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Singh & Associates
Founder - Manoj K. Singh
Advocates & Solicitors

EDITORIAL

Manoj K. Singh
Founding Partner

Benjamin Franklin once said, **"An investment in knowledge pays the best interest."** At Singh & Associates, we always encourage our reader to participate and add more to the legal discourse on latest update happening in the world. We motivate our reader to invest in the knowledge and persuade to disseminate it everywhere. Taking this view forward, we would like to present "July Edition" of our periodical newsletter "Indian Legal Impetus". The entire family of Singh & Associates would like to thank its reader for their overwhelming response towards Indian Legal Impetus.

This edition starts with the article on **"Insolvency Code: Has Corporate Debtor No Say"** in which the author has analyzed the newly enacted Insolvency and Bankruptcy Code, 2016 and has presented critical review on the rights of corporate debtor under the Code. Moving forward, we have an article, **"Application under section 7: A Brief Analysis"** which deals with the essential elements of section 7 of Insolvency and Bankruptcy Code, 2016. The author explains the necessary requirements to initiate a corporate insolvency resolution process by the financial creditor under section 7. Then the article, **"Financial Resolution and Deposit Insurance Bill 2017: Resolution Framework for the Financial Sector Entities"** explains the salient feature of the FRDI Bill 2017 and how it is beneficial for the development of current economy.

The next article, **"Revision of Patents Computer Related Inventions Guidelines"** in which the author discusses the new changes incorporated into the revised guidelines in details as well as its impact on innovation in the information technology sector. Then it is followed with the article, **"Trademark Protection for Building: Hotal Taj Mahal Palace, now a Registered Trademark"** where the author explain the reason behind for securing trademarks for building. The author also throws some light on the legal precedent followed and what is the way ahead of it. Moving forward from this, the article, **"The Amplification of Arbitral Tribunal Power under the Arbitration and Conciliation Act 1996"** gives an insight of power of Arbitral tribunal, in case of any contempt through the medium of various judgments. Thereafter another article, **"A Valid Arbitration Clause cannot oust Jurisdiction of the Consumer Forums in a Builder's Agreement"** discusses the latest amendment made in the Consumer Protection Act. The article explains that purpose of the amendment was dedicated to the scope and nature of the permissible pre-arbitral judicial intervention in order to protect consumers.

Our next article titled, **"Extent of Applicability of the Provision of CPC in Arbitration Proceedings"**, talks about the provisions of Arbitration and Conciliation Act 1996 which allows for the applicability of CPC provisions on arbitration proceedings. The article also covers judgments of Supreme Court and various High Courts which further add to this discussion. Then there is an article, **"Time Barred Claims under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002"** where the author critically analyzed Calcutta High Court Judgment titled *Dr. Dipankar Chakraborty v. Allahabad* and concluded that the SARFAESI proceeding at the time of invocation has to pass through the test of limitation. Lastly, the article, **"Extinguishment of Right to Redemption"** discusses the stages at which the right to redemption of the property by the mortgagor ceases to exist. The article conclude that the mortgagor can still redeem before the confirmation of the sale, but once it is confirmed and he raises no objection to the validity of the sale, right to redeem gets extinguished.

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

Thank you.

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INSOLVENCY CODE: HAS CORPORATE DEBTOR NO SAY?

Himanshu Chawla

The aim and object of the Insolvency and Bankruptcy Code, 2016 is reorganization and insolvency resolution in a time bound manner for the maximization of value of assets of such persons to promote entrepreneurship and availability of credit. The Code provides a speedy process for deciding the application, presentation of resolution plan and to go for liquidation, if the resolution plan gets rejected. However, under this speedy process, the Code does not envisage situations which can defeat the very aim and object for which it was enacted. The Code does not provide any way for the involvement of corporate debtor, which can sometimes cause adverse effect on the company.

The focus of this article is to analyse the Code from the perspective of corporate debtor. The Code gives immense power and rights to financial creditor in order to get back their loans but the Code does not provide corporate debtor any recourse to address their grievances. This creates a heavy imbalance in favor of creditors against corporate debtor. This article analyzes various provisions of the Code and tries to unveil a picture which clearly shows that in situations where the corporate debtor is genuinely interested in revival and paying back loans, the creditor still has the power to take the company to liquidation.

PUBLIC HEARING

Under section 7 of the Code, the financial creditor can file an application for the initiation of Corporate Insolvency Resolution Process (CIRP) to the Adjudicatory Authority in the case of commission of default. Rule 4(4) of the Adjudicatory Authority Rules, mandates the applicants to dispatch forthwith, a copy of the application filed with the Adjudicatory Authority. The purpose for the same being, to give the corporate debtor adequate notice that such an application for initiation of insolvency process has been filed against him. However, the Code does not provide any provision for corporate debtor to make a representation in pursuance of such notice. The Code does not envisage the circumstance under which the financial creditor might have concealed relevant documents which can reject the application.

Although, through judicial ruling in the case of *Sree Metaliks Limited v. Union of India*[1], the Calcutta High Court has said that the Adjudicatory Authority has to adhere to the principle of natural justice while deciding application under section 7. The following paragraph clearly shows the objective of the High Court,

> *"In an application under Section 7 of the Code of 2016, the financial creditor is the applicant while the corporate debtor is the respondent. A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. Where a statute is silent on the right of hearing and it does not in express terms, oust the principles of natural justice, the same can and should be read into in. When the NCLT receives an application under Section 7 of the Code of 2016, therefore, it must afford a reasonable opportunity of hearing to the corporate debtor as Section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application"*

The abovementioned rationale was reiterated by National Company Law Appellate Tribunal in the case of *ICICI Bank v. Innoventives Industries Ltd*[2] observing,

> *"52. The insolvency resolution process under Section 7 or Section 9 of I&B Code, 2016 have serious civil consequences not only on the corporate debtor company but also on its directors and shareholders in view of the fact that once the application under Sections 7 or 9 of the I&B Code, 2016 is admitted it is followed by appointment of an 'interim resolution professional' to manage the affairs of the corporate debtor, instant removal of the board of directors and moratorium for a period of 180 days.*

However, the point of focus remains that the Code by itself does not provide any recourse for the corporate debtor to raise the grievance. It is for the Adjudicatory

1 *WP 7144(W) of 2017, Calcutta High Court.*
2 *Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017*

Authority to make ways for the corporate debtor to represent himself. Moreover, there is no written procedure laid down for the hearing given to the corporate debtor.

ASCERTAINMENT OF DEFAULT

Under section 7(4) of the Code, the Adjudicatory Authority has to ascertain the existence of the default for the purpose of admitting or rejecting the application within fourteen days from the day of receipt of the application. It means that the threshold of admitting an application is only to ascertain the existence of the default which is very low.

For instance, if a company failed to pay a creditor by one day, the creditor will have the right to file an application under the Code. Authority will only look into whether there was any default or not, and if there was default, the authority will admit the application which will result in appointment of interim resolution professional who will overtake the management of the company.

Reserve Bank of India, in its Master Circular of 2015[3], has given overdue[4] period of 90 days before declaring any asset as Non-Performing Asset and initiation of any debt recovery proceedings. Whereas the Adjudicatory Authority can within one day of default send the company into resolution process. Moreover, the Code does not recognize the situation where the corporate debtor has defaulted but started paying back the dues. For instance, Essar Steels Ltd, one of the twelve companies which the RBI has directed to be sent to NCLT, has started repaying their dues.

n this case, Essar Steels has submitted a revival plan to the creditors, who were part of the board meeting. The creditor has approved the revival plan which shows the co-operation between both the parties. Moreover, Essar has repaid Rs 3,467 from its day-to-day cash flow during the period from April 2016 to June 2017[5]. However, in such situation if any creditor decides to file an application for initiation of resolution process and replace the management with an IRP, the revival of whole company will fall on the shoulders of one person who is a stranger to the company and will handle the work of whole management team. This might reduce the chances of revival of a company while ascertaining that it is sent to liquidation.

CREDITOR COMMITTEE AND RESOLUTION PROFESSIONAL

The Creditors while filing an application for initiation of insolvency resolution process have to nominate an Interim Resolution Professional (IRP) also. Such IRP will form the committee of creditors, containing all financial creditors, on the basis of submission of respective claims[6]. Once the committee is constituted, the committee will appoint either the IRP as RP or will appoint a new person as RP with a vote of not less than seventy-five percent of voting share[7].

These provisions show that the person who will be appointed as RP will work for the interest of creditors only. The revival plan, presented by the resolution professional in front of the committee will be focused on the demand of creditors and will not care about the corporate debtor. Consider a situation, where there is chance of revival but the creditor wants to be paid expeditiously; however viable a revival plan, the resolution professional might present, it may not get the committee of creditors. Even if the resolution professional present a genuine revival plan, the committee can reject it and take the company to liquidation. Such action might be against the object of the Code to maximize the value of assets.

However, the Code provides provision for filing a complaint against insolvency professional or insolvency professional agency or information utility by any person in front of the Board[8]. The Board will direct any person to investigate and present a report in front of the Board[9]. Thereafter, the Board will form a disciplinary committee to examine the report[10]. Such disciplinary committee after satisfaction that sufficient cause exists will impose penalty[11].

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

4 Any amount due to the bank under any credit facility is 'overdue' if it is not paid on the due date fixed by the bank.

5 Available at http://www.livemint.com/Companies/UPgt6Sazgkmx6kAtDOGpEI/Essar-Steel-case-hearing-today-a-litmus-test-for-debt-resol.html

6 Section 21

7 Section 22

8 Section 217

9 Section 218

10 Section 219

11 Section 220

The above complaint mechanism is too lengthy and tedious. Even if someone makes a complaint, the probability of getting the decision during the resolution process is very less. In essence, this provision is an empty gesture in the Code but of no use.

CONCLUSION

It is evident from the perusal reading of the Code that it is definitely an effective move towards establishing a strong regulatory framework to deal with insolvency and liquidation problems. However, the Code is at its nascent stage, it will take time to cross various practical and logistical hurdles before becoming fully comprehensive and consistent. At present, the Code illustrates a picture detrimental to the interest of debtor companies instead of a balance of interest between corporate debtors and their creditors. However, it can be hoped that such interest will be protected in future.

***

APPLICATION UNDER SECTION 7: A BRIEF ANALYSIS

Lalit Ajmani

Insolvency and Bankruptcy Code, 2016 (the Code) is enacted to consolidate and amend laws pertaining to insolvency and resolution. Part II of the Code deals with the Insolvency Resolution and Liquidation for 'Corporate persons'. Under this part of the Code; financial creditors, operational creditors and corporate debtors can initiate corporate insolvency process.

Financial creditor includes a person to whom a financial debt is owed[12]. And corporate person has been defined under sub section 7 of section 3 and it stipulates that corporate person includes company, limited liability partnership or any other person incorporated with limited liability. And corporate debtor means a person who owes a debt to any person[13].

Section 7 gives power to financial creditor to file an application against corporate debtor. This research note will basically be discussing the grounds on the basis of which an application under section 7 can be accepted.

APPLICATION

Financial creditor can file application against corporate debtor only when the amount of default is not less than one lakh rupees. However, the threshold limit of one lakh rupees can be increased to one crore rupees[14].

ESSENTIAL INGREDIENTS

There are three important ingredients to attract section 7 of the Code:

DEFAULT

This is the most important element for initiating corporate insolvency resolution process against corporate debtor. Once the default crosses the threshold limit, an application may be filed by financial creditor(s) under section 7.

Default is explained under section 3(12) of the Code and it stipulates the following:-

"default means non-payment of debt when whole or any part or installment 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".

In the case of *Bank of India* v. *Tirupati Infra projects Ltd.*[15], it was held that the adjudicating authority just needs to determine whether default has occurred or not and it does not need to determine the exact amount of default. It must be noted that the said case has been challenged before the NCLAT and the same is pending.

APPLICATION UNDER SECTION 7(2) IS COMPLETE

It is important to file a complete application. Adjudicating authority may reject the application if the application is incomplete. An applicant needs to file the application in accordance with Form 1 of the Code.

Under section 8, operational creditor needs to send notice to the other party before filing application for initiating insolvency process against corporate debtor. In the landmark case of *Era Infra Engineering Ltd.* v. *Prideco Commercial Projects Pvt. Ltd.*[16], NCLAT dismissed the application because operational creditor didn't serve notice to the other party under section 8 of the Code.

On the aforementioned lines, it can be said that statutory requirements are sine qua non for initiating insolvency process. Thus, for taking recourse under section 7, application must be complete.

NO DISCIPLINARY PROCEEDINGS AGAINST THE PROPOSED RESOLUTION PROFESSIONAL

There should not be any disciplinary proceedings pending against the proposed resolution professional.

NOTICE UNDER SECTION 7

The Code does not ask the applicant to provide any notice to the debtor. However, in the case of *M/s Innoventive Industries Ltd.* v. *ICICI Bank and Anr.*[17], the tribunal said that it is the duty of the adjudicating

12 *Section 5(7) of the Code*
13 Ibid; Section 3(8)
14 *Ibid; section 4*
15 *NCLT, New Delhi Principal Bench, C.P. No. IB – 104(PB)/2017*
16 *Company Appeals (AT) (Ins) 31 of 2017*
17 *Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017*

authority to provide notice to the other party before admitting a case.

GROUNDS FOR REJECTION

There are various grounds on the basis of which adjudication authority is empowered to reject an application under section 7 and the same are mentioned below.

- The default has not occurred; or
- Application under section 7(2) is incomplete; or
- Any disciplinary proceeding is pending against the proposed resolution professional.

Moreover in case of *Innoventive Industries Ltd*[18] it was held that if the records enclosed are misleading, the application has to be rejected.

CONCLUSION

Section 7 gives liberty to financial creditor to file application against corporate debtor where default has occurred. Surprisingly, the amount of default is not very high and thus it can be said that in few scenarios, the same provision unnecessarily put threat of winding up onto the corporate debtor. Moreover, it has been observed that the compliances of the procedural requirements have been taken up very seriously by the adjudicating authority. And in few cases, application got rejected due to non compliance of the said requirements. Thus, procedural formalities must be kept in mind while filing application under section 7 of the Code.

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18 *Ibid*

FINANCIAL RESOLUTION AND DEPOSIT INSURANCE BILL 2017: RESOLUTION FRAMEWORK FOR THE FINANCIAL SECTOR ENTITIES

Kumardeep

INTRODUCTION

The Union Cabinet, in its meeting held in the month of June 2017, has approved[19] the Financial Resolution and Deposit Insurance Bill, 2017 ("**FRDI Bill**") to be introduced in the Parliament. The FRDI Bill is a separate bankruptcy law to deal with insolvency and bankruptcy in financial sector companies covering all financial service providers including banks, NBFCs, microfinance institutions and insurance companies.

This Bill is similar to the Insolvency and Bankruptcy Code, 2016, which was enacted in 2016 to deal with the issues relating to insolvency and bankruptcy of companies in all sectors other than financial sectors. Therefore, in order to deal with the situation of insolvency and bankruptcy in financial sectors entities such as banks and insurance companies, the FRDI Bill has been introduced.

BACKGROUND

Subsequent to the announcement made by the Union Finance Minister, Arun Jaitley, in his budget speech of 2016-17, to introduce a comprehensive Code on resolution of financial firms, a committee was formed in the month of March 2016 under the chairmanship of Shri Ajay Tyagi, Additional Secretary, Department of Economic Affairs. On the report of the committee, the FRDI Bill was drafted and after considerations and suggestions received from various authorities & stakeholders as sought by the Finance Ministry, the Bill was approved by the Union Cabinet to get introduced in the Parliament.

KEY OBJECTIVES OF THE FRDI BILL:

The FRDI Bill provides a framework for resolution mechanism of certain specified categories of financial service providers and establishment of Resolution Corporation in order to have the stability and resilience of the financial system in the country. The key objective of the FRDI Bill is to ensure an early recognition of a financial firm, regulated by Reserve Bank of India (RBI), Securities and Exchange Board of India (SEBI), Insurance Regulatory and Development Authority (IRDA), Pension Fund Regulatory and Development Authority (PFRDA) or any other authority as may be notified by the Central Government, which are in financial distress and thus to provide a resolution mechanism to minimize the impact of such financial trouble on the depositors and entire economy of the country.

SALIENT FEATURES OF THE FRDI BILL:

The salient features of the FRDI Bill are:

i) **Establishment of Resolution Corporation**: The FRDI Bill provides for establishment of a Resolution Corporation as principal agency with multiple roles of supervision and oversight from a viability perspective, receiver in case of entities for which resolution plan is to be prepared. The Resolution Corporation will also act liquidator or receiver in the case of liquidation of entities classified as having imminent risk entities to ensure quick payments to depositors and settle the claims of debtors and equity holders.

ii) **Covered Service Provider**: The FRDI Bill provides for the resolution of covered service provider as listed in the Schedule 2 of the FRDI Bill. Under the FRDI Bill, the powers and functions of the Resolution Corporation are applicable to covered service provider. Such covered service providers, among others, include any banking institution, any insurance company, any other financial service provider excluding individuals and partnership firms, Indian branches of foreign banks etc.

iii) **Systemically Important Financial Institutions ("SIFIs"):** The FRDI Bill provides for designation of certain categories of financial institu-

19 http://pib.nic.in/newsite/PrintRelease.aspx?relid=165620

tions as SIFIs by the Central Government. Such designated financial institutions may or may not be a covered service provider and once designated all the provisions of the Act will be applicable to them. The Bill also provides some additional provisions in respect to such SIFIs.

iv) **Time limit on Resolution**: The FRDI Bill provides that any process of resolution of a covered service provider shall be completed within a period of two years from the date on which such entity is classified to be at critical risk to viability. However, such period of two years may be extended for up to one year.

v) **Consolidation of existing laws relating to resolution of certain categories of financial institutions**: The FRDI Bill proposes to consolidate the existing laws relating to resolution of certain categories of financial institutions, including banks, insurance companies, financial market infrastructures, payment systems, and other financial service providers into a single legislation.

vi) **Repeal of Deposit Insurance and Credit Guarantee Corporation ('DICGC') Act, 1961**: The FRDI Bill also provides for repeal of DICGC Act, 1961 in the manner as provided in the Bill. Post enactment of the FRDI Bill, the DICGC shall stand dissolved and all its functions will be carried out by the Resolution Corporation.

vii) **Cross Border Resolution**: The FRDI Bill also provides for enforcement of resolution in a foreign country in case there is an agreement to this effect between the Indian government and such foreign country and its regulators.

BENEFITS & EFFECTS:

The FRDI Bill has been enacted for the purpose of providing resolution regime for companies in the financial sector such as banks, insurance companies and financial institutions when such entities face financial crisis. The FRDI Bill will benefit large numbers of retail depositors and customers of financial service providers. The FRDI Bill will decrease the time and costs involved in resolving distressed financial service provider entities. By providing comprehensive resolution mechanism, the FRDI Bill along with the Insolvency and Bankruptcy Code, 2016 will facilitate reducing the NPAs and also maintaining stability in the economy.

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REVISION OF PATENTS COMPUTER RELATED INVENTIONS (CRI) GUIDELINES

Saipriya Balasubramanian

INTRODUCTION

The Office of the Controller General of Patents, Designs and Trademarks (CGPDTM) issued new Guidelines on Examination of Computer Related Inventions (CRIs) on 30th June, 2017 replacing the earlier published Guidelines in February 2016. The spotlight of the said Guidelines is the removal of the requirement that computer related invention can only be considered for patentability if the same is claimed in conjunction with a novel hardware. Further, the three step test for patentability determination notified in 2016 Guidelines for CRIs was deleted from these new Guidelines. The changes notified by the IPO on examining the CRIs prescribe that it is important to focus on the underlying substance of the invention and not the particular form in which it is claimed. The following article discusses the new changes incorporated into the revised guidelines in details as well as its impact on innovation in the information technology sector.

BASIC CONCEPTS AND RELEVANCE OF CRIS[20]

CRIs involve the use of a computer, computer network or other programmable apparatus, where one or more features are realized wholly or partly by means of a computer program. The provisions relating to CRIs under Section 3 are as follows:

Section	***Description***
3(k)	A mathematical or business method or a computer program *per se* or algorithms;
3(l)	A literary, dramatic, musical or artistic work or any other aesthetic creation whatsoever including cinematographic works and television productions
3(m)	A mere scheme or rule or method of performing mental act or method of playing game
3(n)	A presentation of information

20 https://www.omicsonline.org/open-access/patents-on-computerrelated-inventions-in-india-2375-4516-1000S1-009.php?aid=82521

The '*per se*' term of section 3(k) has been subject to various interpretations in the Courts so as to decide the granting of patents for inventions involving or related to computer programs. The main objective of publication of the said Guidelines for the examination of CRIs is to ensure uniformity and consistency in the examination of such applications. Also, the IPO provides a disclaimer that in case of any conflict between these guidelines and the provisions of the Patents Act or the Rules made there under, the said provisions of the Act and Rules will prevail over these guidelines. Further, these guidelines are subjected to revision from time to time based on the interpretations by Courts of law, statutory amendments and inputs from the stakeholders.

HISTORY TIMELINE OF CRIS

Year	**Highlights**
2013	• Defined two terms- technical effect and technical advancement for testing the patentability of the invention • Examples of technical effect- higher speed, reduced hard-disk time, more economical use of memory, more efficient data base search strategy, more effective data compression techniques, improved user interface, better control of robotic arm, improved reception / transmission of radio signal. • Technical advancement comes with technical effect, but it is to be noted that all technical effects may or may not involve technical advancement • Novel software may not qualify for a patent if applied on a known hardware. • The guidelines mentioned careful consideration of how integrated is the novel hardware with the computer program.

2015	The 2015 Guidelines clarified that for being considered patentable, the subject matter should involve either a novel hardware or a novel hardware with a novel computer program or, a novel computer program with a known hardware which goes beyond the normal interaction with such hardware and affects a change in the functionality and/or performance of the existing hardware. Technical advancement of the inventions relating to CRIs may not fall within Section 3(k) if: • The claimed technical feature has a technical contribution on a process which is carried on outside the computer; • The claimed technical feature operates at the level of the architecture of the computer; • The technical contribution is by way of change in the hardware or functionality of the hardware. • The claimed technical contribution results in the computer being made to operate in a new way; • In case of a computer program linked with hardware, the program makes the computer a better computer in the sense of running more efficiently and effectively as a computer • The change in the hardware or the functionality or hardware amounts to technical advancement. Also, "mathematical method" exclusion may not apply to any computing / calculating machine encoding / decoding, method of encrypting / decrypting, method of simulation though employing mathematical formulae for their operations.
2016	In 2016 CRI Guidelines, a three step test was introduced, which included that "if the contribution lies in the field of computer program, check whether it is claimed in conjunction with a novel hardware and proceed to other steps to determine patentability with respect to the invention." The said test did not help much as 'hardware' in any event does not fall within the exclusion of section 3(k), and hence, determination of the invention related to computer programs *per se* remained ambiguous.

CRI GUIDELINES OF 2017[21]

The major changes witnessed in 2017 guidelines are as follows:

1. The three step test as mentioned in the 2016 guidelines highlights above was deleted. In this context, the Revised Guidelines do not expressly lay down any specific tests, indicators or determinants on patentability of CRIs.

2. The new guidelines exclude the layout of integrated circuits as patentable subject matter in the CRIs.

3. The definition of "new invention" has been moved from 4.1 in the previous Guideline to 2.1 under the new CRI Guidelines.

4. Under 4.2, Industrial Applicability, the detailed description pertaining to 'Industrial Applicability' is now deleted. Accordingly, in comparison to the previous version, under the present CRI Guidelines the meaning of "industrial applicability" is not restricted to any specific examples.

5. Under 4.4.1, which mentions sufficiency of the disclosure, the description detailing about what should be the contents of the disclosure has been deleted.

6. Under 4.5, which mentions about the determination of excluded subject matter relating to CRIs following is added: *Hence, along with determining the merit of invention as envisaged under Sections 2(1) (j), (ja) and (ac), the Examiner should also determine whether or not they are patentable inventions*

21 http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/Revised_Guidelines_for_Examination_of_Computer-related_Inventions_CRI.pdf

under Section 3 of the Act.

7. Under 4.5.1 mentioning about claims directed as mathematical method, following portion is added*: mere manipulations of abstract idea or solving purely mathematical problem/equations without specifying a practical application also attract the exclusion under this category.*

   Also, such exclusions may not apply to inventions that include mathematical formulae and resulting in systems for encoding, reducing noise in communications/ electrical/electronic systems or encrypting/ decrypting electronic communications

8. The examples on non-patentable and patentable claims have also been removed in the present guidelines.

In addition to above, the new CRI Guidelines also provide for replacement of provisions in Chapter 08.03.05.10 of the Manual pertaining to section 3(k) with these new provisions as given under the new Guidelines.

***

TRADEMARK PROTECTION FOR BUILDINGS: HOTEL TAJ MAHAL PALACE, NOW A REGISTERED TRADEMARK

Shrabani Rout

INTRODUCTION

On May 19, 2017, the Indian Hotels Company Limited (IHCL) created history by securing a trademark registration for the exterior design of the Taj Mahal Palace Hotel. While securing trademarks for buildings are a common phenomenon around the world, the iconic landmark of Mumbai is the first of its kind in India to get a registered trademark under its hood. Other famous landmarks that are registered as trademarks are the Empire State Building in New York, the Eiffel Tower in Paris, Sydney Opera House in Australia to name a few.

The primary reason behind securing trademarks for buildings is to protect copycat architecture and protect the unique design of the building and preserve its uniqueness and heritage. Buildings satisfy the dual test of graphical representation, along with the capability of functioning as an indication of source and are hence eligible for trademark protection. By registering buildings as trademarks, the proprietors also attempt to control and limit the depictions of those landmarks in artistic works, pictorial representations, unfair commercial use etc.

Another reason for securing a trademark for the iconic structure can be that the IHCL wanted to protect the structure from being used in productions that could tarnish and dilute the image. For example, if an alcohol manufacturer would put the design of the Taj Mahal Palace Hotel on its whisky bottles, it could tarnish the reputation of the building and dilute its trademark status.

Now that the building is successfully registered as a trademark, the IHCL has the following powers in relation to the building:

1. Nobody can use the trademarked image for commercial purposes without a license from the company. Selling any object with the trademarked image on it will be considered as an infringement action.
2. Any sort of commercial use will be with the permission and may include the payment of a licensing fee to the company.

The IHCL had sought registration for the iconic building under Class 43 for the following services namely, "services providing food and drink; temporary accommodation".

A pertinent question that can be raised here is why the IHCL chose to secure a trademark registration rather than a design or copyright registration. Copyright registration only protects the aesthetic value of the building; design registration only helps in increase of commercial revenue generation. A trademark registration on the other hand however, not only increases the commercial revenue generation through licensing, it also signifies that a particular landmark denotes the source or acts as a source indicator while also protecting the distinctiveness of the landmark. Also, the term of protection of a trademark is much longer than that of a copyright or design protection.

REQUISITES TO BE FULFILLED BY A LANDMARK BUILDING TO BE ELIGIBLE FOR REGISTRATION

1. It must be used on or in connection with the promotion and sale of goods and services, or displayed on materials used in offering the goods or services for sale, rather than merely as a landmark per se.
2. The public must recognize such building or landmark as indicating and designating the source of particular goods or services.

Thus, trademark protection "cannot be enforced in the absence of evidence that the public recognizes it and associates it with the owner's services."

LEGAL PRECEDENTS:

1. In the case of *Rock and Roll Hall of Fame and Museum v. Gentile Production*,[22] the Museum's building design was registered with the State of Ohio and the United States Patent and Trademark Office as a trademark. Photographer Charles Gentile took a picture of the Museum against a colorful sunset and began selling the photograph as a poster. The Museum filed a lawsuit against Gentile over the depiction of the Museum in the poster. The court in this case said that "in order to be protected as a valid trademark the building must create "a separate and distinct commercial impression which performs the trademark function of identifying the source of the merchandise to the customers."

   However the Museum could not produce evidence to demonstrate that the public actually identified the building as a trademark. If the public does not rely upon the landmark to identify the source then the landmark cannot be held to be a trademark and thus it cannot be registered.

2. Another interesting case is that of *ESRT Empire State Building, L.L.C. v. Michael Liang*[23], the Empire State Building LLC, owns federal registrations for the word mark EMPIRE STATE BUILDING for observation deck, sightseeing and real estate services, as well as design mark registrations for the same services for this two dimensional depiction of the building exterior. The respondent's company used the picture on their beer bottles without the official permission or any form of licensing agreement form the ESRT. The beer logo in this case belonged to trademark applicant Michael Liang who applied for the trademark on January 8, 2011 with the intent to use the mark in commerce for alcoholic and non-alcoholic styles of beer. The Trademark Trial and Appellate Board found that ESRT's mark is "famous for purposes of dilution", that its mark is inherently distinctive or acquired its distinctiveness through its exclusive use of its mark and have a "strong degree of recognition. After considering all the evidence found, the Trademark Trial and Appellate ruled that applicant's mark is likely to cause dilution by blurring ESRT's mark, hence ruled in the ESRT's favor.

22 134 F.3d 749 (6th Cir. Ohio 1998)

23 http://ttabvue.uspto.gov/ttabvue/ttabvue-91204122-OPP-95.pdf

THE ROAD AHEAD:

Now that the Taj Palace Hotel is a registered trademark, no one can use the image of the building for any commercial purpose. If any individual or entity wants to use the image on any of their products, they will have to get a license from IHCL.

Few articles online have criticized this move of IHCL and stated that by getting trademark registrations for landmark buildings , the IHCL is curtailing the right of the public to cultural heritage by not allowing even pictures of the Taj Palace to be depicted on t-shirts and photographs. It is to be kept in mind here that getting a registered trademark for the image does not take away the right of citizens from clicking pictures before the iconic building; they can just not use the pictures for commercial purposes without a license from IHCL. The adverse impact of this move will be felt by photographers who will now have to pay a licensing fee to the IHCL even if they take a picture of the building and sell it to a magazine.

The reasons as to why the building was registered as a trademark have been stated earlier and are not repeated here for the sake of brevity. However to prove that dilution has occurred, the claimant must show that when the general public encounters the mark in almost any context, it associates the mark at least initially with the mark's owner. The IHCL can therefore justify the move of securing a trademark registration for the Taj Mahal Palace Hotel on the grounds that they did it not only to protect the building's architecture and distinctiveness but also to protect the image of the iconic building from dilution by blurring or tarnishment.

CONCLUSION

Being the first Indian building to get a trademark, the Taj Mahal Palace Hotel has certainly ushered in a new era for the development of Intellectual Property in this field of securing trademark protection landmarks and there can be an exciting road ahead for companies and entities who wish to trademark their famous structures to protect its distinctivity.

Therefore, it is safe to conclude that the move of IHCL in securing trademark registration for easily the most famous building in Mumbai was a smart one

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THE AMPLIFICATION OF ARBITRAL TRIBUNAL POWERS UNDER ARBITRATION AND CONCILIATION ACT, 1996

Palash Jain

BACKGROUND

The Arbitral Tribunal hereinafter referred to as 'tribunal' now has power to make representation to principal civil court of original jurisdiction and high court of its ordinary jurisdiction for contravention or default of any of its order, any contempt and refusal to give evidence to the tribunal, though the same was provided in Section 27(5) of the Arbitration and Conciliation Act, 1996 hereinafter referred to as "Act" but was interpreted differently, the honorable Supreme Court in Alka Chandewar Vs. Shamshul Ishrar Khan on July 6, 2017 thereby affirmed the power of tribunal under the Act.

ANALYSIS

The Bombay High Court in the case of Alka Chandewar v. Shamshul Ishrar Khan[24] ruled that "Section 27(5) of "Act" does not empower the Tribunal to make representation to the Court for contempt if the orders including the interim orders passed by the Arbitrator except in respect of taking evidence are violated by the party".[25]

The rationale given by the court was citing judgment of Delta Distillers Limited v. United Spirits Limited[26] which provided that –

- Arbitral Tribunal only have the power to get evidence, it is for this purpose only Section 27 of the Act has been provided.

- The default Contemplated under sub Section 27(5) of the Act is a default pertaining to violating the order in respect of taking evidence and the default under Section 25 of the Act is not in respect of taking evidence though it is covered under conduct of arbitral proceedings. The word 'conduct' in legal proceedings means to take steps. It signals Court's power to decide and to move. Thus by use of the word 'conduct' in sub clause 4 of sub Section 5 of Section 27 of the Act, the legislature has restricted its meaning to taking of evidence only and not any other contempt in arbitral proceedings.

In Nihaluddin v. Tej Pratap Singh and Ors.[27], one of the parties in the dispute allegedly disobeyed the injunction order passed by the statutory arbitrator. The other party filed a criminal miscellaneous petition under Section 3 of the Contempt of Courts Act, 1952 alleging contempt. The court had to decide whether the arbitrator was a "Court". Having held that the arbitrator was not a Court, the Allahabad High Court went on to hold that the opposite party could not be guilty of contempt of Court in having overlooked the arbitrator's order.

The Honorable Supreme Court in a special leave petition[28] set aside the decision of Bombay High Court and overruled the decision of Allahabad High Court and ruled that the arbitral tribunal has special powers under 27(5) to punish for its contempt. Section 27(5) is read hereunder-

*"Persons failing to attend in accordance with such process, or making **any other default,** or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court."*

If the provision is read in a literal manner then the arbitral tribunal has power to punish for non appearance, contempt or any other default and further the court stated "in consonance with the modern rule of interpretation of statutes, the entire object of providing that a party may approach the Arbitral Tribunal instead of the Court for interim reliefs would

24 2016 (1) ARBLR488(Bom)
25 Paragraph 29, ibid.
26 MANU/SC/0978/2013
27 AIR 1968 All 157
28 Alka Chnadewar v. Shamshul Ishrar Khan CIVIL APPEAL NO.8720 OF 2017, MANU/SC/0818/2017

be stultified if interim orders passed by such Tribunal are toothless".

The judgment also took consideration from Delhi High Court judgment, *Sri Krishnan v. State*[29], which stated that under Section 27(5) of the Act, any person failing to comply with the order of the arbitral tribunal under section 17 would be deemed to be "making any other default" or "guilty" of any contempt to the arbitral tribunal during the conduct of the proceedings under section 27(5) of the Act. The Court also noted down that the aggrieved party has the power to apply to the Court for its contempt under contempt of the Court and Order 39 Rule 2A of the Civil Procedure Code.

CONCLUSION:

The arbitral tribunal is now entrusted to make embodiment to the Court for default of any order, including the interim orders passed by the arbitrator is violated by the parties before it. Thereby persons appearing before the tribunal will be deterred to make any violations and orders will now be construed scrupulously.

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29 (2009) 3 Arb LR 447 (Del)

A VALID ARBITRATION CLAUSE CANNOT OUST JURISDICTION OF THE CONSUMER FORUMS IN A BUILDER'S AGREEMENT

Satwik Singh & Kunal Kumar

In order to protect the customers from the situation arising out of unequal bargaining power, the Legislature has tried to provide an additional remedy under Section 3 of the Consumer Protection Act, which states that the provisions of the Act are in addition to and not in derogation of the provisions of any other law prevailing for the time being.[30]

Section 3 of the Consumer's Protection Act (hereinafter referred to as "**CP Act**") prima facie appears to be in direct conflict with the amended Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "**Arbitration Act**") which states that in the situations of dispute matters which are arbitrable and the presence of a valid arbitration agreement, the reference to an arbitration is must once invoked by a party. There are many case laws on the issue and the law is well settled that notwithstanding the provisions under Section 8 of the amended Arbitration Act, the arbitration agreements do not bar the jurisdiction of the National Consumer Disputes Redressal Commission (hereinafter referred to as "**NCDRC**") and other consumer forums. The issue of the extent of applicability of the amended Section 8(1) of the Arbitration Act with respect of the Consumer Foras established under the Consumer Protection Act 1986 was reconsidered at length by a Full Bench of the NCDRC dated 13.07.2017 in the case of *Aftab Singh v Emaar MGF Land Limited & Anr*[31] wherein it was again reiterated that the Consumer Courts by the virtue of being a special act constituted to serve a public purpose, the provisions of the amended Arbitration Act will not apply to it. The present case originated from the complaints filed by a group of apartment owners before the Commission against Emaar MGF Land Private Limited i.e. the Builder, who failed to give delivery of the plots to the buyers as per the timeline laid down in the Buyer's Agreement executed between both parties. The Builder filed applications under Section 8 of the Arbitration Act and argued that the Commission is a 'judicial authority' as per Section 8 of the Arbitration Act and is therefore mandated to refer parties to arbitration on the basis of a valid arbitration agreement as is present in the Buyers' Agreements executed between the Builders and the plot owners.

CONTENTION OF THE PETITIONERS

The main contention of the petitioners was that the remedies that are provided by the CP Act are in addition to and not in exclusion of the other laws is force. This was argued on the basis of the ratio laid down in the case of *National Seeds Corporation Limited v M Madhusudhan Reddy* [(2012) 2 SCC 506] . It was also argued that the CP Act is a beneficial legislation and, therefore, the intention behind its enactment ought to be advanced. A consumer complaint can therefore be filed before the consumer forum taking aid of Section 3 under CP Act, despite presence of an arbitration clause as per the Arbitration Act. The argument was stretched to include that the intention of the legislature was never to bar the jurisdiction of the Consumer Courts, even under the un-amended Arbitration Act in the existence of an arbitration clause. The argument in this regard was that the addition of words – "*notwithstanding any judgment, decree or order of the Supreme Court or any Court*" in the amended Section 8 of the Arbitration Act cannot be interpreted to alter law declared by the Supreme Court prior to amendment. The amended Section 8 does not override any other law in force because the aforesaid amendment was intended solely to curtail the scope of enquiry by courts into issues of existence of arbitration agreement in applications filed under Section 11 and Section 8 of the Arbitration Act and thereby it did not alter nor affect the interplay between Section 3 of the CP Act and the Arbitration Act.

CONTENTION OF THE RESPONDENT

On the other hand, the Respondent contended that the Consumer Courts are 'judicial authority' within the meaning of the amended Arbitration Act, therefore they are required to refer parties to arbitration, if a valid arbitration clause exists. The amended act is clear in its

30 Act not in derogation of any other law.—The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

31 [Consumer Case No 701 of 2015]

wording that the disputes are required to refer parties to arbitration irrespective of the any decisions pending in Hon'ble High Court, or the Hon'ble Supreme Court, and thereby Article 141will be of no assistance to the parties. The respondent also contended that since the Amended Section 8 of the Arbitration Act mandates any "judicial authority" to sidestep the decisions of the Supreme Court, prior to the amendment. Therefore, the Respondent argued that the judgment in National Seeds is of no use to the petitioner.

CONCLUSION

The commission examined the Law Commission Report in order to gauge the intent behind the amendment to Section 8 of the Arbitration Award, and came to the conclusion that, the purpose of this amendment was dedicated to the scope and nature of the permissible pre-arbitral judicial intervention and clearly did not intend to refer or disturb the view laid down in the National Seeds case with respect to the non arbitrability of the consumer disputes. The Commission referred to Section 2(3) of the Arbitration Act, which clearly recognizes the non-arbitrable nature of certain disputes by stating that *'This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration'*. The Hon'ble NCDRC noted that disputes are not characterized as non-arbitrable on the whims and fancies of the legislature but based on jurisprudence built by the Hon'ble Supreme Court in harmony with the legislature and keeping in mind the public policy objective. By the Amended Act, particularly Section 8(1), the legislature could not have intended to undo this entire jurisprudence. In addition to this, the Hon'ble NCDRC also looked into the importance of the remedies available under the CP Act and the special object and the purpose of a beneficial legislation such as CP Act in protecting the interest of the consumers, it came to the reasoning that the entire purpose of the CP Act was to ensure expeditious resolution and disposal of the consumer disputes, reference of such disputes to arbitration would involve the application of the portions of the Arbitration Act that are enforceable only through the civil courts and this would be repugnant to purpose of the CP Act.

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EXTENT OF APPLICABILITY OF THE PROVISIONS OF CODE OF CIVIL PROCEDURE, 1908 IN ARBITRATION PROCEEDINGS

Tanuka De

Relevant provisions of Arbitration and Conciliation Act, 1996 Act (hereinafter referred to as "**the Act"**) in this context have been reproduced as follows,

> Section 19-
>
> *"Determination of rules of procedure.—*
>
> *(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).*
>
> *(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*
>
> *(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.*
>
> *(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."*
>
> Section 5-
>
> *"Extent of judicial intervention.—notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*

From a combined reading of the provisions, it can be clearly inferred that the legislative intent was to curtail judicial interference of the civil courts which are infamous for their long, costly and delayed proceedings. Further, it also satisfies the primary objective of the Act which was to minimize the supervisory role of courts in the arbitral process and expeditious disposal of disputes.

So far as the application of Civil Procedure Code (herein after referred to as "**the Code**") in the arbitral proceedings is concerned, Section 19 of the Act exempts the arbitral tribunal from the shackles of the Code as also the rules of evidence contained in the Indian Evidence Act, 1872 and empowers it to formulate its own rules of procedure.[32] However, the Act itself in sections 36 and 37 of the Act provide for resorting to civil courts. The Delhi High Court, putting rest to the contradictory provisions, correctly said that the parties are required to proceed to the civil courts either for setting aside the award or its effective enforcement under section 36 or Section 37 of the Act only once the arbitral proceedings are complete and an arbitral award is made.[33] However, the question whether all the features and provisions of CPC will be applicable to an arbitration proceeding still remains unresolved. This issue has come up before the Apex Court and High Courts in a number of cases.

High Court of Bombay in the year 2002 held that

> *"In Sub-section (1) of Section 19, the Act has prescribed that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 or by the Evidence Act, 1872. These are words of amplitude and not of restriction. These words do not prohibit the Arbitral Tribunal from drawing sustenance from the fundamental principles underlying the Civil Procedure Code or Evidence Act, but free the Tribunal from being bound, as would a Civil Court, by the requirement of observing the provisions of the Code and the law relating to evidence with all its rigour."*[34]

The Supreme Court in its landmark judgment while examining the issue whether a revision petition under Section 115 of the Code lies to the High Court as against an order made by a civil court in an appeal preferred under Section 37 of the Act held that

> *"….there is always a strong presumption that the civil courts have the jurisdiction to decide all questions of civil nature, therefore, if at all there has to be an inference the same should be in favour of*

32 *Mahanagar Telephone Nigam Limited Vs. Applied Electronics Ltd. ; AIR2014Delhi182*

33 *Ibid.*

34 *Maharashtra State Electricity Board Vs. Datar Switchgear Ltd. ; 2003(105(1))BOMLR937*

the jurisdiction of the court rather than the exclusion of such jurisdiction and there being no such exclusion of the Code in specific terms except to the extent stated in Section 37(2), we cannot draw an inference that merely because the Act has not provided the CPC to be applicable, by inference it should be held that the Code is inapplicable."[35]

So what can be inferred is that unless the statute expressly or implicitly provides, the jurisdiction of a civil courts cannot be ousted.

Affirming the law laid down by the Apex Court in the case *Municipal Corporation of Delhi v. International Security and Intelligence Agency*[36] the High Court of Karnataka in the case of *Syko Bag Industries, Proprietor, Mr. T.K. Yahoo and Mrs. K. Zubaida Vs. ICDS Limited rep. by its GPA Holder, K. Balakrishna Rao and Sri B.I. Sharma, Advocate and Arbitrator*[37] took a similar view that

> *"The applicability of the provisions of the Code of Civil Procedure to the Arbitral proceedings under the Arbitration and Conciliation Act shall be subject to affecting any rights of a party under special law or local law in force in relation to the arbitration proceedings."* and that *"the provisions of Civil Procedure Code can be applied if they are not inconsistent with the provisions of Arbitration and Conciliation Act."*

While all of the above judgments were regarding the application of CPC post arbitration award, the High Court of Bombay in the case *Sahyadri Earthmovers Vs. L and T Finance Limited and Anr.*[38] examined the scope of applicability of CPC during the arbitration proceedings and held that although the Code and the Evidence Act are not applicable strictly, (Section 19), but their settled principles do apply. The court further took the view that,

> *"Section 19 of the Arbitration Act, which is reproduced contemplates when the parties agree on a particular procedure to be followed by the Arbitral Tribunal, all are bound to follow the same, but in its absence, the Arbitral Tribunal is bound to conduct the proceeding in the manner it considers appropriate. It also means that the Arbitrator has power to determine the admissibility, relevance, materiality and weight in evidence though the provisions of the Code of Civil Procedure and/or Indian Evidence Act, are not binding upon the Tribunal.*
>
> *The principles of natural justice, fair play, equal opportunity to both the parties and to pass order, interim or final, based upon the material/evidence placed by the parties on the record and after due analysis and/or appreciation of the same by giving proper and correct interpretation to the terms of the contract, subject to the provisions of law, just cannot be overlooked."*

The division bench of the Supreme Court in *Mahanagar Telephone Nigam Ltd. Vs. Applied Electronics Ltd.*[39] had raised doubt over the correctness of judgment in ITI Ltd. vs. Siemens Public Communications Network Ltd. wherein it was held that that the applicability of the Code is not prohibited in an arbitration appeal proceedings under Section 37 of the Act. The matter has now been referred to a larger bench for reconsideration. Until then, the Apex court judgment in the ITI Ltd. case will continue to be the binding precedent.

CONCLUSION:

The Code will be applicable to an arbitration proceeding to the extent the Act expressly allows (section 36 and section 37 of the Act). Moreover, the original jurisdiction of the Civil Courts will not be barred unless otherwise provided by the statute. Furthermore, although an Arbitration proceedings does not have to strictly follow the provisions of CPC and Evidence Act, yet it should be conducted keeping in mind the basic principles of fair trial and evidence appreciation which in turn are rather derivative of the fundamental principle of natural justice. These principles are also the fundamental pillars of CPC and Evidence Act which cannot be overlooked in an Arbitration dispute as well. However, the pending case in the Apex court will bring the much needed clarity regarding the extent of applicability of CPC once it is resorted to under section 36 or section 37 of the Act.

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35 *I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd. ; AIR2002SC2308*

36 *AIR2002SC2308*

37 *2007(4)KCCRSN240*

38 *2011(7)ALLMR279*

39 *Supra 1*

TIME BARRED CLAIMS UNDER SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002

Tushar Roy

The Hon'ble Calcutta High Court ("***High Court***") in its recent judgment titled as *Dr. Dipankar Chakraborty vs Allahabad Bank & Ors.* numbered as W.P.No. 16511 (W) of 2016 had decided the issue as laid down as under:

"Whether the period of limitation stops on filing of a proceeding under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 for a bank or a financial institution to invoke the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in respect of the same claims?"

FACTS:

Dr. Dipankar Chakraborty ("***Petitioner***") is a medical professional who had obtained loan from Canara Bank for starting a medical diagnostic centre. The credit facility availed by the petitioner has been claimed to be paid. Thereafter, Petitioner had approached Punjab National Bank for credit facility, according to Petitioner; bank had sanctioned credit facility in favour of the Petitioner. As security, immovable property being a residential property was mortgaged with the Bank in 1995 against the credit facilities.

Petitioner paid the last installment in 1995 and thereafter defaulted, Bank filed an original application being O.A. no. 137 of 2001 under Section 19 of *Recovery of Debts Due to Banks and Financial Institutions Act, 1993* ("***RDDBFI ACT, 1993***") before the Debt Recovery Tribunal – I, Kolkata. Prior to the filing of the O.A. No. 137 of 2001, Petitioner had already filed a suit for damages for money being Money Suit no. 120 of 2000 before the City Civil Court at Calcutta against the Bank.

After institution of O.A. No. 137 of 2001, bank had issued a notice dated 04.02.2011 under Section 13 (2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("***SARFAESI ACT, 2002"***), being aggrieved Petitioner had filed a writ petition before the Hon'ble High Court for quashing of the notice dated 04.02.2011. The writ petition was dismissed by the Hon'ble High Court on the ground that the Petitioner has alternative efficacious remedy. In furtherance, Bank had invoked the provisions of Section 13 (4) of SARFAESI Act, 2002 on 13.04.2011, possession notice had been published vide publication dated 27.04.2011 and a sale notice was published on 10.05.2011. Petitioner had filed securitization application under Section 17 of SARFAESI Act, 2002 before the Debt Recovery Tribunal, Kolkata. Before the Debt Recovery Tribunal, Kolkata, Bank had undertaken to withdraw all the measures under SARFAESI that they have invoked till date. Vide publication dated 06.06.2011, Bank had withdrawn their SARFAESI measures against the Petitioner.

Soon after withdrawing the notice dated 04.02.2011, Bank had again issued another demand notice dated 05.07.2011 only against the Guarantor. Detailed objection under Section 13 (3A) of SARFAESI Act, 2002 has been sent on 29.07.2011, the Bank had dealt with the same by their letter dated 09.08.2011.

Bank issued a fresh demand notice dated 03.03.2016 under SARFAESI Act, 2002 being the impugned notice, the Petitioner had replied to the demand notice on 21.03.2016.

ARGUMENTS:

- The contention of the Petitioner before the High Court is that the claim as claimed through the avenues of SARFAESI Act, 2002 is time barred being hit by the provisions of the Limitation Act.

- That the argument of the Respondent Bank is that the limitation has stopped soon after the filing of the O.A. No. 137 of 2001 and henceforth the invocation of SARFAESI measures against the Petitioner is not time barred.

JUDGMENT

The observation of the Hon'ble High Court is laid down as under:

- The provisions of the Limitation Act, 1963 would apply to the proceedings of SARFAESI Act, 2002 by virtue of Section 36 of the SARFAESI Act, 2002. Further, similar question[40] fell for consideration before the Hon'ble Delhi High Court and the Hon'ble Delhi High Court has also held that the claim to subsist under SARFAESI Act, 2002 has to be compliant with Section 36 of the SARFAESI Act, 2002.

- If the period of 12 years had not expired as mentioned under Article 62 in the schedule of the Limitation Act then there was still time to file the proceedings under SARFAESI Act, 2002.

- Pendency of the proceedings before the Debt Recovery Tribunal under the RDDBFI act, 1993 will not save the period of limitation for a proceeding under SARFAESI Act, 2002. In other words, a Bank cannot take the benefit of the pendency of the proceeding before the Debt Recovery Tribunal to claim a proceeding under the SARFAESI Act, 2002, which is otherwise, barred by laws of limitation.

- Secured creditor as held in Transcore[41], is entitled to take a remedy or a measure as available in the SARFAESI Act, 2002, despite the pendency of the other proceedings, including a proceedings under Section 19 of RDDBFI Act, 1993, in respect of the self-same cause of action, the invocation of such right under the SARFAESI Act, 2002 has to be done within the period of limitation prescribed under the Limitation Act, 1963 in terms of Section 36 of the SARFAESI Act, 2002.

- The laws of limitation do not take away a subsisting right, it merely postpones the enforcement of an existing right to be revived for enforcement of future event. The Bank on receiving a certificate under Section 19 of the RDDBFI Act, 1993, has its right to proceed under the Act of 2002 revived. It then needs to proceed under the Act of 2002, within the period of limitation, from the date of such certificate.

- Demand notice dated 03.03.2013 is barred by limitation. The initiation of the proceedings by the bank was barred by the laws of limitation on July 5, 2011 and all proceedings taken by the bank consequent upon and pursuant to the notice under Section 13 (2) of the Act of 2002 dated July 5, 2011 are quashed including such notice.

ANALYSIS

In view of the aforementioned observation of the Hon'ble High Court, it can be concluded that the SARFAESI proceedings at the time of invocation has to pass through the test of Section 36 of the SARFAESI Act, 2002 and Limitation Act, 1963. It is imperative to mention that "***limitation count***" does not stop on filing of original application under Section 19 of the RDDBFI Act, 1993 before the Debt Recovery Tribunal as both the rights are independent of each other and the banks are at liberty to invoke either of the rights as available to them under the Act, however, such rights and remedies as available while invocation has to be within the period of limitation prescribed under the Limitation Act, 1963.

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40 *Somnath Manocha vs Punjab and Sind Bank & Anr.; 2012 (129) DRJ 654*

41 *Transcore vs Union of India and Anr.; (2008) 1 SCC 125*

EXTINGUISHMENT OF RIGHT OF REDEMPTION

Vaishali Goyal

Redemption is the act of buying back the property after tendering the amount due to the creditor. In a transaction of mortgage, the mortgagor has the right to redeem his property after paying off the debt amount. The right of redemption is statutory and inalienable, meaning thereby, that it cannot be taken away by the provisions of the contract. Section 60 of the Transfer of Property Act, 1882 (*hereinafter*, 'TPA') confers the right of redemption on the mortgagee. It lays down that after the principal money becomes due, the mortgagor can tender the money and require the mortgagee to deliver the possession of the property or the deed/documents to him. The proviso to section 60 puts a restriction on the exercise of this right. It can only be exercised till the time it is not extinguished by the act of the parties or by decree of a court.

The Hon'ble Supreme Court of India recently pronounced a judgment on the extinguishment of this right of redemption in *Allokam Peddabbayya & Ors. v. Allahabad Bank & Ors.*[42] it was laid down categorically that right to redemption exists only till the time sale of the mortgaged property has been confirmed. Once the sale is confirmed, the right to redeem is lost within the meaning of the proviso.

The facts of the case were that the mortgagor had created an equitable mortgage of their property in favour of the Allahabad Bank by deposit of title deeds in 1979. The bank had instituted proceedings for sale of the mortgaged property and it was sold to the Respondents. The Respondents executed the decree and were put in possession in 1997. Meanwhile, the original mortgagor had sold the property to the Appellants in 1985. Before the execution of the decree, the Appellant brought suit asserting their possession and seeking permanent injunction restraining defendant from interfering with their peaceful possession of the property. They did not ask for redeeming the property or to set aside the sale. It was after execution in 1997 that they brought a suit under Order XXXIV Rule 1 of the Code of Civil Procedure (hereinafter referred to as 'the CPC').

It was contended that the Appellants had purchased the property and by virtue of Order XXXIV Rule 1, CPC, they were necessarily to be impleaded as party defendants before institution of the suit for foreclosure by the Bank or sale of the mortgaged property. Because the same was not done, the decree was not binding on them and did not affect their right to redemption. They also relied on section 91 of TPA which gives right to persons other than the mortgagor to redeem the mortgaged property.

The Supreme Court recognized the interest of the Appellants in the mortgaged property as per section 91 and held them to be competent to bring a suit for redemption. However, in light of the facts of the case, the court denied the right of redemption to the Appellants. It held that the conduct of the Plaintiffs amounted to a waiver of their right. The court concluded that the Appellants preferred a suit seeking permanent injunction against any interference by the auction-purchaser. All the facts regarding mortgage, foreclosure suit, and consequent sale were disclosed by the Respondents. Despite this, they did not take any steps for redeeming the property or setting aside the sale. Action for redemption was taken after the sale was confirmed in favour of the Respondents, when the right to redeem had become irrelevant. In words of the court :

"The right to enforce a claim for equity of redemption is a statutory right under the Act. It necessarily presupposes the existence of a mortgage. The right to redeem can stand extinguished either by the act of the parties or by operation of the law in the form of a Decree of the Court under the proviso to Section 60 of the Act."

Thus, the law emerges to be that actions to redeem property and to claim it back should be such that a clear intention is evinced to protect the property. Court does not entertain claims of those who appear to be sleeping on their rights and approach it at their own sweet will.[43]

With respect to the query that whether the right to redemption gets extinguished on passing of decree or

42 MANU/SC/0700/2017.

43 Rukmini Amma & Ors. v. Rajeswary (2013) 9 SCC 121.

its execution, the court relied on following paragraph in *L.K. Trust v. EDC Ltd*.[44]:

"…What is held by this Court is that, in India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished but the conferment of power to sell the mortgaged property without intervention of the court, in a mortgage deed, in itself, will not deprive the mortgagor of his right of redemption…"

Furthermore, for availing right of redemption after decree for sale of mortgaged property has been passed, it is not enough that a suit for redemption is filed, it is necessary that objection is raised against the decree or sale certificate.[45] It has been observed as follows in *Embassy Hotels Pvt. Ltd. vs. Gajaraj & Co. & ors.*[46]:

"15....In such circumstances, in our considered view, the only option was to directly challenge the court auction of the suit property and the issuance of sale certificate…it is not possible to accept the contention on behalf of the plaintiff that the first defendant being a mortgagor will continue to have a right of redemption although the sale of mortgaged property to a third party through a court auction became final."

Therefore, based on the aforesaid discussion it becomes clear that the right to redemption is not an absolute right. It is extinguishable in terms of section 60 of the TPA. As pointed out in the aforesaid judgment, the right gets extinguished if the sale is confirmed. The mortgagor can still redeem before the confirmation of the sale, but once it is confirmed and he raises no objection to the validity of the sale, the right to redeem gets extinguished. The courts provide no relief to the person who has been sleeping on his right before and did not claim the same even after being provided opportunity. Nevertheless, it is an important right and given utmost superiority by the courts. It is based on the principle 'once a mortgage, always a mortgage' and imbibes that a person is not deprived of his property if he is willing to make good his dues. The right to redemption is an incident of a subsisting mortgage and is inseparable from it such that the right is co-extensive with the mortgage itself.

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44 (2011) 6 SCC 780.

45 Rukmini Amma, supra note 2; Mrutunjay Pani & Anr. v. Naramada Bala Sasmal & Anr., AIR 1961 SC 1353.

46 (2015) 14 SCC 316.

NOTES

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