act couldn't be strictly construed to disadvantage a consumer, we analyze the relevant case and the impact of this decision on the cases challenged on the grounds of being barred by limitation.

Lastly, we enlarge the issue of 'excepted matters' that are usually weaved in arbitration agreements / clauses and render more clarity on the issue through precedents thereupon.

Trust you enjoy reading this issue as well. Please feel free to send your valuable inputs / comments at newsletter@singhassociates.in

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SINGH & ASSOCIATES
ADVOCATES & SOLICITORS

NEW DELHI
E-337, East of Kailash
New Delhi - 110065 INDIA

GURUGRAM
7th Floor, ABW Tower, MG Service Road
Sector 25, IFFCO Chowk, Gurugram
Haryana-122001 INDIA

MUMBAI
Unit No. 48 & 49, 4th Floor, Bajaj Bhavan,
Barrister Rajni Patel Marg, Nariman Point,
Mumbai- 400021, INDIA

BENGALURU
N-304, North Block, Manipal Centre,
47, Dickenson Road
Bengaluru - 560042, INDIA

Ph : +91-11-46667000
Fax : +91-11-46667001

Email: india@singhassociates.in
Website: www.singhassociates.in

www.singhassociates.in

SINGH & ASSOCIATES
FOUNDER MANOJ K SINGH
ADVOCATES & SOLICITORS

Managing Editor
Manoj K. Singh

Editor
Daizy Chawla

Published by
Singh & Associates
Advocates and Solicitors

Contents

REVISED FRAMEWORK ON RESOLUTION OF STRESSED ASSETS

Kumardeep

BACKGROUND

Before India adopted the Insolvency and Bankruptcy Code, 2016 (the '**IBC'**), the Reserve Bank of India (the '**RBI'**) had promulgated a number of interim schemes for the resolution of stressed assets, namely -

1. Framework for Revitalizing Distressed Assets
2. Guidelines for Corporate Debt Restructuring (CDR Mechanism)
3. The Flexible Structuring of Long Term Project Loans to Infrastructure and Core Industries
4. Strategic Debt Restructuring Scheme (SDR)
5. Prudential Norms on Change in Ownership of Borrowing Entities (Outside Strategic Debt Restructuring Scheme)
6. Scheme for Sustainable Structuring of Stressed Assets (S4A)

In addition to the above schemes, a Joint Lenders' Forum ('JLF') was also established as an institutional mechanism for overseeing stressed asset negotiations in cases of large consortium loans.[1]

With the advent of the IBC, the RBI has recently adopted a new framework[2] vide Notification[3] dated February 12, 2018, which subsumes "*the existing guidelines with a harmonised and simplified generic framework for resolution of stressed assets*." In other words, the above mentioned numerous guidelines of the RBI have been substituted by the revised framework and the JLF shall be discontinued. This framework seeks to rely on the IBC to resolve stressed assets while doing away with the above mentioned interim schemes.

KEY HIGHLIGHTS OF THE NEW FRAMEWORK:

A. INCIPIENT STRESS RECOGNITION BY LENDERS

(i) Early Identification: The RBI has provided for an immediate recognition of 'incipient' stress in loan accounts, immediately on default[4] by classifying stressed assets as Special Mention Accounts (the 'SMA') as per the following categories:

SMA Sub-categories	Basis for classification - Principal or interest payment or any other amount wholly or partly overdue between
SMA - 0	1-30 days
SMA - 1	31-60 days
SMA - 2	61-90 days

It is to be noted that the above classification into the SMAs are the same as provided under Paragraph 2.1 of the Framework for Revitalizing Distressed Assets guidelines of the RBI issued in 2014. However, the old framework also provided for different level of monitoring for accounts classified as different SMAs as listed above. For instance, Individual banks were required to closely monitor the accounts reported as SMA-1 or SMA-0 as these are the early warning signs of weaknesses in the account.

(ii) Reporting Requirements: The lenders are required to report the credit information including the SMA classification, as above, to the

1 According to RBI Circular RBI/2013-14/503 dated 26th February, 2014 dealing with "Framework for Revitalising Distressed Assets in the Economy – Guidelines on Joint Lenders' Forum (JLF) and Corrective Action Plan (CAP)".

2 The guidelines are issued in exercise of powers conferred under Section 35A, 35AA (read with S.O.1435 (E) dated May 5, 2017 issued by the Government of India) and 35AB of the Banking Regulation Act, 1949; and, Section 45(L) of the Reserve Bank of India Act, 1934

3 https://rbidocs.rbi.org.in/rdocs/notification/PDFs/131DBRCEC9D8FEED1C467C9FC15C74D01745A7.PDF

4 *'Default' means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.*

Central Repository of Information on Large Credits (the 'CRILC'), that has been established under the Framework for Revitalizing Distressed Assets by RBI, on all borrower entities having aggregate exposure of INR 50 million and above with them.

(a) Weekly report - The borrower entities in default (with aggregate exposure of INR 50 million and above) are to be reported weekly to CRILC (at the close of business on every Friday, or the preceding working day if Friday happens to be a holiday), starting from February 23, 2018.

(b) Monthly report – The CRILC-Main Report will now be required to be submitted on a monthly basis from April 1, 2018.

B. THE IMPLEMENTATION OF A RESOLUTION PLAN (THE 'RP'):

(i) Implementation of RP: The RBI requires all lenders to put in place Board-approved policies for resolution of stressed assets, including the timelines for resolution, which must be clearly documented even if there is no change in its terms and conditions. This RP may involve any actions / plans / reorganization including, but not limited to,

(a) regularization of the account by payment of all over dues by the borrower entity

(b) sale of the exposures to other entities or investors,

(c) change in ownership, or

(d) restructuring.

(ii) Conditions of Deemed Implementation of RP: An RP, shall be deemed to be 'implemented' only if specified conditions are fulfilled, namely, the borrower entity is no longer in default with any of the lenders. If the resolution involves restructuring then all related documentations are completed by the lenders, along with, reflection of new capital structure and/or changes in the terms of conditions of the existing loans in the books of all the lenders and the borrower.

(iii) Independent Credit Evaluation (the 'ICE'): The RPs involving restructuring / change in ownership in respect of large accounts require an ICE of the residual debt[5] by credit rating agencies specifically authorized by the RBI. It may be noted that accounts with aggregate exposure of INR 5 billion and above require two (2) ICEs. The ICE is mandatory for even such restructuring(s) carried out before the 'reference date'. It is to be noted that the provision for independent evaluation had already been provided for the "large value restructuring(s)" under the Framework for Revitalising Distressed Assets of the RBI.

C. REFERRAL FOR INSOLVENCY FOR LARGE ACCOUNTS:

(i) Timelines: The new framework provides for strict timelines for the initiation of insolvency proceedings.. These timelines come into effect from the 'reference date' being March 1, 2018 as follows:

<table>
<tr><th>Default in Accounts with aggregate exposure</th><th>Reference date and Timeline</th></tr>
<tr><td>For accounts:
with an exposure of INR 20 billion or more;
where resolution may have been initiated under any of the existing schemes;
classified as restructured standard assets which are currently in respective specified periods (as per the previous guidelines)</td><td>Reference date: March 1, 2018
<table>
<tr><th>Occurrence of Default</th><th>Timeline</th></tr>
<tr><td>On the reference date</td><td>180 days from the reference date.</td></tr>
<tr><td>After the reference date</td><td>180 days from the date of first such default</td></tr>
</table></td></tr>
</table>

5 The residual debt of the borrower entity, in this context, means the aggregate debt (fund based as well as nonfund based) envisaged to be held by all the lenders as per the proposed RP.

For other accounts with aggregate exposure of the lenders below INR 20 billion and, at or above INR 1 billion.	The RBI intends to announce the reference date(s), over a two-year period, for implementing the RP to ensure calibrated, time-bound resolution of all such accounts in default.

Note: The prescribed timelines are the upper limits. Lenders are free to file insolvency petitions under the IBC against borrowers even before the expiry of the timelines, or even without attempting an RP outside IBC.

(ii) Scenarios for Implementation of RP within timeline above: It is possible that the RP may or may not be implemented within the prescribed timeline(s). Therefore, RBI has clarified the course to be adopted for such situations, accordingly -

Scenarios	**Prescription under Framework**
If RP is **not** implemented within the timeline as above	The lenders are obliged to file an insolvency application, either singly or jointly, under the IBC within 15 days from the expiry of the said timeline.
If RP is implemented within the timeline as above, and, the concerned account is in default at any point of time during the 'specified period'. Note: Any default in payment after the expiry of the 'specified period' shall be reckoned as a fresh default for the purpose of this framework.	The lenders shall file an insolvency application, singly or jointly, under the IBC within 15 days from the date of such default.

D. PRUDENTIAL NORMS:

(i) Ineligibility for Restructuring of Certain Borrowers: The RBI has categorically stated that the borrowers who have committed frauds/ malfeasance/ willful default will remain ineligible for restructuring. However, in case of a borrower-company if the existing promoters/ management are replaced with the new ones such that the former is "totally delinked" from the latter, the lenders may opt for its restructuring "without prejudice to the continuance of any criminal action instituted against the erstwhile promoters/management". It is pointed out that similar provision, which excludes such defaulting borrowing entities, was also provided for under the now defunct Guidelines for Corporate Debt Restructuring by RBI.

(ii) Non-compliance Consequences: Any failure in meeting the prescribed timeline(s) or any actions by lenders with an intent to conceal the actual status of accounts or evergreen the stressed accounts, will be subjected to stringent supervisory / enforcement actions as deemed appropriate by the RBI, including, but not limited to, higher provisioning on such accounts and monetary penalties.

(iii) Disclosure by Lenders: The RBI requires the lenders to disclose the implementation of RPs in their financial statements under the head, "Notes on Accounts", as appropriate. It is to be noted that the RBI has reserved to issue separate detailed guidelines for the same.

(iv) Exception to the New Framework: Restructuring in respect of projects under implementation involving deferment of date of commencement of commercial operations (DCCO), to be covered under the extant guidelines contained at paragraph 4.2.15 of the Master Circular dated July 1, 2015 on 'Prudential norms on Income Recognition, Asset Classification and Provisioning Pertaining to Advances'.[6]

(v) Substitution of Extant Schemes / Guidelines: The interim schemes, guidelines and circulars of the RBI have been substituted by the new framework which is provided in Annex-3 of the circular. It is also to be noted that even those accounts that have been invoked under

6 Master Circular No. DBR.No.BP.BC.2/21.04.048/2015-16 dated July 1, 2015

the previous resolution regime but not yet implemented would be governed by the new framework.

(vi) Existing Resolution Cases: The RBI has also clarified that the new guidelines will not affect the existing resolution cases such that the lenders must continue to pursue them as per the specific instructions already issued by the RBI to the banks for reference under IBC.

(vii) Regulatory Exemptions Noted: The guidelines take into consideration the exemptions provided under the Securities and Exchange Board of India (SEBI) (Issue of Capital and Disclosure Requirements) Regulations, 2009, as well as SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, for restructurings carried out as per the regulations issued by the RBI.

CONCLUDING REMARKS:

In the wake of the problem of Non-performing Assets (the 'NPA') within the Indian economy, several initiatives were taken by the RBI through various schemes for dealing with their restructuring. However, the problem persisted and thus, with the coming of the IBC, the revised framework is an attempt by the RBI to ensure a uniform and speedy resolution of stressed assets for the lenders. Therefore, it may be concluded that, with the new regime, the lenders are now precluded from reporting under divergent asset classification norms on the same account since the fragmented and multiplicity of options to lenders under various schemes has now been unified under the new regime. The chances of lenders for interpreting the assets leading to divergence in NPA has also been eliminated by stating that as soon as there is a default in the borrower entity's account with any lender, all lenders either singly or jointly shall initiate steps to cure the default. In other words, as soon as an asset has been marked as stressed by one lender, other lenders must also acknowledge the same and follow the procedure for resolution. Such a provision was absent under the old guidelines since it was mandated that the restructuring plan could only be drawn out by the JLF with specified majority (as under the S4A regime at its Paragraph 7.5, the resolution plan could be put up only when agreed by, at least, 75% of lenders by value and 50% of lenders by number). Thus, the new regime would provide certainty to both lenders and borrowers in respect of resolution of stressed assets and consequences of non-compliances.

CORPORATE FRAUDS: AN ANALYSIS

Akanksha Tomar

INTRODUCTION

White Collar Crimes are the type of crimes that are committed by respectable persons, holding enviable positions, either in public or private entities. It is practically very difficult for the bureaucratic agencies to track and detect such frauds and probably because such activities are carried out in much secrecy and goes un-notified. Such crimes are defined by the Federal Bureau of Investigation as, *"Illegal acts characterized by deceit, concealment or violation of trust, which are not dependent upon the application or threat of physical force or violence".* The FBI says that in cases of white collar crime, *"Individuals and organizations commit these acts to obtain money, property or services; to avoid the payment or loss of money or services; or to secure personal or business advantage".* Today, the focus of white collar crimes has moved from the individuals to the organization, where individuals alone or in collaboration with others commit criminal acts. One such white-collar crime is the Corporate Fraud.

In the broadest sense, a fraud is an intentional deception made for personal gain or to damage another person/ entity. 'Fraus Omnia Vitiate' - Fraud vitiates everything. Corporate fraud takes place when a corporation purposefully provides dishonest information with the purpose of obscuring truth and deceiving the recipient of the data with the intent to gain an advantage.

CORPORATE FRAUDS IN INDIA

A corporate fraud occurs when a company or an entity deliberately changes and conceals sensitive information which then apparently makes it look healthier. Companies adopt various modus-operandi to commit such corporate frauds, which may include miss-information in the prospectus, manipulation of accounting records, debt hiding etc. The aspect of falsification of financial information includes false accounting entries, false trades for inflation of profits, disclosure of price sensitive information which comes under the ambit of insider trading and showing false transactions which result in attracting more investors and lenders for funding.

There can be several reasons cited for which companies commit such frauds like making more falsified money, creating a false image of the company for the market scenario and misguiding Governmental authorities for tax evasion. In India, the Commission on 'Prevention of Corruption', in its report, observed, "The advancement of technological and scientific development is contributing to the emergence of mass society with a large rank in file and a small controlling elite, encouraging the growth of monopolies, the rise of a managerial class and intricate institutional mechanisms. There is a necessity for a strict adherence to high standards of ethical behavior for even the honest functioning of the new social, political and economic processes. The report of the Vivian Bose Commission inquiring into the affairs of the Dalmia Jain group of companies in 1963, highlighted as to how the big industries indulge in frauds, falsification of accounts and record tampering for personal gains and tax evasion etc.

The first successful trial of a financial scandal in independent India was the Mundhra Scam, in which Hon'ble Justice M.C. Chagla made certain critical observations about the big business magnate Mundhra who wanted to build an industrial empire entirely out of dubious means.

TYPES OF FRAUD:

There are many types of frauds like Fraudulent Financial Statements, Employee Fraud, Vendor Fraud, Customer Fraud, Investment Scams, Bankruptcy frauds and miscellaneous. Some of the common types of frauds are:

1. Financial frauds - Manipulation, falsification, alteration of accounting records, misrepresentation or intentional omission of amounts, misapplication of accounting principles, intentionally false, misleading or omitted disclosures.

2. Misappropriation of Assets - Theft of tangible assets by internal or external parties, sale of proprietary information, causing improper payments.

3. Corruption - making or receiving improper payments, offering bribes to public or private officials,

receiving bribes, kickbacks or other payments, aiding and abetting fraud by others.

The financial and corporate frauds or scams like Harshad Mehta case, Satyam fiasco, Sahara case required the attention of law makers. Such frauds made it imperative to evaluate the standards set in corporate governance and stringent methods were needed to be implemented to tackle corporate frauds.

CORPORATE FRAUDS UNDER COMPANIES ACT, 2013

The Companies Act, 2013, is the legislation which focusses on issues related to corporate frauds. Fraud in relation to affairs of a company or any corporate body as defined in S.447 of the Companies Act 2013, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

In order to amount to Fraud, an act must be confined to acts committed by a party to contract with an intention to deceive another party or his agent or to induce him to enter into a contract. Fraud, which vitiates the contract, must have a nexus with the acts of the parties entering into the contract. This definition highlights the precondition to prove the intention of the person who has committed fraud. If that person has willingly committed a fraud, then he will be punished. Here the person means himself or his agent. The acts which include fraud are wrong suggestions or concealment of facts or false promises or any fraudulent act to deceive others.

PUNISHMENT FOR FRAUD (S.447)

Any person who is found guilty of fraud shall be punishable with imprisonment for a term which shall not be less than six (06) months but which may extend to ten (10) years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three (03) times the amount involved in the fraud. Where the fraud in question involves public interest, the term of imprisonment shall not be less than three (03) years.

PUNISHMENT FOR FALSE STATEMENT (S.448)

If in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement —

which is false in any material particulars, knowing it to be false; or

which omits any material fact, knowing it to be material

PUNISHMENT FOR FALSE EVIDENCE (SECTION 449)

If any person intentionally gives false evidence –

upon any examination on oath or solemn affirmation; or

in any affidavit, deposition or solemn affirmation in or about winding up of any company under this Act, or otherwise in or about any matter arising under this Act,

he shall be punishable with imprisonment for a term which shall not be less than three (03) years but which may extend to seven years (07) and with fine which may extend to ten lakh rupees (Rs. 10 Lacs).

PUNISHMENT WHERE NO SPECIFIC PENALTY OR PUNISHMENT IS PROVIDED (SECTION 450)

If a company or any officer of a company or any other person contravenes any of the provisions of this Act, or the rules made thereunder and for which no penalty or punishment is provided elsewhere in the Act, they shall be punishable with fine which may extend to ten thousand rupees (Rs. 10,000) and where the contravention is continuing one, with a further fine which may extend to one thousand rupees (Rs. 1,000) for every day after the first during which the contravention continues.

PUNISHMENT IN CASE OF REPEATED DEFAULT (SECTION 451)

If a company or an officer of a company commits an offence punishable either with fine or with

imprisonment and where the same offence is committed for the second or subsequent occasions within a period of three (03) years, then, that company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence. This section is not applicable to the offence repeated after a period of three (03) years from the commitment of first offence.

ADJUDICATION OF PENALTIES (SECTION 454)

The Central Government, may by an order published in the official gazette appoint adjudicating officers for adjudicating penalty under this Act. The Central Government shall also specify their jurisdiction. The adjudicating officer may, by an order, impose penalties on the company and the officer who is in default, stating any non – compliance of default under the relevant provision of the Act. Any person aggrieved by an order made by the adjudicating officer may prefer an appeal to the regional director having jurisdiction in the matter.

OFFENCE OF FRAUD NON- COMPOUNDABLE

As the punishment for fraud is both imprisonment and fine, it is considered a non-compoundable offence. It shows that, the commission of fraud has become a serious offence in the eyes of law. The Act has provided punishment for fraud under section 447 and about 20 sections of the Act talk about fraud committed by the directors, key managerial personnel, auditors and/or officers of company. Thus, the new Act goes beyond professional liability for fraud and extends it to personal liability, if a company contravenes such provisions. Here, the contravention of the provisions of the Act with an intention to deceive are also considered as fraud; to name a few acts amounting to fraud:

Section	Fraud	Defaulter
7(5)	Furnishing false information or suppressing material information	Any person who does so
8	Affairs of the company conducted fraudulently	Every officer in default
34	Mis-statements in prospectus	Every person who authorizes the issue of prospectus
36	Fraudulently inducing persons to invest money	Any person who does so
38	Personation for acquisition, etc. of securities	Any person who does so
46(5)	Issuance of duplicate certificate of shares	Every officer who defaults
75(1)	Company fails to repay deposits/ interests	Every officer of the company
206	Business being carried out for fraudulent or unlawful purpose	Every officer who defaults
229	Person required to provide an explanation or make a statement during an investigation furnishes false statement or destroys documents	Person who was required to provide the explanation or make the statement
251	Application is made for removal of name from register with the object of evading liabilities or deceiving or defrauding the creditors	Persons in charge of management of the company
266	If Tribunal concludes that an employee during the period of his employment with a company was guilty of any misfeasance, malfeasance or non-feasance in relation to the sick company	Any person who is found so guilty

448	A person who makes a false statement or omits a material fact in any return, report, certificate, financial statement, prospectus	Person who makes such statement

CONCLUSION

There are certain mechanisms that have been cited by the Government by which the frauds can be prevented under the Companies Act 2013.

Section 211 empowers the Central Government to establish an office called Serious Fraud Investigation Office (SFIO) to investigate frauds relating to companies. No other investigating agency shall proceed with investigation in a case in respect of any offence under the Act, once the case has been assigned to SFIO. The SFIO has power to arrest individuals if it has reason to believe that he is guilty based on the material in possession. SFIO shall submit a report to the Central Government on conclusion of investigation. Central Government may direct SFIO to initiate prosecution against the company. SFIO shall share information they possess regarding a case being investigated by the latter and vice versa.

Auditors shall report material fraud to the Central Government within 30 days. Immaterial fraud shall be reported to the board or the auditor of the company. Audit committee is required to monitor that every listed company shall establish a vigilance mechanism for directors and employees to report genuine concerns. The vigilance mechanism shall provide for adequate safeguards against victimization of persons who use such mechanism. It shall make provision for direct access to the Chairperson of the Audit Committee in appropriate cases.

Independent directors shall report concerns about actual or suspected fraud. They must also ascertain and ensure that the company has an adequate and functional vigilance mechanism and to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use.

Central Government can order investigation into the affairs of a company on the receipt of a report of the Registrar or inspector; on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or in public interest.

INVOCATION OF CORPORATE GUARANTEE DURING MORATORIUM - ANALYSIS

Jatin Kapoor

To punish the defaulters, India had numerous Acts in place like the Indian Contract Act,1872, the Recovery of Debts Due to Banks and Financial Institution Act 1993, the Securitizations and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). The Government supplanted the existing insolvency laws with the Insolvency & Bankruptcy Code, 2016, which takes care of the existing defaulters in a time constrained manner. The provisions of the Code are applicable to companies, limited liability entities, firms and individuals (i.e. all entities other than financial service providers).

One of the most significant features of the Code is the grant of moratorium, during which creditors' actions is be stayed. The moratorium is not automatic and is granted by the Adjudicating Authority u/s 14 of the Code. The Invocation of Corporate Guarantee during Moratorium remains a big question before the Judicial and Quasi-Judicial Authorities.

Banks in India have conventionally placed tremendous confidence on promoters and personal guarantees provided by them and the majority of promoters also always on the brink of extending guarantees as long as banks keep sanctioning more and more loans, aggregating to several times over the net worth of the guarantor. The Hon'ble NCLT, in **Axis Bank Limited v. Edu Smart Services Limited,** upheld that the invocation of corporate guarantee during the moratorium period was bad in law and rejected the plea of Axis Bank Limited, the financial creditor who filed its claim with the resolution professional appointed for the principal debtor as well as the guarantor. Reference is drawn to the pronouncement made by NCLAT in the case of **Indian Overseas Bank (IOB) against Amtek Auto's** IRP Dinnkar T. Venkatsubramaniam, where it was held that once moratorium is declared, financial institutions have to act "on the instructions of IRP" with respect to the corporate debtor's account. The Adjudicating Authority observed that corporate guarantees could not be invoked as the same would violate the moratorium provided to a company undergoing insolvency resolution and cannot take any action without the approval of resolution professional once Section 14 of the Code comes into play. The Hon'ble NCLT, Chennai Bench in the case of **V Ramakrishnan V. Veesons Energy Systems Private Ltd** and others ruled that financial creditor could not proceed against the corporate guarantor as allowing invocation of the corporate guarantor would mean that the interest would be shifted to the guarantor which would violate Section 14 (1) of the IBC,2016.

Once a case of insolvency is admitted by the NCLT, the Insolvency and Bankruptcy Code, 2016 provides a firm 180 days to restructure itself. It also imposes a moratorium on anybody claiming dues from the firm during this period. The basic idea behind the Corporate Insolvency Resolution Process is to restructure the firm; not to throw it into liquidation process. The invocation of guarantee during moratorium against the 'Company under Insolvency Proceedings' at a stage where Resolution Plan has to be executed is violating the basic idea of Resolution process.
In a situation where a creditor decides to continue/ initiate proceedings against a guarantor of a Corporate Debtor during the pendency of the CIRP, the creditor may well be able to satisfy its outstanding debts through the assets of the guarantor. However, this will alter the financial position of the Corporate Debtor after the declaration of the moratorium. This may effectively derail the CIRP and any resolution plan that the Committee of Creditors (COC) may be formulating, thereby defeating the scope and purpose of the Code.

It is notable here that the entire preamble of the Insolvency & Bankruptcy Code, 2016, relating to the revival and resolution of Corporate persons in a time bound manner is aimed for maximisation of value of assets keeping in view the interest of stakeholders. Further, the entire Chapter II of the Code relating to the CIRP is for the resolution of the 'Company under Insolvency Proceedings'. Therefore, the first endeavour of the Adjudicating Authority under the Code is

resolution and rehabilitation of the corporate debtor and for the said purpose the IRP/RP is duly appointed.

CONCLUSION

The invocation of guarantee during moratorium against the 'Company under Insolvency Proceedings' is not only contrary to provision of the IBC Code but is also directly against the interest of the company and its stakeholders. The IBC code is exhaustive and promotes simultaneous insolvency proceedings against the principal debtors and guarantors. The recent judgments by several NCLTs and the High Courts have created confusion in the financial sector regarding the working of corporate guarantees under the code and this may adversely affect the finance sector. Therefore the IBBI should come up with clarifications on this cardinal issue.

GLOBALISATION OF LEGAL SERVICES (...AND INDIAN PERSPECTIVE)

Harsimran Singh

Globalization, be it technological or political or economic, has brought about a revolution in international trade with increasing participation and involvement of countries & greater access to domestic economies.

The last decade has been a mini-revolution in legal service sector with the best legal impact on corporate legal arena. Activities in project financing, intellectual property protection, environmental protection, competition law, corporate taxation, infrastructure contract, corporate governance and investment law were practically obscure before the 90's. The number of law firms capable of managing such work was also very limited. Even though globalization is not new, but in the purview of legal services, it is now gaining momentum due to the growth of the Internet, automation of legal processes, developments in data security and emerging technology tools. It is clear that need of professional service has been tremendous in the legal service sector.

In recent years the number of law firms, in-house firms and individual lawyers with expertise in providing legal services in corporate field has increased exponentially. These are defining times in the disposition of emerging legal sectors towards settling disputes through ADR (Alternate Dispute Resolution). Globalization has extended the inward and outward demand for legal services. Domestic law firms are expanding their services beyond local jurisdiction; joining forces with foreign counterparts and forming intercontinental mergers, obliterating traditional boundaries on the geographical scope of the practice of law. As law firms continue to expand their presence globally, globalization will continue to reshape the landscape of the legal industry in the coming years.

India has been putting efforts to liberalize its legal services sector, to allow foreign law firms and lawyers, the right to operate in India. Global integration in the legal profession would help India in increasing her share in the global services trade. Few Indian firms have set up their branches across other jurisdictions like UK and US. Likewise, post-liberalization, the foreign firms and lawyers will be allowed to set up their branches in India and employ Indian lawyers or enter into partnerships with Indian firms, provide legal advice on foreign law, etc.

MAJOR ISSUES DETERRING THE OPENING-UP OF INDIAN LEGAL SERVICE SECTOR

The legislator and the Bar Council of India's approach is not been clear on the opening-up of the legal service sector in India. The over-riding view is still against foreign law firms setting up offices in the country as apprehension abounds about probable stiff competition from foreign firms, owing to their better infrastructure, better knowledge and developed skills of legal drafting and documentation. Hence, the Indian government did not enter the successive rounds of negotiation as mandated by the WTO rules.

The provisions of the Advocates Act, 1961 and BCI regulations are too stringent, Section 24 of the former being a key deterrent. The section states that only advocates recognized under the act can practice law and a person shall be qualified as an advocate on a state roll, if the person is a citizen of India and has obtained a law degree from a BCI recognized college/ university. Subject to other provisions of this Act, a national of another country may be permitted to practice law, if citizens of that country, duly qualified, are allowed to practice law in that country. Similarly, as per *Section 33* of the Act or any other law for the time being in force, no person shall, on or after the appointed date, be entitled to practice law unless he is enrolled as an advocate under the Act.

Foreign law firms in the country have been subject to controversy since 1995, when firms like *Ashurst* of UK and *White and Case and Chadbourne and Parke* of the US, set up liaison offices in India and were granted permission under the Foreign Exchange Regulation

Act, 1973, to start liaison activities only and not active legal practices. In 1955, the Lawyers Collective, a public interest trust set up by the advocates to engage in the free legal aid, moved the Bombay high court challenging the right of foreign law firms to practice law in India. Their main contention was that practicing law should include not only appearance before the court as pleaders, but also drafting legal documents and advising clients. The Central Government, on the other hand, contended that the Advocates Act prevented foreign lawyers from practicing law in court, and from giving advice to clients.

Nevertheless, the government had the intention of opening-up the legal service sector in India. Attempts had been made where foreign lawyers and foreign law firms had been allowed to establish their offices in India. In the year 2009, the Bombay High Court held that foreign lawyers and law firms could establish their offices in India only after being enrolled as advocates under the Advocates Act, 1961. Later, in February 2012, the Madras High Court held that foreign lawyers and law firms cannot practice law in India, neither on the litigation nor on the non- litigation side, unless they fulfilled the requirements of the Advocates Act and the Bar Council of India Rules. It had, however, held that they might visit India on a 'fly in and fly out' basis for advising clients on foreign law. It had further held that there is no restriction against them coming to India for conducting arbitration proceedings in disputes involving international commercial arbitration.

Recently, the Hon'ble Supreme Court held that foreign law firms cannot 'practice' or open offices in the country, but allowed foreign lawyers to visit India on a 'fly in and fly out' basis for rendering legal advice to their clients on foreign law. Some of the notable excerpts from the judgment of the Hon'ble Apex Court are as under:

"*Ethics of the legal profession apply not only when an advocate appears before the Court. The same also apply to regulate practice outside the Court. Adhering to such Ethics is integral to the administration of justice... The professional standards laid down from time to time are required to be followed. Thus, we uphold the view that practice of law includes litigation as well as non-litigation.*" (the Hon'ble Supreme Court relied on the judgment in the case of *Pravin C. Shah versus K.A. Mohd. Ali* to hold this)

"*We have already held that practicing of law includes not only appearance in courts but also giving of opinion, drafting of instruments, participation in conferences involving legal discussion. These are parts of non-litigation practice which is part of practice of law. The scheme in Chapter-IV of the Advocates Act makes it clear that advocates enrolled with the Bar Council alone are entitled to practice law, except as otherwise provided in any other law. All others can appear only with the permission of the court, authority or person before whom the proceedings are pending. Regulatory mechanism for conduct of advocates applies to non-litigation work also.*"

"*Visit of any foreign lawyer on fly in and fly out basis may amount to practice of law if it is on regular basis. A casual visit for giving advice may not be covered by the expression 'practice'. Whether a particular visit is casual or frequent so as to amount to practice is a question of fact to be determined from situation to situation. Bar Council of India or Union of India are at liberty to make appropriate rules in this regard.*"

"*We may, however, make it clear that the contention that the Advocates Act applies only if a person is practicing Indian law cannot be accepted. Conversely, plea that a foreign lawyer is entitled to practice foreign law in India without subjecting himself to the regulatory mechanism of the Bar Council of India Rules can also be not accepted. We do not find any merit in the contention that the Advocates Act does not deal with companies or firms and only individuals. If prohibition applies to an individual, it equally applies to group of individuals or juridical persons.*"

"*If the matter governed by particular rules of an institution or if the matter otherwise falls under Section 32 or 33, there is no bar to conduct such proceedings in prescribed manner. If the matter is governed by an international commercial arbitration agreement, conduct of proceedings may fall.*"

"*The BPO companies providing range of customized and integrated services and functions to its customers may not violate the provisions of the Advocates Act, only if the activities in pitch and substance do not amount to practice of law. The manner in which they are styled may not be conclusive. As already explained, if their services do not directly or indirectly amount to practice of law, the Advocates Act may not apply. This is a matter which may have to be dealt with on case to case basis having regard to a fact situation.*"

"*In case of a dispute whether a foreign lawyer was limiting himself to "fly in and fly out" on casual basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues or whether in substance he was doing practice which is prohibited can be determined by the Bar Council of India. However, the Bar Council of India or Union of India will be at liberty to make appropriate Rules in this regard including extending Code of Ethics being applicable even to such cases.*" (the Hon'ble Court modified the Madras High Court's observation on the bar against foreign lawyers visiting India on a fly in and fly out basis to hold that the expression "fly in and fly out" will only cover a casual visit not amounting to practice)

"*If the Rules of Institutional Arbitration apply or the matter is covered by the provisions of the Arbitration Act, foreign lawyers may not be debarred from conducting arbitration proceedings arising out of international commercial arbitration in view of Sections 32 and 33 of the Advocates Act. However, they will be governed by code of conduct applicable to the legal profession in India. Bar Council of India or the Union of India are at liberty to frame rules in this regard.*"

In a nutshell, visit of any foreign lawyer on fly in and fly out basis may amount to practice of law if it is on a regular basis. A casual visit for giving advice may not be covered by the expression 'practice'. Whether a particular visit is casual or frequent to amount to practice, is a question of fact to be determined from situation to situation. Bar Council of India or Union of India are at liberty to make appropriate rules in this regard. The Hon'ble Apex Court, however, permitted foreign lawyers to conduct arbitration proceedings in disputes involving international commercial arbitration, after following the code of conduct applicable to the legal profession in India. Rules of institutional arbitration will apply to them, the court said. It also modified provisions of the Advocates Act, 1961, debarring foreign lawyers completely for conducting international commercial arbitration in the country. The Hon'ble Bench clarified that such visits must not amount to advocacy (which also comes under the definition of 'practice of law') under the Advocates Act, 1961. The SC held that the prohibition (on practicing law) applicable to any person in India other than an advocate enrolled under the Advocates Act certainly applies to any foreigner also. So foreign lawyers or law firms cannot practice in India without fulfilling the requirements of Advocates Act and the BCI rules. Upholding the Madras and Bombay High Courts' judgments with certain modifications, the SC bench defined 'practice of law' to include litigation as well as non-litigation; not only appearance in courts but also giving of opinion, drafting of instruments, participation in conferences involving legal discussion amount to practice, the top court clarified. The top court rejected the plea that a foreign lawyer is entitled to practice foreign law in India without subjecting himself to the regulatory mechanism of the BCI rules. The Advocates Act applies equally to firms and individuals, the judgment stated. Justice Goel, writing for the bench, said "BPOs, LPOs, etc. providing range of customized and integrated services and functions to its customers would not be allowed to provide services, which, in pitch and substance, amount to advocacy, but they can render all other services".

The SC judgment came on a batch of appeals and cross-appeals led by BCI challenging the conflicting judgments by the Madras High Court and the Bombay High Court on entry of foreign law firms. The BCI had opposed any move to allow foreign firms in India. It argued that foreign lawyers could not be allowed even to chip in for seminars and conferences.

Many countries including Singapore and China have opened-up their legal service sectors. Hence fly in and fly out is not a complete solution. It is a personal opinion, that the Supreme Court could have taken a more pragmatic approach on the issue. Several analysts also feel that the decision of the Hon'ble Apex Court could dampen India's prospects of foreign investments, as availability of quality legal service is what large and sophisticated investors would expect. While the ruling does not permit globalization of the legal sector for now, it shifts the onus on the government to do so!

IMPACT OF THE JUDGMENT OF THE HON'BLE SUPREME COURT IN 'BCCI VS KCPL' ON THE PETITIONS FILED UNDER SECTION 34

Satwik Singh

The amendment made to the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, "**Arbitration Act**"), introduced many important changes into the arbitration regime in the country with the aim of streamlining the arbitration proceedings and making it more in sync with the best practices observed in arbitration proceedings worldwide such as limiting the court intervention and completion of the proceedings within a fixed time period. However, as seen over the past two years it seems that some ambiguity exists on the applicability of the amended provisions especially in those court proceedings which arise out of an arbitration which commenced before October 23, 2015.

One of these contentious issues was in the context of the enforceability of the domestic awards prior to the aforesaid amendment, wherein the mere filing and pendency of an application under Section 34 of the Arbitration Act, for the setting aside of an award, operated as an automatic stay against its enforcement. The 2015 amendment made to the Arbitration Act, changed this situation substantially as Section 36 was amended to lift this automatic stay against the enforcement of the arbitral awards. The change implied that instead of the automatic stay, the person aggrieved by the Award would, now, have to make an application for seeking stay which would be decided based on merit, subject to reasonable conditions. In view of this, various applications were filed for the execution of the arbitral awards even when the applications under Section 34 were pending. This raised the question - whether parties would be able to take advantage of the amended provisions even though the arbitration had commenced under the old regime.

The Hon'ble Supreme Court, vide its judgment dated March 15, 2018, in the case of, "*Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd*[7]", decided the issue and cleared the confusion for the time being. In the present matter, the Hon'ble Supreme Court had the opportunity to put to rest one such controversy - whether the amended Section 36 would apply to the pending applications for setting aside the arbitral awards under Section 34 as on the date of coming into force of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter to be referred as, "**Amendment Act**") in view of the interpretation of the Section 26[8] of the Amended Act or not. In the present case, the Hon'ble Supreme Court had to interestingly decide a batch of 8 appeals wherein in four cases, the Section 34 applications had been filed prior to the amendment of 2015 and the rest four were filed after the commencement date of the aforesaid amendment. The crux of the issue before the Hon'ble Supreme Court was around the interpretation of Section 26 of the Amendment Act since the same would decide whether the substituted Section 36 of the Arbitration Act would apply in its amended form or not to both a Section 34 application filed after the commencement date of the Amended Act and a Section 34 application filed prior to the commencement date of the Amendment Act, however, pending as on that day.

On the issue of applicability of Amended Section 36, to a pending Section 34 application filed after the commencement date, the Hon'ble Court referred to the 246th Law Commission Report for gauging the intent behind the amendment brought to Section 36 wherein it was stated that the automatic stay against the enforcement of the arbitral award was leading to a lot of delays and thereby, rendering the arbitration proceedings ineffective. The Hon'ble Supreme Court also discussed the bifurcation of the proceedings before the arbitral tribunal and the courts by making a clear and definite distinction between the two limbs of Section 26, it was observed that Section 26 of the Amendment Act consists of two parts separated by the

7 *(SLP (C) Nos. 19545-19546 of 2016*

8 ***Section 26. Act not to apply to pending arbitral proceedings:*** *Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.*

word "*but*", which signifies that the parts are separate and distinct. While the first part, which is couched in negative terms, applies only to arbitral proceedings, in relation to Section 21 of the Arbitration Act, the second part affirmatively applies the Amendment Act to Court proceedings in relation to arbitral proceedings. The same is evident since the words, "*to the arbitral proceedings*" are in contrast to the expression "*in relation to*" which has been used in the second part and the expression "the" arbitral proceedings and, "*in accordance with the provisions of Section 21 of the principal Act*" is absent. With regard to the scheme of Section 26, the Court held that the Amendment Act is prospective in application and applies only to arbitral proceedings and Court proceedings which commenced on or after the Commencement Date.

On the issue of determining the applicability of the substituted Section 36 to Section 34 applications filed before the Commencement Date, however was pending as on October 23, 2015 (the date on which the Amended Act came into force), the Hon'ble Court looked into the meaning and import of the word "*enforcement*" used in Section 36. The Hon'ble Court stated that under Section 36, an arbitral award is deemed to be a decree of Court and shall be enforced under the Code of Civil Procedure, 1908 ("**CPC**"). The manner of enforcement of a decree under the CPC is through the execution process, *i.e.*, under Order XXI of the CPC. The Hon'ble Court considered the question, whether the execution proceedings gave rise to vested rights or were they procedural in nature. Relying upon various case laws namely *Lalji Raja and Sons vs. Hansraj Nathuram*[9] and *Narhari Shivram Shet Narvekar v. Pannalal Umediram*[10], the Hon'ble Supreme Court concluded that the execution of the decree pertains and points towards the realm of procedural law and definitely no substantive vested right was present with the judgment debtor to resist the execution of the award. Further, the Hon'ble Supreme Court also observed that the unamended Section 36 was only a clog on the right of the decree holder who could not execute the award in his own favour until the stay was disposed-off. Additionally, the Hon'ble Supreme Court also looked into the use of the words "*has been*" in the newly introduced Section 36(2), and stated that Section 36 being a procedural provision, the words "*has been*" would refer to Section 34 applications which were filed before the Commencement Date. Thus, the Court concluded that the amended Section 36 will apply even to Section 34 applications pending as on the Commencement Date.

The Hon'ble Court also opined that in the respect of the proposed Arbitration Amendment Bill of 2018, a new section 87 is proposed to be inserted to clarify that unless parties agree otherwise, the Amendment Act shall not apply to (a) Arbitral proceedings which have commenced before the commencement of the Amendment Act (b) Court proceedings arising out of or in relation to such arbitral proceedings, irrespective of whether such court proceedings are commenced prior to or after the commencement of the Amendment Act of 2015, and shall apply only to Arbitral proceedings commenced on or after the commencement of the Amendment Act and to court proceedings arising out of or in relation to such Arbitral proceedings. It is significant to note that the Court has opined that it appears that the proposed amended Section 87 would put the important amendments introduced by the Amendment Act on the back burner and the purpose of the principal Act. The Supreme Court has conclusively determined that the substituted Section 36 will be applicable to Section 34 applications filed both before and after the Commencement Date. The factors considered by the Court in reaching these conclusions are detailed below. With regard to the scheme of Section 26, the Court held that the Amendment Act is prospective in application and applies only to arbitral proceedings and Court proceedings which commenced on or after the Commencement Date.

This Judgment of the Hon'ble Supreme Court has an effect on all the pending section 34 petitions, irrespective of the fact whether the Arbitration proceedings were held under the Unamended Act or the Amended Act. If the Petition under section 34 was pending as on October 23, 2015, the new section 36 will be applicable to the proceedings. This Judgment of the Hon'ble Supreme Court will be helpful for the industry to enforce the Award or at least get some relief within a specified time frame.

9 (1971) 1 SCC 721

10 (1976) 3 SCC 203

CCI PENALISES DOMESTIC AIRLINES FOR ANTI-COMPETITIVE PRACTICES

Divya Harchandani

INTRODUCTION

Express Industry Council of India, a non-profit company filed an information under Section 19 (1)(a) of the Competition Act, 2002, against Jet Airways India Ltd., IndiGo Airlines, SpiceJet Ltd., Air India Ltd. and Go Airlines India Ltd. alleging, *inter alia*, collusion in fixing of Fuel Surcharge (FSC) rates for cargo transportation by the domestic airlines and thereby, contravening provision under Section 3 (Anti-Competitive Agreements) of the Act. In May 2008, certain domestic airlines in India connived to introduce a 'Fuel Surcharge' (FSC) for transporting cargo. This surcharge was fixed at a uniform rate of Rs. 5/kg and came into force on May 15, 2008.

AVERMENTS

It was averred that there was no legal provision under which such FSC could have been levied by the airlines and the same was introduced for the ostensible reason of mitigating volatility of fuel prices. Further, the very fact of levying FSC at a uniform rate from the same date itself constituted the act of cartelization. It was also an admitted fact that when fuel prices were reduced there was no corresponding decrease in FSC; instead FSC had increased in the past even without any corresponding increase in fuel prices. This increase adversely affected the consumers who bore the ultimate burden of price rise.

OBJECTIONS

The main objection taken by the airlines was the lack of evidence to show the existence of an agreement or exchange of information regarding prices between the airlines. It was also stated that the airline industry is an oligopolistic market and there is interdependence between market participants due to which price parallelism is a normal result of the market structure. It was also pointed out that all companies admitted that agents appointed by the airlines are a crucial link in providing market feedback as these agents are common for various airlines. These agents thus act as an effective channel for transfer of information from one airline to another. It was also contended that freight tariff is highly variable, which is decided on basis of several factors like existing demand, existing flight capacity, total distance traveled by flights, flight timings, etc.

CONCLUSION

The Commission considered all the contentions raised by the airlines in detail. It was noted that the definition of 'agreement' as given in Section 2(b) of the Act, required any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The understanding may be tacit and covers situations where the parties act on basis of a nod or wink as well. It was noted that it is not necessary that cartels must operate in a symmetric manner and more often than not attempt would be made to hide the coordinated behavior to try and mislead the authorities. On the contention of the airline industry being an oligopolistic structured market, it was noted that while it is normal for one firm to change its price while following the price increase by another, parallel pricing alone cannot be the sole factor establishing anti-competitive behavior. The airlines had been unable to justify why such coordinated behavior in cargo prices should spill over FSC rates as the fuel consumption would vary not only based on cargo handled but also on passenger miles handled by each of the airlines. While considering the issue of common agents, the Commission noted that to have an edge over other competitors a player will have an incentive to hide any change in its price. Further, an increase in price may affect consumers and hence any collusion will only be profitable for the airlines. The airlines had associated random factors to FSC prices without having a systematic mechanism to arrive at the prices.

In view of the foregoing, it was opined that the three airlines – Jet Airways, IndiGo and SpiceJet, had acted in a concerted manner in fixing and revising the FSC rates and thereby, contravened Section 3 of the Act. The Commission however did not deem it appropriate to proceed against Air India and Go Airlines. It was noted that Go Airlines gave its cargo belly space to third party

vendors to undertake cargo functions and had no control on any aspects of cargo operations done by its vendors including imposition of FSC. In relation to Air India, it was noted that when there was a substantial decline in fuel costs, the fuel surcharge was withdrawn by them. As against the remaining three airlines, while taking into account the average turnover of the airlines, and also the fact that the airlines had been incurring losses, the Commission imposed a penalty of 3% on the average turnover earned from the levy of FSC on the volume of cargo handled during the last three financial years to the tune of Rs. 39.81 crores on Jet Airways, Rs. 9.45 Crores on IndiGo Airlines and Rs. 5.10 crores on SpiceJet Ltd. under provisions of Section 27 of the Act.

OVERVIEW OF SECTION 482 CR.P.C VIS-À-VIS THE LANDMARK JUDGMENTS OF THE SUPREME COURT OF INDIA

Pushkraj Deshpande

SECTION 482 CR.P.C

S482, under the 37th Chapter of the Code – titled 'Miscellaneous' deals with Inherent powers of the Court.

SEC 482 CR.P.C READS AS FOLLOWS:

"Saving of inherent power of High Court- Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

WHY THE NEED FOR SECTION 482 CR.P.C?

The powers of the High Court U/s 482 Cr.P.C are partly administrative and partly judicial. The section was added by the Code of Criminal Procedure (Amendment) Act of 1923, as the High Courts were unable to render complete justice even if in a given case the illegality was palpable and apparent. The Hon'ble Supreme Court in State of Karnataka v. Muniswami– AIR 1977 SC 1489, held that the section envisages 3 circumstances in which the inherent jurisdiction may be exercised, namely, "***to give effect to an order under CrPC, to prevent abuse of the process of the court, and to secure the ends of justice".***

The Hon'ble Allahabad High Court went on to state that, "*The section is a sort of reminder to the High Courts that they are not merely courts in law, but also courts of justice and possess inherent powers to remove injustice*". The inherent power of the High Court is an inalienable attribute of the position it holds with respect to the courts subordinate to it. They are necessarily judicial when they are exercisable with respect to a judicial order and for securing the ends of justice. The jurisdiction under section 482 is discretionary, therefore, the high court may refuse to exercise the discretion if a party has not approached it with clean hands.

WHAT ARE THE REAL POWERS OF THE HIGH COURT U/S 482 CR.P.C.?

Inherent powers u/s 482 of Cr.P.C. include powers to quash FIR, investigation or any criminal proceedings pending before the High Court or any Courts subordinate to it and are of wide magnitude and ramification. Such powers can be exercised to secure ends of justice, prevent abuse of the process of any court and to make such orders as may be necessary to give effect to any order under this Code, depending upon the facts of a given case. Court can always take note of any miscarriage of justice and prevent the same by exercising its powers u/s 482 of Cr.P.C. These powers are neither limited nor curtailed by any other provisions of the Code. However, such inherent powers are to be exercised sparingly and with caution.

It is well settled that the inherent powers under section 482 can be exercised only when no other remedy is available to the litigant and NOT where a specific remedy is provided by the statute. If an effective alternative remedy is available, the High Court will not exercise its powers under this section, especially when the applicant may not have availed of that remedy.

TEST TO CHECK WHETHER HIGH COURT CAN INTERFERE OR NOT

Ordinarily, a High Court will not interfere at an interlocutory stage of criminal proceeding in a subordinate court but HC is under an obligation to interfere if there is harassment of any person (Indian citizen) by illegal prosecution. It would also do so when there are any exceptional or extraordinary reasons for doing so. The Supreme Court, in Madhu Limaye v. Maharashtra, has said, "Nothing in the Code, not even Section 397 can affect the amplitude of the inherent power preserved in Section 482. Where the impugned interlocutory order clearly brings about a situation which is an abuse of the process of the court then for the purpose of securing the ends of justice, interference by the High Court is absolutely necessary and nothing contained in Section 397 (2) can limit or affect the exercise of the inherent power of the High Court".

The SC, further, in Madhu Limaye v. Maharashtra, has held that the following principles would govern the exercise of inherent jurisdiction of the HC:

1. Power is not to be resorted to, if there is specific provision in code for redress of grievances of aggrieved party.

2. It should be exercised sparingly to prevent abuse of process of any Court or otherwise to secure ends of justice.

3. It should not be exercised against the express bar of the law engrafted in any other provision of the code.

It can never be laid down more particularly or precisely when the High Court can and cannot use its powers, but attempts have been made on that behalf in several of the decisions of Supreme Court.

In the landmark case State of Haryana v. Bhajan Lal (1992 Supp.(1) SCC 335), a two-judge bench of the Supreme Court of India considered in detail, the provisions of section 482 and the power of the High Court to quash criminal proceedings or FIR. The Supreme Court summarized the legal position by laying the following guidelines to be followed by High Courts in exercise of their inherent powers to quash a criminal complaint:

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which, no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or, where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

LIMITATION ON SECTION 482 OF CR.P.C

Even though the inherent jurisdiction of the High Court under Section 482 is very wide, it has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex-debito justitiae to do real and substantial justice for the administration of which alone, courts exist. This view has been taken by the Hon'ble SC in many of its judgments including the recent Monica Kumar v. State of Uttar Pradesh.

In a proceeding under section 482, the High Court will not enter into any finding of facts, particularly when the matter has been concluded by concurrent finding of facts of two courts below.

In State of Bihar and another v. K.J.D. Singh, the Hon'ble Supreme Court had a question whether the Criminal Proceedings can be quashed even before the Commencement of the Trial. The Supreme Court went ahead and held that "*The inherent power under Section 482 has to be exercised for the ends of the justice and should not be arbitrarily exercised to cut short the normal process of a criminal trial. After a review of catena of authorities, Pendian, J. in Janta Dal v. H.S. Chowdhary (supra) has deprecated the practice of staying criminal trials and police investigations except in exceptional cases and the present case is certainly not one of these exceptional cases.*"

In R.P. Kapoor v. State of Punjab, Hon'ble Supreme court went on to limit the powers of the Hon'ble High Court within the ambit of the Cr.P.C. It was held, "*Inherent power of the High Court cannot be invoked in regard to matters which are directly covered by* specific *provisions* in *the Cr.P.C.*".

It is well settled that the inherent powers under section 482 can be exercised only when no other remedy is available to the litigant and NOT where a specific remedy is provided by the statute. If an effective alternative remedy is available, the High Court will not exercise its powers under this section, specially when the applicant may not have availed of that remedy.

CONCLUSION

Section 482 Cr.P.C has a very wide scope and is an essential part of statue to meet the end of justice where injustice can take place but at the same time the said Power is too wide and hence, it is important for the courts to use it wisely and according to the guidelines laid down by High Courts and Supreme Court time to time. Section 482, in its current form has seen several changes with the changing times and needs of the hour and by the Guidelines framed by the Supreme Court in several of its judgments. The Courts are constrained to do so as the said Section which gives wide powers to the High Court, was highly abused by the Law Practitioners. Section 482 of Cr.P.C has made its space in Cr.P.C in order to enable the High Courts to provide proper justice and at the same time to curb filing of fictitious complaints just to avenge personal grudges.

LIMITATION VIS-A-VIS CONSUMER PROTECTION ACT – AN ANALYSIS OF THE JUDGEMENT OF THE HON'BLE SUPREME COURT OF INDIA IN THE MATTER OF NATIONAL INSURANCE CO. LTD. VS. HINDUSTAN SAFETY GLASS WORKS LTD. AND ORS.

Aishwarya Mishra

The pros and cons of consumerism including rising demands and issues of globalization have been affecting everyone in recent times. In such a scenario, the Indian Government, taking in to account the needs of the people, passed the Consumer Protection Act, 1986, to protect the consumers from unscrupulous suppliers. The Consumer Protection Act, 1986, an Act of the Parliament of India, enacted in 1986, to protect the interests of consumers in India, makes provision for the establishment of consumer councils and other authorities for the settlement of consumer disputes and for matters connected therewith also. Unlike civil suits which are expensive and time consuming, the Consumer Protection Act, 1986, was enacted to provide a simpler and quicker access for redressal of consumer grievances. The Act, for the first time, introduced the concept of 'consumer' and conferred various express additional rights on the person who comes under the purview of 'consumer' as per the Consumer Protection Act, 1986.

One of the main and vital challenges in every adjudication is the period of 'limitation'. It is pertinent to state that **Section 24A of the Consumer Protection Act, 1986,** defines the limitation period for filing the complaints under the Consumer Protection Act, 1986. As per the definition, the complaint can be filed with District Forum, State or National Commission within 2 years from the date of cause of action having been arisen. However, sub-clause (2) of the said provision states that a complaint filed beyond the prescribed period would be entertained if the complainant satisfies the Forums, State and National Commissions with sufficient reason that prevented him from filing within the prescribed period. A provision is also given mandating the Forum, State Commission, and National commission to record the reasons for condoning the delay and proceed to entertain such delayed complaint.

For the sake of reference, the operative part of Section 24A is reproduced herein below:

Section 24A in the Consumer Protection Act, 1986

[24A. Limitation period.—

(1) The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

(2) Notwithstanding anything contained in sub-section (1), a complaint may be entertained after the period specified in sub-section (1), if the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period*; Provided that no such complaint shall be entertained unless the National Commission, the State Commission or the District Forum, as the case may be, records its reasons for condoning such delay.*

Hence, in view of the aforesaid, the time period for filing a complaint for a consumer from the date of violation of a right is 2 years. The law in this regard is laid down in Sec24-A of the Consumer Protection Act, 1986. However, the Hon'ble Supreme Court of India, in a landmark judgement, on 07.04.2017 in the matter of ***National Insurance Company Ltd. vs. Hindustan Safety Glass Works Ltd. (MANU/SC/0390/2017),*** has held that where a supplier is responsible for causing a delay in the settlement of the consumer's claim, the consumer shall be entitled under law to file a complaint in the Consumer Court even after the expiry of the period of two years.

Brief Facts of the Case & Analysis of the Judgment Passed by the Hon'ble Supreme Court of India

Hindustan Safety Glass Works Ltd. (i.e. insured) i.e. Respondent, had taken out two policies with the appellant National Insurance Company, both dated August 29, 1990, for a period of one year which were subsequently renewed for another year. The first policy was for an amount of Rs. 4.9 lakhs to cover the risks on office building, residential quarters and canteen etc. in Calcutta. The second policy was for an amount of about Rs. 5.7 crores to cover the risks on building, machinery, finished and semi-finished stocks, store, furniture, wiring and fittings etc. in its factory/works in Calcutta, wherein both the policies included damage or loss due to flood and inundation.

On August 06, 1992, there was heavy incessant rain in Calcutta resulting in heavy accumulation of rain water inside and around the factory/works of the insured, which the respondent claimed had caused considerable damage to raw materials, stocks and goods, furniture etc. As a result of the damage suffered by the insured and in terms of the two policies taken out with National Insurance, claims were filed by the insured on August 07 and 08, 1992, claiming a total amount of about Rs. 52 lakhs.

Pursuant to claims, National Insurance carried out two surveys wherein the reports were submitted on November 11, 1993, and the second report was given on November 23, 1994, assessing the loss/damage suffered by the insured.

In spite of the two survey reports quantifying the loss or damage suffered at about Rs. 24 lakhs, nothing was paid to the insured by National Insurance. Pursuant to the same, notices were served upon the insurer. However, to the utter shock and disappointment, there was no response from the National Insurance. Hence, in view of such circumstances, insured filed a complaint with the National Commission under the provisions of the Consumer Protection Act, 1986 (*for short 'the Act'*) claiming an amount of Rs. 52.32 lakhs, along with an amount of about Rs.1.81 lakhs being the expenses incurred for the purpose of loss minimization, further interest at 18% per annum was also claimed by the insured with effect from December 06, 1992 i.e. four months after the occurrence of the flood or inundation.

There were various objections raised by the National Commission as follows, wherein one of the major objection, which is subject matter of the present article, is regarding the complaint being barred by condition No. 6(ii) of the policies i.e Complaint was barred by limitation as it was filed on August 13, 1996, while the loss/damage to the insured properties had taken place in August, 1992.

Reliance on condition number 6(ii) of the insurance policies it is necessary to first understand the scope of this condition which reads as follows:

In no case whatsoever, shall the company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration: it being expressly agreed and declared that if the company shall disclaim liability for any claim hereunder and such claim shall not within 12 calendar months from the date of the disclaimer have been made the subject matter of a suit in a court of law and the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

A reading of the aforesaid condition leads to the conclusion that National Insurance would not be liable for any loss or damage 12 months after the event that caused the loss or damage to the insured unless the claim is the subject matter of a pending action or arbitration. It was submitted by the learned Counsel for National Insurance that the expression 'pending action' must relate to action instituted in a court of law.

However, the Hon'ble Court held that when a claim is made by the insured, that itself is actionable, there is no question of requiring the insured to approach a court of law for adjudication of the claim and that this would amount to encouraging avoidable litigation, which certainly cannot be the intention of the insurance policies and which in no case in public interest.

However, the learned Counsel vehemently argued that in terms of Section 24A of the Act, the claim made by the insured was barred by limitation, since the complaint was filed with the National Commission on August 13, 1996, while the loss or damage had occurred on August 06, 1992. Therefore, the National Commission could not have admitted the complaint since it was filed beyond the stipulated period of two years from the date on which the cause of action had arisen.

The National Commission rejected all the contentions urged by National Insurance and by the impugned judgment and order, the insured was awarded an

amount of Rs. 21,05,803.89 with interest at 9% per annum from May 11, 1995, i.e three months after the addendum issued by Seascan Services (WB) Pvt. Ltd. (the second surveyor), furthermore even costs of Rs. 20,000/- were also awarded to the insured.

Aggrieved by the impugned order, National insurance preferred appeals to the Hon'ble Supreme Court of India.

JUDGMENT

The Hon'ble Supreme Court of India held that the event that caused the loss or damage to the insured occurred on August 06, 1992, was the heavy incessant rain in Calcutta in which the raw materials, stocks and goods, furniture etc. of the insured were damaged. It was observed that on the very next day, the insured lodged a claim with National Insurance. In response, National Insurance first appointed N.T. Kothari & Co. to assess the loss suffered by the insured and a report was given by this surveyor after more than one year. Thereafter, for reasons that are not at all clear, National Insurance appointed a second surveyor which also took about one year to submit its report, and eventually gave an addendum to that report thereby, crossing one year in completion of its report along with the addendum. It was observed and noted by the Hon'ble Court that National Insurance itself took more than two years in surveying or causing a survey of the loss or damage suffered by the insured and hence, the entire delay is attributable to National Insurance which cannot prejudice the claim of the insured, especially when the insured had lodged a claim well within time. Furthermore, to make matters worse, National Insurance actually repudiated the claim of the insured only on May 22, 2001, which was well after the complaint was filed with the National Commission.

The Hon'ble Court was of the view that in a dispute concerning a consumer, it is necessary for the courts to take a pragmatic view of the rights of the consumer principally since it is the consumer who is placed at a disadvantage vis-a-vis the supplier of services or goods. It was further held that the very purpose of a beneficent legislation, in the form of the Consumer Protection Act, is to overcome this disadvantage. The provision of limitation in the Act cannot be strictly construed to disadvantage a consumer in a case where a supplier of goods or services itself is instrumental in causing a delay in the settlement of the consumer's claim. The Court observed that this being the underlying principle, it had no hesitation in concluding that the National Commission was quite right in rejecting the contention of National Insurance in this regard.

Further, it was held that the contention urged was that the first survey report given by N.T. Kothari & Co. was not a bona fide report as the Central Glass and Ceramic Research Institute, Calcutta had not authorized that specific officer to give any report with regard to the damage or loss suffered by the insured. Further, the Hon'ble Court noticed that the second survey report was prepared in consultation with the Central Glass and Ceramic Research Institute, Calcutta, wherein another officer had been consulted. However, it was clearly held that the Insurance Company failed to provide any reason to remotely suggest that the second report was also tainted either because the officer consulted was not authorized to give a report or for any other justifiable reason.

The National Commission accepted the second survey report which was provided by Seascan Services (WB) Pvt. Ltd. as well as the addendum to it and the apex court did not see any reason to disagree with the findings arrived at in the absence of any material to discredit the surveyor or the report of the surveyor.

That the Hon'ble Court in the second appeal being **Civil Appeal No. 1156 of 2008,** further observed and held that the aforesaid appeal even concerns the interpretation, in the context of limitation, of condition number 6(ii) of the insurance policy taken out by the insured. That in view of the same, it was further observed by the Hon'ble Court that, the insured suffered a loss or damage to its goods in an incident that occurred on September 06, 1993. A claim was lodged by the insured on the next day. The claim was repudiated by National Insurance on December 27, 1999 while a complaint filed by the insured in the National Commission was pending since March 06, 1998. In view of these facts and in view of the discussion in the connected appeal it was held that there is no merit in the objection raised by learned Counsel that the complaint was barred by limitation in view of condition number 6(ii) of the insurance policy or Section 24-A of the Act. In any event, this contention was not strictly pressed by learned Counsel on the facts of this appeal.

Thus, the Hon'ble Supreme Court of India was of

the view that National Insurance had not been able to make out a case for interference with the order passed by the National Commission and held that both appeals were without any merit and were accordingly dismissed.

CONCLUSION

The result of this decision, now, is that in all other complaints, the limitation period under section 24A cannot be strictly construed to disadvantage a consumer. It is pertinent to state that with the economic progress and developments in the trade and commerce, a wide variety of consumer goods and services have started appearing and the very purpose of the Consumer Forums/Commissions is to observe the principle of natural justice for redressing the grievance of the consumers. Hence, as per the aforesaid judgement of the Hon'ble Supreme Court of India, in matters concerning consumer dispute, it is important to take a pragmatic view of the rights of the consumer principally, since it is the consumer who is placed at a disadvantage vis- a vis the supplier of good or services who is a step forward in the legal system of our country and thereby, making it imperative to protect the interest of the consumers who also play a major role in the economics and market dynamics of our country.

"EXCEPTED MATTERS" IN ARBITRATION

Mahip Singh Sikarwar

INTRODUCTION

In agreements executed between parties to the contract, generally there exists an arbitration clause and when the subject matter touches the doorsteps of the Court/Tribunal for adjudication of the claims raised by the aggrieved party to the contract, the Court/ Tribunal is concerned with interpreting the arbitration clause which stipulates, "*In the event of any question, dispute or difference arising under this agreement or in connection there-with (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration…*" or the arbitration clause commencing with the words "*except where otherwise' provided in the contract*" or "*The Superintending Engineer's/Engineer's decision shall be final*" or with similar words attaching finality to the decisions of the concerned authorities.

When a dispute arises between the parties, relating to (i) payment of compensation / damages (ii) extension of time, (iii) the power of any authority under the contract to take a decision on any issue relating to the contract and similar other matters, and when the aggrieved party to the contract raises such a claim, naturally the other party to the arbitration will raise the objection contending that the said claim(s) fall under excepted matters and as such they are outside the scope and jurisdiction of arbitrator/arbitral tribunal, because of the specific provision in the agreement. Therefore, it was contended that there was no valid arbitration agreement between the parties in respect of the particular dispute(s).

FIRST CATEGORY OF EXCEPTED MATTERS

The Division Bench of the Hon'ble Supreme Court construed the expression in clause 2 of the conditions of contract that 'The Superintending Engineer's decision shall be final' as referring only to finality by a specified official in the department; in other words, that it only constitutes a declaration that no officer in the department can determine the quantification and that the quantum of compensation levied by the Superintending Engineer shall not be changed without the approval of the Government. After referring to certain judicial decisions regarding the word 'final' in various statutes, the Division Bench concluded that the finality cannot be construed as excluding the jurisdiction of the arbitrator under clause 25. The Court is unable to accept the view. Clause 25, which is the arbitration clause, starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the contract. These words in our opinion can have only reference to provisions such as the one in parenthesis in clause 2 by which certain types of determinations are left to the administrative authorities concerned. If that be not so, the words 'except where otherwise' provided in the contract would become meaningless. The Court is, therefore, inclined to hold that the opening part of clause 25 clearly excludes matters like those mentioned in clause 2 in respect of which any dispute is left to be decided by a higher official of the department. Our conclusion, therefore, is that the question of awarding compensation under clause 2 is outside the purview of the arbitrator and that the compensation determined under clause 2 either by the Engineer-in-charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator**. [Vishwanath Sood –vs- Union of India (AIR 1989 SC 952(SC)]** This judgment declared that when the arbitration clause opens with the words 'except where otherwise provided in the contract' and somewhere in the contract finality was attached to the decisions of the specified authorities on the said matters.

SECOND CATEGORY OF EXCEPTED MATTERS

Similarly, the Hon'ble Supreme Court brought in the concept of excepted matters to some other categories also.

The Supreme Court considered the matter and held that a bare reading of Clause 63 shows that it consists of three parts. One of the three parts is qualified by a proviso which deals with 'excepted matters'. 'Excepted matters' are divided into two categories: (i) matters for which provision has been made in specified clauses of the General Conditions, and (ii) matters covered by any

clauses of the Special Conditions of the Contract. The other of the three parts is a further proviso, having an overriding effect on the earlier parts of the clause, that all 'excepted matters' shall stand specifically excluded from the purview of the Arbitration Clause and hence, shall not be referred to arbitration. The source of controversy is the expression "*matters for which provision has been made in any clauses of the Special Conditions of the contract shall be deemed as 'excepted matters' and decisions thereon shall be final and binding on the contractor.*" In **GENERAL MANAGER NORTHERN RAILWAYS & ANR. –vs- SARVESH CHOPRA 2002 AIR 1272, 2002,** it was submitted by the learned counsel for the respondent that to qualify as 'excepted matters' not only the relevant clause must find mention in that part of the contract which deals with special conditions, but should also provide for a decision by an authority of the Railways by way of an 'in-house remedy' which decision shall be final and binding on the contractor. In other words, if a matter is covered by any of the clauses in the Special Conditions of the contract but no remedy is provided by way of decision by an authority of the Railways then that matter shall not be an 'excepted matter'. ------ The bench found it difficult to agree. In their opinion those claims which are covered by several clauses of the Special Conditions of the Contract can be categorized into two. One category is of such claims which are just not leviable or entertainable. Clauses 9.2., 11.3 and 21.5 of Special Conditions are illustrative of such claims.

Each of these clauses provides for such claims being not capable of being raised or adjudged by employing such phraseology as "shall not be payable", "no claim whatsoever will be entertained by the Railway", or "no claim will/shall be entertained". These are 'no claim', 'no damage', or 'no liability' clauses. The other category of claims is where the dispute or difference has to be determined by an authority of Railways as provided in the relevant clause. In such other category fall such claims as were read out by the learned counsel for the respondent by way of illustration from several clauses of the contract such as General Conditions Clause 18 and Special Conditions Clause 2.4.2.(b) and 12.1.2. The first category is an 'excepted matter' because the claim as per terms and conditions of the contract is simply not entertainable; the second category of claims falls within 'excepted matters' because the claim is liable to be adjudicated upon by an authority of the Railways whose decision the parties have, under the contract, agreed to treat as final and binding and hence not arbitrable. The expression "and decision thereon shall be final and binding on the contractor" as occurring in Clause 63 refers to the second category of 'excepted matters'. **[]**

In a case, where the agreement had provided for complete machinery for settlement of disputes, including machinery for fixation of the liability, the position seems to be that "excepted matters" clauses will be construed strictly; and the Courts will prefer an interpretation narrowing the scope of "excepted matters".

The Court can also consider another important issue, where the clause in the agreement providing for the computation of damages provided that the appellant would calculate the amount of damages in accordance with the agreed formula. The appellant had contended that the quantum of liquidated damages decided by the appellant, even if it is exorbitant and contrary to the formula, would be final and could not be challenged. The Supreme Court rejected this argument as well, saying that such an argument would mean that the agreement was contrary to Section 28 (agreement in restraint of legal proceedings is void) and Section 74 (compensation for breach of contract where penalty is stipulated) of the Indian Contract Act. In this connection, it is worth noting that although Section 28 does allow for an exception in the case of arbitration agreements, a provision stating that a certain person shall compute damages in accordance with a formula cannot be regarded as an 'arbitration' proceeding. In *K.K. Modi v. K.N. Modi* (AIR 1998 SC 1297), the Supreme Court had made clear - the distinction between arbitration and an expert determination – the provision relating to the computation of damages in accordance with a given formula would be a 'determination' and not an 'arbitration'.

CONCLUSION

Whenever any dispute is referred to adjudication by the arbitral tribunal, first aspect that can be contested, if exists, is that of the jurisdiction of the arbitral tribunal. One of the aspects touching the jurisdiction of arbitral tribunal is that in the agreement between the parties to the contract there exists a clause dealing with arbitration and in most of the contracts it may be stated as : 'In the event of any question, dispute or difference arising under this agreement or in connection there-with (except as to the matters, the decision to which is

specifically provided under this agreement), the same shall be referred to the sole arbitration…" or the arbitration clause commenced with the words "except where otherwise provided in the contract" or "The Superintending Engineer's / Engineer's decision shall be final" or with similar words attaching finality to the decisions of the concerned authorities.' Unless a decision on the issue of 'excepted matters' is finalized, if the arbitral tribunal goes with adjudication of the disputes, it will be a futile exercise and ultimately in respect of those claims that come under excepted matters, the award passed by the arbitral tribunal will be set aside.

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NOTES

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SINGH & ASSOCIATES

FOUNDER MANOJ K SINGH

ADVOCATES & SOLICITORS

NEW DELHI
E-337, East of Kailash
New Delhi-110065, INDIA

GURUGRAM
7th Floor, ABW Tower, MG Service Road
Sector 25, IFFCO Chowk, Gurugram
Haryana-122001, INDIA

MUMBAI
Unit No. 48 & 49, 4th Floor
Bajaj Bhavan, Nariman Point
Mumbai - 400021, INDIA

BENGALURU
N-304, North Block, Manipal Centre
47, Dickenson Road
Bengaluru - 560042, INDIA

india@singhassociates.in
www.singhassociates.in