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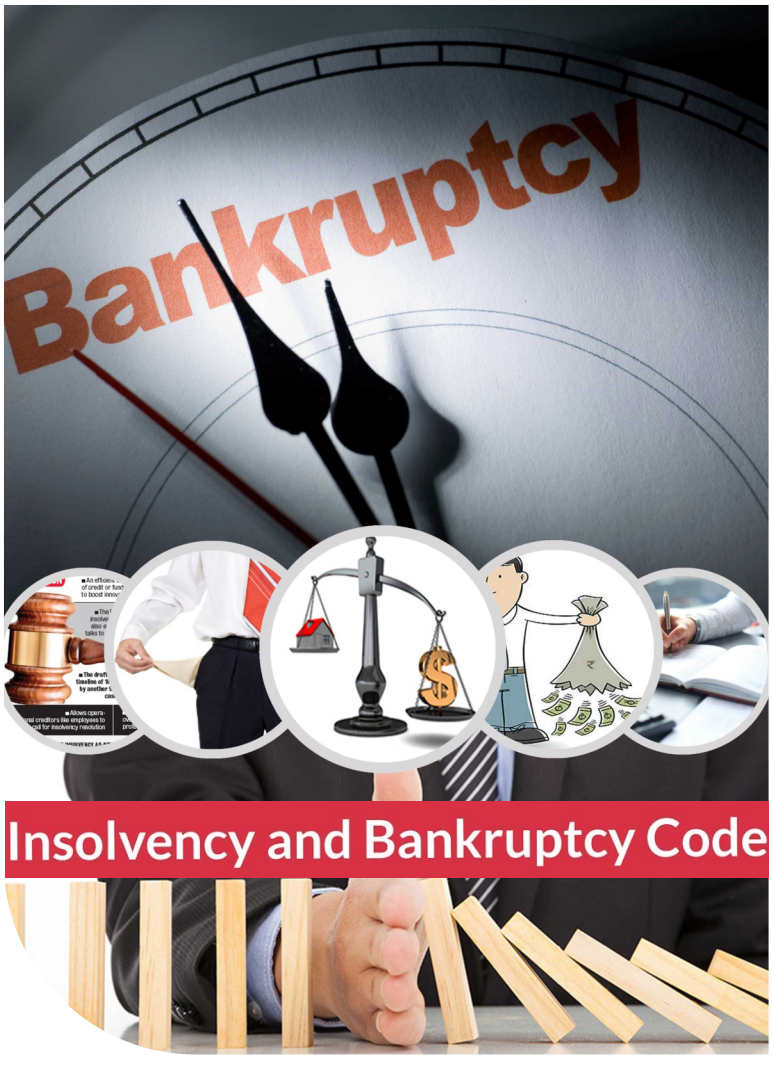

EDITORIAL

Manoj K. Singh
Founding Partner

Dear Friends,

We are pleased to present November 2018 edition of our monthly newsletter "Indian Legal Impetus". In this edition we have covered recent developments, case laws and issues relating to various discipline of laws in India.

Starting with an article covering case analysis of *State Bank of India V. Ramakrishnan and Ors.* which clarifies the issue relating to applicability of moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 on the personal guarantor. The Hon'ble Supreme Court has given much needed clarity as to the application of period of moratorium on surety of corporate debtor in corporate insolvency resolution process.

Further, our next article is an analysis of a recent Judgement of the Hon'ble Supreme Court in *Rajasthan Cylinders Containers Ltd. vs. Union of India & Ors.* relating to Competition Act, 2002 which explain that Parallel Pricing by Itself Cannot be Construed as Collusive Bidding in competition as in the given case the Hon'ble Supreme Court had observed that while analyzing anti-competitive practices and price parallelism, the market type and conditions are important factors which need to be taken into consideration and not only concerted practice.

The issue relating to submission of additional evidence at a belated stage in Arbitral Proceedings has been explained in our next article. By referring various case laws it has been summarized that the Arbitrator is free to call for additional evidence at a belated stage of the arbitral proceedings as long as it does not cause prejudice to the other party.

In the next Article the applicability of Limitation Act on the filing of applications under the Insolvency & Bankruptcy Code, 2016 has been discussed. It has been seen that different Benches of National Company Law Tribunal had contrary views on the issue of applicability of the Limitation Act to the proceedings under the Code. However, in the recent judgments of the Hon'ble Supreme Court it has now been clear that Limitation Act is applicable from the inception of the Code i.e. December 01, 2016 and thus if any default has been occurred over three years prior to the date of filing of the application, such application would be barred under Section 137 of the Limitation Act.

Moving forward we have included an article on a recent case analysis of *Vedanta Ltd. vs. Shenzen Shandong Nuclear Power Construction Co. Ltd.* wherein it has been decided that dual rate of interest is not allowed in Arbitral Awards.

Another article lays emphasis on the leniency provisions under the Competition Act, 2002 and explains how the exemptions and benefits of the leniency regime under the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 can be claimed by corporates as well as individuals.

Lastly, a comprehensive study on the remedies and penalties under the Environmental Protection Laws in India has been enumerated in our last article. In this article it has been analyzed that there several legislations trying to deal with the menace of environment degradation which led to a situation of confusion and difficulty in enforcement, therefore, there is a need for a strong integrated legislation that can provide a much clearer and integrated approach in dealing with cases relating to environmental protection in India.

I hope that our esteemed readers find this information useful and it also enables them to understand and interpret the recent legal developments. I welcome all kinds of suggestions, opinion, queries or comments from all our readers. You can also send in your valuable insights and thoughts at newsletter@singhassociates.in

Thank you.

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CASE ANALYSIS TO CLARIFY THE APPLICABILITY OF MORATORIUM ON PERSONAL GUARANTOR UNDER SECTION 14 OF THE INSOLVENCY AND BANKRUPTCY CODE

Parth Rawal

The case analysis of State Bank of India V. Ramakrishnan and Ors. (Decision by Hon'ble Supreme Court of India in Civil Appeal No. 3595 and 4553 of 2018 on 14.08.2018[1]) reveal the clarity on the issue relating to applicability of moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"/"**Code**") on the personal guarantor.

FACTS OF THE CASE

In February 2014, M/s. Veesons Energy Systems Private Limited ("Corporate Debtor"/ "Company") availed credit facilities from State Bank of India ("Financial Creditor"/ "Bank"). Mr. V Ramakrishna, the managing director of the company signed a personal guarantee in favor of State Bank of India. As the company did not pay its debts, the assets of the company were classified as non-performing assets on July 26, 2015. The bank initiated proceedings under The Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("**SARFAESI Act"**) and issued notice under section 13(2) of the SARFESI Act, demanding the outstanding amount from the company and the personal guarantor. As the outstanding amount was not paid within statutory period of 60 days, the Bank issued a possession notice on November 18, 2016, thereby, taking symbolic possession of the secured assets of the company.

On May 20, 2017, the company filed an application under section 10 of the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal ("**NCLT"/ "Tribunal**") initiating corporate insolvency resolution process against itself. The Tribunal admitted the application and passed an order of Moratorium under section 14 of the IBC. Even after declaration of moratorium, the bank proceeded against property of personal guarantor under SARFAESI Act and issued a sale notice on July 12, 2017. Being aggrieved, the personal guarantor approached NCLT for stay of proceeding under SARFAESI Act. The Tribunal by its order dated September 18, 2018, prohibited the Bank from proceeding against the property of personal guarantor during moratorium period. An appeal was filed by the Bank before the National Company Law Appellate Tribunal ("**NCLAT**"), whereby the NCLAT relying upon section 60 and section 31 of the Code, held that moratorium under section 14 will apply to personal guarantor as well.[2]

The said decision was challenged before the Hon'ble Supreme Court of India by the State Bank of India on the ground that the moratorium period envisaged under section 14 is applicable only to corporate debtor and the Bank can henceforth proceed against the property of personal guarantor.

ISSUES INVOLVED

Whether the period of moratorium under section 14 of Insolvency and Bankruptcy Code is applicable to Personal Guarantor?

DECISION

The Hon'ble Supreme Court first took note of the fact that different provisions of Insolvency and Bankruptcy code were brought into effect on different dates and some of the provisions were not yet brought into force on the date of the judgment. The Apex Court then proceeded to make observations on relevant sections. Section 14 of the Code authorizes adjudicating authority to pass an order of moratorium during which there is prohibition on institution of suits or continuation of pending suits against corporate debtor, transfer of property of corporate debtor or any action to foreclose or enforce any security interest. Section 96 and 101 of the Code provide for separate provision for moratorium for personal guarantor, however, these provisions have not been brought into force. In light of this, the Apex Court opined that section 14 of the Code cannot apply to personal guarantor. The Hon'ble Court also highlighted the different view of Allahabad High Court in *Sanjeev Shriya v. State Bank of India*, where the

1 *State Bank of India vs. V. Ramakrishnan and Ors. (14.08.2018 - SC)*

2 *State Bank of India vs. V. Ramakrishnan and Ors. (510/IB/CB/ 2017)*

Allahabad High Court had held that when Corporate Insolvency Resolution Process ("**CIRP**") is going on against the corporate debtor, then the debt owed by the corporate debtor is not final till the resolution plan is approved, and thus, the liability of the surety would also be unclear. Hence, till the time the liability of corporate debtor is not crystallized, the guarantor's liability is not triggered. The Supreme Court while overruling these judgments concluded that in a contract of guarantee, the liability of surety and that of principal debtor is coextensive and hence, the creditor can proceed against assets of either the principal debtor, or the surety, or both, in no particular sequence. The Apex Court also took note of report of Insolvency Law Committee dated 26.03.2018 which clarified that the period of moratorium under section 14 is not applicable to personal guarantors. The court also took into consideration the Amendment Ordinance dated 06.06.2018, which amended the provision of section 14. The proviso to amended section 14 clearly states that the moratorium period envisaged in section 14 is not applicable to personal guarantor to a corporate debtor. Hence, as the provisions of section 96 and 101 have not been brought into force, the personal guarantor is not entitled to moratorium period under the Insolvency and Bankruptcy Code.[3]

CONCLUSION

The aforesaid finding of the Hon'ble Supreme Court has given much needed clarity as to the application of period of moratorium to surety of corporate debtor. If there is stay on proceedings against assets of personal guarantor during corporate insolvency resolution proceeding, then the surety may file frivolous application to safeguard their assets. The apex court has remedied this situation by clarifying that Section 14 does not intend to bar actions against assets of guarantors and that the amendment in this regards is applicable retrospectively from June 6, 2018.[4]

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3 *Prsindia.org. (2018). PRS | Bill Track | The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018. [online] Available at: http://www.prsindia.org/billtrack/the-insolvency-and-bankruptcy-code-amendment-ordinance-2018-5263/ [Accessed 30 Aug. 2018].*

4 *Supra n1*

PARALLEL PRICING BY ITSELF CANNOT BE CONSTRUED AS COLLUSIVE BIDDING: SUPREME COURT

Divya Harchandani

INTRODUCTION

The Supreme Court, in a recent judgment in *Rajasthan Cylinders Containers Ltd. vs. Union of India & Ors.* on October 01, 2018, set aside the order passed by Competition Appellate Tribunal (COMPAT) wherein the Appellants/Suppliers of Liquefied Petroleum Gas (LPG) Cylinders were penalized for indulging in cartelization, thereby influencing and rigging prices in violation of Section 3(3)(d) of the Competition Act, 2002 (the Act). The Appellants are manufacturers of 14.2 kg LPG cylinders, which are required by only three oil companies in India i.e. Indian Oil Corporation Ltd. (IOCL) being the leading market player with 48% market share along with Bharat Petroleum Corporation Ltd. (BPCL) and Hindustan Petroleum Corporation Ltd. (HPCL). The suo-moto proceedings in the matter were started by the Competition Commission of India (CCI) after receiving complaints about unfair conditions in a tender floated by IOCL for supply of 10.5 lakh 14.2 kg LPG cylinders. The CCI instructed investigation by the Director General (D.G.) and subsequently CCI and COMPAT both held the suppliers guilty of collusive bidding. While allowing the appeal of the suppliers, the Apex Court observed that the market type and conditions are important factors which need to taken into consideration while analyzing anti-competitive practices and price parallelism, and strong evidence cannot, by itself, be identified as concerted practice.

GROUNDS TAKEN AGAINST THE SUPPLIERS IN THE IMPUGNED ORDER BY CCI

- **Identical Rates**

  The D.G. observed that the contract was awarded to a set of bidders with identical rates and that there was a common pattern of quotation depending upon the state, with highest rates in North East.

- **LPG Cylinders Manufacturers Association**

  It was also found that LPG Cylinder manufacturers had formed an association in the name of LPG Cylinders Manufacturers Association and the members interacted through this Association. The date for submitting the bids in the tender floated by IOCL was March 03, 2010 and in the two days prior - on March 01, 2010 and March 02, 2010 - meetings were held at Hotel Sahara Star in Mumbai for members of this association and 19 parties took part and discussed the tender.

- **Entry Barrier**

  The D.G. also stated that this behavior created an entry barrier and there were no accrual benefits to consumers. The D.G. concluded that there existed cartel like behavior on part of the bidders.

- **Other Factors taken into consideration**

  After considering these observations and submissions of the suppliers, CCI answered the issue against the Cylinder Manufacturers and inflicted penalties on the present appellants while taking into account various factors such as few new entrants, identical products, few or no substitutes, appointing of common agents, identical bids despite varying cost, active trade association, etc which collectively suggested collusive bidding.

Based on these admitted grounds, COMPAT also upheld the order of CCI and observed that as per Section 3 of the Act once agreement is proved there is a presumption about its appreciable adverse effect on competition and the onus shifts on the other side to prove otherwise.

PROPOSITIONS OF THE APPELLANTS BEFORE THE APEX COURT

- **Inherent Nature of the market of Cylinder Manufacturers**

The Act prohibits anti-competitive practices which implies that there has to be a competition in the market in the first place. However, in the present case there is no such competition. The market is an oligopsony market with extremely limited number of buyers and in the present case a sole buyer i.e. IOCL controls 48% of the market. IOCL thus, has tight control and regulation over the market, leaving hardly any scope of competition at the threshold. The counsel for the Appellants also placed reliance on a recent judgment of this Apex Court in *Excel Crop Care Limited vs. Competition Commission of India and Anr.* [(2017) 8 SCC 47] to state that price parallelism is inevitable in an oligopoly/oligopsony market where the limited number of sellers/buyers have high degree of control on price, quantity and even identities of awardees at its discretion. Thus, the very nature of the industry cannot be used as a factor to presume collusion.

- **No collusive agreement**

  The Appellants also contended that the factum of meetings of an association before submitting of bids by itself cannot lead to conclusion of collusion and stated that the said approach is contrary to the fundamental right to form an association under Article 19 (1)(c)(g) of the Constitution. It was further contended that the meetings on 1st and 2nd March 2010 were hosted by individual members and the expenses for the same were not shared by all members who attended it. Further out of 45 members of the association only 12 persons representing 19 parties had attended those meetings.

- **No appreciable adverse effect on competition**

  It was contended that in an oligopoly industry, the identical quoting of price does not by itself lead to the conclusion of a concerted price. Moreover, in the instant case, number of new entrants had increased as 12 new entrants submitted their bid for the year 2010-11, thus the finding of CCI that there were barriers to new entrants was baseless.

DECISION OF THE APEX COURT

The Apex Court relied on the parameters laid down in the *Excel Crop Care* judgment which states that in an oligopoly situation parallel behavior may not, by itself, amount to a concerted practice. The Hon'ble Court further discussed the theory of oligopolistic market in detail and observed that in such a market, rivals are interdependent; they are aware of each other's presence and are bound to match one another's marketing strategy. As a result, price competition between them will be minimal or non-existent. It was thus concluded, that inferences drawn by CCI were duly rebutted by the appellant/suppliers of LPG cylinders and the appellants have been able to discharge the onus shifted upon them.

***

PRODUCTION OF EVIDENCE AT A BELATED STAGE IN ARBITRAL PROCEEDINGS

Divya Kashyap

INTRODUCTION

Arbitration in India is governed by the Arbitration & Conciliation Act, 1996 (the "**Act**"). In any arbitral proceeding, the parties are free to appoint arbitrator(s) of their own choice. However, the arbitrators so appointed cannot act as agents of parties as this would give rise to justifiable doubts as to their independence or impartiality. The arbitrators so appointed have to adopt a judicial approach in deciding the dispute between the parties. In *Soceite Aninmina Lucchesse Oil Vs. Gorakhram Gokalchand* [1], the Madras High Court has held that the Arbitrators are bound to come together and act judicially, conforming to principles of natural justice. They must not merely act judicially, but should not consider themselves as the agents or advocates of the party who appoints them. Once nominated, they ought to perform their duty of deciding impartially between parties.[2]

WHETHER ARBITRATORS ARE BOUND BY RULES OF EVIDENCE WHILE CONDUCTING ARBITRAL PROCEEDINGS?

The Arbitrators are the masters of their own procedure and may conduct arbitral proceedings in a manner they consider appropriate. It is a settled law that arbitrators are not bound by the technical rules of evidence as observed by the courts.[3] Section 19 of the Act clearly states that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908, or the Indian Evidence Act, 1872. The power of Arbitral Tribunal to conduct arbitral proceedings includes the power to determine the admissibility, relevance, materiality and weight of any evidence.[4] Thus, the relevancy or admissibility of a particular fact is to be decided by the Arbitral Tribunal as per its own good sense, and reference to the statutory provisions are not necessary.

However, this does not imply that the arbitrators are not bound by rules of evidence and fundamental principles of natural justice. In *Hindustan Shipyard Limited Vs. Essar Oil Limited and Ors.* [5], the Andhra Pradesh High Court has categorically stated that parties are free to agree on the procedure to be followed by the Arbitral Tribunal. When such procedure is not fixed, the Arbitral Tribunal has to follow the statutory procedure; it means it has to weigh the entire evidence on record properly and that it has to come to a just conclusion within the parameters of the dispute. It has been held that 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.[6] It has been further held that parties, by consent, may adopt their own procedure for conducting arbitration. An Arbitral Tribunal is not a Court. Any lacuna in procedure does not vitiate the Award, unless it is in breach of principle of natural justice, equity or fair play for the aggrieved parties.[7] It has been reiterated by the Bombay High Court in *Vinayak Vishnu Sahasrabudhe v. B.G. Gadre and Ors.* [8] that though the Arbitration Act does not provide for the procedure to be followed by the arbitrators, even so, the Arbitrators are bound to apply the principles of natural justice.

CAN ARBITRATOR ALLOW PRODUCTION OF ADDITIONAL EVIDENCE AT A LATER STAGE OF PROCEEDINGS?

Considering that the arbitrator is the sole judge of quantity and quality of evidence, the next question to be discussed is whether the arbitrator can allow additional evidence to be submitted at a later stage of the arbitration. Whether a particular document is

1 *AIR 1964 Mad 532*
2 *Id., at para 15.*
3 *NPCC Limited Vs. Jyothi Sarup Mittal Engineers, Contractors and Builders 2007 (93) DRJ 379 at para 20*
4 *Section 19(4) of the Arbitration & Conciliation Act, 1996*
5 *2005 (1) ALT 264*
6 *Sahyadri Earthmovers Vs. L and T Finance Limited and Ors. (2011) 4 MhLJ 200 At para 7*
7 *Id. At para 9*
8 *AIR 1959 Bom 39*

material document or not and whether the arbitrator should call for its production is essentially a matter for the arbitrator to decide, and whatever decision is taken by the arbitrator is binding upon the parties.[9] As per the Code of Civil Procedure, 1908[10], a document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of Court, be received in evidence on his behalf at the hearing of the suit. Thus, no additional evidence can be presented at such a stage where substantial part of the proceedings have already been conducted. In *Polyflor Limited Vs. A.N. Goenka and Ors.*[11], the Delhi High Court has stated- "*To grant leave to and permit the plaintiff to file and lead in evidence additional documents at this stage would mean that the defendants would be put to serious prejudice. The defendants have not had the occasion to deal with the said documents. Had the documents now sought to be produced, been produced at the relevant time, i.e. at the stage of filing of the suit, or at least at the time when the issues were framed, the defendants would have had the occasion to deal with the same by making appropriate pleadings and filing their own documents to counter the reliance placed by the plaintiff on the documents in question.*" The above observation makes it clear that allowing the plaintiff to produce additional documents, which were not produced earlier, at a later stage of the proceedings, would cast a prejudice on the defendant. If there is no justifiable reason for not filing the said documents at an earlier stage of proceedings, it indicates the casual approach of the party doing so and the progress of the case cannot be stopped on this account. Hence, if the issues have been framed and the evidence of the petitioner has already commenced, the belated filing of the documents as evidence would prejudice the Respondent.[12]

To conclude, a plaintiff does not have a legally vested right to file documents at a belated stage of proceedings. The provision under Order 7 Rule 14 (3) gives a discretionary power to the Court, which needless to say has to be exercised in a reasonable and legal manner. In fact, this power has to be exercised sparingly and for some overpowering reason and not as a matter of routine.[13]

Similar principles have been extended to arbitral proceedings as well. Even in case where an arbitrator passes a non-speaking order, principles of natural justice are required to be observed. The meaning of application of principles of natural justice in this context has been explained by the Supreme Court of India in *Bareilly Electricity Supply Co. Ltd. v. The Workmen and Ors.*[14]. In paragraph 21 it has been held as under:

. ...But the application of principles of natural justice does not imply that what is not evidence can be acted upon. On the other hand, what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal the question that naturally arises is, is it a genuine document, what are its contents and are the statements contained therein true.

Thus, the admission of documents which are not proved in spite of serious objections from the other party implies a non-application of mind and such an award deserves to be set aside on this ground.[15] If the Arbitrator allows inadmissible evidence though objected to and takes it into consideration in framing the award and is presumably misled by it, there is patent error of law on the face of the award. It has been held by the Division Bench of Allahabad High Court in the case of *Banwari Lal vs. Jagannath Prasad and Anr.*[16] in paragraph 6 as under:

"6. It is a well-established principle of law that an arbitrator ought not to hear or receive evidence from one side in the absence of the other side without giving the side affected by such evidence, the opportunity of meeting and answering it."

In *Pradyuman Kumar Sharma and Ors. Vs. Jaysagar M. Sancheti and Ors.*[17], the Bombay High Court has clearly

9 *Bachawat's Law of Arbitration & Conciliation 6th Ed. Volume1 Page 1419*

10 *Order 7, Rule 14 (3)*

11 *MANU/DE/0943/2016*

12 *Shri Ramanand Vs. Delhi Development Authority & Anr. 2016 SCC Online Del 4925 at para 11*

13 *Haldiram (India) Pvt. Ltd. Vs. Haldiram Bhujiawala (2009) ILR 5 Delhi 503 at para 21*

14 *AIR 1972 SC 330*

15 *Biwater Penstocks Ltd. Vs. Municipal Corporation of Greater Bombay and Ors. 2011 (1) ARBLR 278 (Bom) at para 14*

16 *AIR 1958 All 717*

17 *2013 (5) MhLJ 86*

laid down the law in regard to admissibility of additional evidence in paragraph 32 as under:

"32**……In my view, though arbitrator is not bound by the provisions of Code of Civil Procedure or Evidence Act, principles of Evidence Act and Code of Civil Procedure are applicable even to arbitration proceedings.* ***A document which is disputed by a party and if not proved, cannot be considered even by the arbitrator to be on record or as a piece of evidence. Taking into consideration an unproved document by an arbitrator, on the contrary would be in violation of principles of natural justice. *In my view, arbitrator was not bound to refer the alleged document to an expert witness suo moto."*

In Russell on Awards (7th Edition page 191), the proposition is put thus - Neither side can be allowed to use any means or influencing his (the arbitrator's) mind, which are not known to, and capable of being met and resisted by the other. As much as possible the arbitrator should decline to receive private communications from either litigant respecting the subject matter of the reference.[18]

Thus, an award cannot be vitiated on the ground that the Arbitrator refused to take evidence into consideration on account of belated filing of the same. Merely because another Arbitrator may have permitted a party to produce a document even at the later stages of arguments, and may have thereafter permitted the opposite party to deal with the same, is no ground to conclude that the refusal of the Arbitrator to adopt that course of action vitiates the award.[19] It is upon the discretion of the Arbitral Tribunal to permit the party to rely on certain additional evidence as long as the other party is not prejudiced by such late production. If after production of such additional documents, the other party has full opportunity to contest the veracity and evidentiary value of the documents, there will be no infirmity with the procedure adopted by the Arbitral Tribunal as decided by the Delhi High Court in *Glencore International AG vs. Dalmia Cement (Bharat) Limited.* [20]

CONCLUSION

The power to decide the relevancy and admissibility of evidence is the sole jurisdiction of the Arbitrator. The Arbitrator is the judge of the quality and quantity of evidence that is produced by the parties. By virtue of this power, an arbitrator can call for additional evidence too, if it will be helpful for him to decide upon the dispute. But the exercise of this power has to be circumscribed within the fundamental principles of natural justice. It must be exercised cautiously and for some legitimate cause and not as a matter of routine. As stated by the Delhi High Court[21], you cannot win battles by springing surprises. It means that the Arbitrator is free to call for additional evidence at a belated stage of the arbitral proceedings as long as it does not cause prejudice to the other party. It would be unfair if parties are permitted to plead and proof at variance. If permission to lead evidence is ordinarily allowed, it will be impossible to conclude the hearing of any arbitral proceedings.

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18 *Supra*, Note 15

19 *Public Works Department Vs. Navayuga Engineering Co Ltd. and Ors. MANU/DE/0831/2014 at para 44*

20 *2017 (4) ARB LR 228*

21 *Delhi Development Authority Vs. Krishna Construction Co. 183 (2011) DLT 331 (DB) at para 19*

APPLICATION OF LIMITATION ACT ON BANKRUPTCY CODE

Vijay K Singh

The Insolvency & Bankruptcy Code was enacted in the year 2016. Since then there have been divergent views regarding the application of the Limitation Act, 1963, to the proceedings under the Insolvency & Bankruptcy Code, 2016 (Code). The provisions of the Code are used by the financial creditors as a tool to claim their debts. The creditors invoke the provisions of Code by filing application to initiate Corporate Insolvency Resolution Process (CIRP), even if the claims are more than three years old i.e. after the period of limitation has elapsed to recover the said debt by approaching a Civil Court. The Code did not provide (prior to 6.6.2018) that the provisions of the Limitation Act will be applicable on the proceedings under the Code.

Different Benches of National Company Law Tribunal (NCLT) have divergent views on the issue of applicability of the Limitation Act to the proceedings under the Code. In the case titled *M/s Deem Roll-Tech Limited vs. R.L. Steel and Energy Limited* and *Sanjay Bagrodia vs. Satyam Green Power Limited*, the NCLT was of the view that the period of limitation will be applicable to the proceedings under the Code. However, in a subsequent judgment titled *Machhar Polymer Ltd. vs. Sabre Helmets Pvt. Ltd.*, the Tribunal was of the view that the Limitation Act would not be applicable to the proceedings under the Code. In the case of *Neelkanth Township & Construction Pvt. Ltd. vs. Urban Infrastructure Trustees Limited*, the National Company Law Appellate Tribunal (NCLAT), after considering the provisions of the Limitation Act and the Code, held that in the absence of any specific provisions in the Code, the Limitation Act would not be applicable to initiate Corporate Insolvency Resolution Process. The Appellate Tribunal was of the view that the object of the Code is related to commencement of Corporate Insolvency Resolution Process and not for recovery of money. Thus, the judgment passed by the Appellate Tribunal in *Neelkanth Township* case (supra), allows a party to commence Corporate Insolvency Resolution Process based on even time-barred debts which could not have been recovered due to expiry of stipulated period of limitation. Section 433 of the Companies Act, 2013, provides that Limitation Act is applicable to the proceedings before NCLT and NCLAT. In another judgment rendered by the Appellate Tribunal, in the case titled *Speculum Plast Pvt. Ltd. vs. PTC Technologies Pvt. Ltd.*, wherein the Appellate Tribunal was pleased to hold that Limitation Act is not applicable for initiation of Corporate Insolvency Resolution Process. The Appellate Tribunal held that the doctrine of limitation and prescription is necessary to be looked into for determining the question whether the application under Section 7 or Section 9 of the Code can be entertained after long delays amounting to latches and thereby the person forfeited his claim. The Appellate Tribunal held that if an application under Section 7 or Section 9 of the Code has been filed after long delay, the Adjudicating Authority may give opportunity to the applicant to explain the delay to find out whether there are latches on the part of the applicant. However, the said judgment in the *Speculum* case (supra) had been stayed by the Hon'ble Supreme Court.

Due to confusion with regard to the applicability of Limitation Act, Insolvency Law Committee, deliberated on the above issue and agreed that the intent of the Code is not to give a time barred debt a new lease of life and recommended that a particular provision should be inserted in the Code about the application of Limitation Act to the Code. Thereafter, to rest the controversy, Section 238-A was inserted by the Insolvency & Bankruptcy Code (Second Amendment) Act, 2018, with effect from 06/06/2018 which reads as hereunder:

*"238-A. **Limitation** – The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the provisions or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.*

Section 238-A of the Code provides that the provisions of Limitation Act, 1963, shall apply to the proceedings for appeal before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal.

The Hon'ble Supreme Court in the case titled "*B.K. Educational Services Pvt. Ltd. vs. Parag Gupta & Associates*" (Civil Appeal No. 23988 of 2017) considered as to whether the provisions of Limitation Act would apply in the proceedings under Section 7 or Section 9 of the Code filed during the period from 01/12/2016 (from the commencement of the Code) till 06/06/2018 (when Section 238-A was inserted in the Code).

The Hon'ble Supreme Court held that the provisions of Limitation Act would apply to the proceedings under Section 7 or Section 9 of the Code filed during the period 01/12/2016 till 06/06/2018. Thus, after the pronouncement of the judgment in *B.K. Educational* case, a creditor cannot invoke the provisions of the Code for initiating CIRP based on a time-barred debt. The Hon'ble Supreme Court held that Limitation Act is applicable from the inception of the Code i.e. December 01, 2016. Thus, the right to sue accrues when a default occurs. When the default has occurred over three years prior to the date of filing of the application, the application would be barred under Section 137 of the Limitation Act, save and except, in those cases, where Section 5 of the Limitation Act may be invoked for condoning the delay in filing such application.

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DUAL RATE OF INTEREST NOT ALLOWED IN ARBITRAL AWARDS

Nikhil Kr. Singh

INTRODUCTION AND FACTS OF THE CASE

In the recent case of *Vedanta Ltd. vs. Shenzen Shandong Nuclear Power Construction Co. Ltd.* judgment passed on October 10, 2018[1], the Hon'ble Supreme Court faced a peculiar issue of dual interest rate imposed on the final arbitration award by an Arbitral Tribunal. On May 22, 2008, the present Appellant and Respondent entered into four interrelated contracts which were collectively called as "EPC Contract" for the construction of a 210-MW Co-Generation Power Plant.

The Appellant in the present case was an Indian company while the present Respondent was a company incorporated in People's Republic of China. All four contracts entered between the parties had an arbitration clause, where the governing laws for these contracts were the laws of India and the seat of arbitration was chosen as India. These contracts also had a termination clause where the purchaser was required to pay 105% of the cost incurred by the supplier till the date of termination while fulfilling its obligation under the contracts.

A dispute arose between the parties and led to the termination of these EPC Contracts by the present Respondent through a notice issued on 25.02.2011. The present Respondent demanded payments for the outstanding dues mentioned under the abovesaid notice. The Appellant failed to make the requested payment.

Subsequently, the present Respondent was forced to invoke the arbitration clause and a three-member arbitral tribunal was formed. The present Respondent raised various claims in multiple currencies against the present Appellant along with 18% interest rate for the period of *pendent lite*. In its response, the present Appellant refuted these claims and raised certain counter claims against the present Respondent during this arbitration proceeding.
The Tribunal passed its final award in the favour of the present Respondent allowing their claims partially. Surprisingly, the Tribunal also imposed two different rates of interest on the final award based on timeline of realization of the award by the present Respondent. In its award, the Tribunal imposed an interest rate of 9% from the date of institution of the arbitration proceeding till the date of actual realization of the award by the present Respondent. The Tribunal held that the amount decided in the award must be paid within 120 days from the date of passing of the award. In case, the present Appellant fails to reimburse the abovesaid amount within 120 days, then it will be liable to pay further interest at the rate of 15% till the date of realization of the complete award by the Respondent. The Tribunal, herein, adopted a dual interest rate approach while awarding the amount in favor of the present Respondent. The Arbitral Tribunal also refused to allow the counter claims of the present Appellant.

The present Appellant aggrieved by the final award of the Tribunal appealed before the Single Judge of Delhi High Court under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred as "**Act**"). The said appeal was rejected by the Delhi High Court. A further appeal under Section 37 of the Act was presented before the Division Bench of the same High Court, which was again dismissed by the Court. Hence, the Present Appellant was forced to approach the Supreme Court through a special leave petition.

DECISION OF THE APEX COURT

The Hon'ble Supreme Court commenced its decision by elaborating the definition of the term 'interest'. The court held that,

"*'Interest' is defined as "the return or compensation for the use or retention by one person for a sum of money belonging to or owned by any reason to another". In essence, an award of Interest compensates a party for its forgone return on investment, or for money withheld without a justifiable cause.*"
The court acknowledged the inconsistency and lack of uniformity in rate of interests awarded by the Tribunals in various arbitral proceedings around the globe. The court held that there is no consensus nor a common agreed method for the determination of rates of interest which are imposed on the final arbitral awards.

1 *Civil Appeal No. 10394 of 2018*

However, the Apex Court held that the arbitral tribunals must impose rates of interest as per the laws of the seat of the arbitration unless something contrary is agreed between the parties. The Hon'ble Court said that the present case is an international commercial arbitration seated in India and must be governed by the Act.
The Hon'ble Court then examined section 37 (1) of the Act which empowers the Arbitral Tribunal to impose interest rates on the awards passed by them unless something contrary has been agreed between the parties in advance.

31. Form and content of arbitral award:
….
(7)... (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. [(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent, higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

The Hon'ble Court established that section 31(7) of the Act has two parts. The sub section (a) deals with interest rate imposed by the Tribunal for the period of pre-reference and during pendent lite of the dispute. This power of the Tribunal shall be subject to any agreement between parties wherein they may agree in advance to prohibit this power of the Tribunal to impose interest for these periods during the dispute. The court emphasized on the phrase "*Unless otherwise agreed by the parties"* in the provision of the aforementioned sub-section while interpreting the sub-section.

However, the Hon'ble Court also noted that the second part of Section 31(7) i.e. clause (b) deals with interest rate imposed by the Tribunal for the post-award period. This period kicks off from the date of passing of the final award by the Tribunal and continues till the actual date of realization of this award. Interestingly, the Hon'ble Court noted that this particular sub-section lacks party autonomy and cannot be subjected to any prior agreement between the parties in this regard. The apex court also highlighted the absence of the phrase "*Unless otherwise agreed by the parties"* in this particular sub-section which is present in the preceding sub-section (a) of 37(1).

The Hon'ble Court categorically held that the power of an arbitrator to award interest in an arbitration proceeding must be exercised reasonably. The apex court held that:

"On the one hand, the rate of Interest must be compensatory as it is a form of reparation granted to the award-holder; while on the other it must not be punitive, unconscionable or usurious in nature."

The apex court held that the courts are within their power to reduce the rate of interest awarded by an arbitral tribunal when a) it notices that the rates are unreasonable or are not in accordance with the prevailing economic conditions or b) to promote the interest of justice.

The Hon'ble court held that the dual interest rate imposed on the award, especially the higher interest rate of 15% for the period after 120 days is unjustified and arbitrary. This higher rate of interest seriously impacts the rights of the award debtor to challenge this award under sec. 34 of the Act. The court also pointed out that there is no justification or reason provided by the Tribunal for imposing this higher rate of interest for post-120 days period.

Similarly, the apex court also found that the rate of 15% was exorbitantly high from an economic point of view having no co-relation to prevailing economic conditions. The Tribunal cannot impose an interest rate on the award debtor which is penal in nature and when his statutory right to challenge the award in a court of law is still subsisting with or even for the period later than that.

In the present case, the award was passed in two different currencies i.e. INR and Euro. The court held that a uniform rate of interest on different kinds of currencies in an award may result into absurd financial implications for the award debtor. Hence, a uniform rate of interest on two different kinds of currencies is also not justified. The court went on to apply LIBOR rate for the Euro components and the INR component remained undisturbed with 9% interest rate on the award till the realization of award.

ANALYSIS

Interest rate imposed on awards of an arbitration dispute is an issue which remains highly unregulated. In most instances, the Tribunal fails to provide a reasonable basis to the rates imposed by them to an award. Similarly, it becomes a herculean task to challenge the rate of interest of an award in court of law.

The apex court, in this judgment, has rightly identified this problem which plagues the current regime of arbitration. The court, through this judgment, has clearly signaled that the powers of the arbitral tribunal are not always absolute and unfettered while deciding the rate of interest to be imposed on the award. The Tribunals will henceforth inculcate a habit of bringing consistency, reasonableness and certainty in the decision-making process while imposing the rate of interest on awards.

This judgment will be particularly useful in cases of international commercial arbitral disputes where it involves various different kinds of currencies and it becomes impractical to impose a uniform rate of interest on these different kind of currencies during passing of an award. The introduction of LIBOR rate will provide consistency and economic viability to the award which is the dire need of the hour for international commercial arbitration.

Finally, this decision will serve as an impetus to make India an attractive destination for international commercial arbitration as it brought a cure to the inconsistency which the Indian Arbitration jurisprudence is marred with.

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COMPETITION VIOLATORS ESCAPE: LEAN ON LENIENCY REGIME

Pierre Uppal

INTRODUCTION

Cartels are agreements amongst market competitors which have significant adverse effect on competition. But without effective sanctions, it becomes very difficult to detect the existence of cartels as they are concerted actions and work in secrecy. The colluders might get an impression in the absence of strict penalties that the benefits associated with the cartelization outweigh the associated risks of penalties.

This is where the Leniency Regulations i.e. Competition Commission of India (Lesser Penalty) Regulations, 2009 under the Competition Act, 2002 came into play. The Competition Act, 2002 (hereinafter referred as the "**Act**"), which replaced the erstwhile Monopolies and Restrictive Trade Practices Act (under which the commission could only pass cease and desist orders), has given the Competition Commission of India ("**CCI**") the freedom to decide upon lesser penalties in case of disclosure of existence of cartel by a member under Section 46 of the Act. The Act has extended the benefits of such provisions to not just a corporation but to individuals as well with the amendments in the Leniency Regulations vide Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 which were notified in August 2017 (hereinafter referred as "**Amended Regulations**").

ESSENTIAL INGREDIENTS TO CLAIM RELAXATION UNDER THE LENIENCY REGIME

The protection provided under Section 46 of the Act is subject to the fulfillment of the following conditions:

1. The producer, seller, distributor, trader or service provider must have been part of the cartel.
2. It / He /She must have made a full disclosure.
3. Such disclosure shall be a true and vital disclosure.
4. The disclosure shall be before the report of investigation of the Director General ("**DG**") under Section 26 of the Act, or even where the matter is under investigation, without the disclosures made by the applicant, the Commission or the DG would not have been able to establish contravention due to insufficient evidence.
5. Such applicant must cease to be a further part of the cartel.

QUANTUM OF THE PENALTIES

The corresponding Regulations post-amendment, provide the benefit of such leniency on disclosure to not just the applicants with first, second or third priority status but also to such subsequent applicants fulfilling the requirements of disclosure under Section 46 of the Act. The quantum of such penalty post the Amended Regulations stand as follows:

1. The first applicant may still be granted up to 100% reduction in penalty;
2. The second applicant may enjoy a reduction up to 50 %; and
3. The third or any subsequent applicant may be granted relaxation in penalty up to 30%.

The addition of subsequent applicants within the ambit of the regulations to provide relaxation in quantum of penalty has helped in instilling confidence among enterprises and individuals to come out in open and blow the whistle against the contravention of Section 3 of the Act. Earlier, the enterprises used to shy away from furnishing self-incriminating evidence under the uncertainty of making it to the list of first three applicants and to fall outside the ambit of the Regulations. But the Amended Regulations has taken care of this apprehension and developed much more confidence in the minds of the offenders to come out in open.

RECENT VERDICTS ON THE LENIENCY REGIME

After coming into force of the Amended Regulations, the Competition Commission of India has been very proactive and passed various judgments and given the benefits of the provisions of the leniency regime to applicants. Some of the important judgments relevant to understand the issues are summarized herein below.

1. Brushless DC Fan case - the first in history of Competition laws

The CCI took suo moto cognizance under Section 19 of the Act of the bid rigging or collusive bidding of tenders floated by the Indian Railways for brushless DC fans. M/s. Pyramid Electronics, one of the contravening firms out of the three disclosed the modus operandi of the cartel to CCI and confirmed the existence of a cartel.

In the instant case, the cartel was proved with the help of scrutiny on communication and correspondences of the key personnel of the firms during and after the period of bidding of tenders and exchange of quotations between the firms for the purpose of upcoming tenders.

M/s. Pyramid Electronics was given the benefit of the leniency provisions under the Act and was granted reduction of 75% in the quantum of penalties after taking into account the cooperation provided to CCI and the stage at which the application was made.

2. Suo Moto Case No 02 of 2016

In the case of Re: Cartelisation in respect of zinc carbon dry cell batteries market in India, Panasonic was the first applicant to reveal the existence of cartel in the industry and hence was awarded a full reduction in penalty by the CCI marking a departure from the first leniency order of CCI. Panasonic was awarded with waiver of full penalty for providing continuous cooperation, making an application when there was no incriminating evidence available against the offenders in the industry of anti-competitive activities being committed. Nippo and Eveready which were also the members of Association of Indian Dry Cell Manufacturers (AIDCM), being the other parties to cartel were the subsequent applicants under the leniency regime and were granted some reduction in penalties. However, CCI observed that both of the subsequent applicants did not provide any "significant value addition" to the already incriminating evidence available. The reduction was granted to the subsequent applicants taking into consideration the corroborating evidence, admission of being a party to the cartel and the stage at which application was made.

3. Suo Moto Case No 50 of 2015

The case was filed on information filed by Nagrik Chetna Manch through its President against Fortified Security Solutions (hereinafter, 'OP-1'), Ecoman Enviro Solutions Pvt. Ltd. (hereinafter, 'OP-2'), and Pune Municipal Corporation (hereinafter, 'OP-3'). The parties were found to be involved in bid rigging/collusive bidding in contravention of Section 3(3) read with Section 3(1) of the act. On an investigation conducted by the DG, Lahs Green India Pvt. Ltd. (hereinafter, 'OP-4'), Sanjay Agencies (hereinafter, 'OP-5'), Mahalaxmi Steels (hereinafter, 'OP-6') and Raghunath Industry Pvt. Ltd. (hereinafter, 'OP-7') were included as Opposite Parties in the instant case.

The CCI granted a reduction in penalty of 50% to the OP4 and OP6. The order suffers because the Commission despite acknowledging the fact that the OP1(having the first marker status)supported the investigation and co-operated with the investigation/ inquiry throughout and disclosed the modus operandi of the cartel and provided evidence in its possession to the Commission. However, the Commission exercising its discretion held that there was no significant value addition made by the OP1. The subsequent applicants OP2 and OP5 were also granted a reduction of 25% and 40% respectively in the penalties payable by the Commission.

4. Suo Moto Case No 02 of 2013

The most recent decision of CCI which was delivered on 11.07.2018 came in the case of Globecast which had disclosed the existence of a cartel in the bid rigging arrangement with Essel Shyam Communication Limited (now Planetcast Media Services Limited) or ESCL in the broadcasting service industry and was thus granted the first applicant status in the case. ESCL on the other hand was also accorded the second priority status as it had filed its leniency application only after a prima facie opinion had been formed by the CCI on the information of Globecast. It was further held in the given case that collusion for even a single event is sufficient to establish contravention of provisions of

Section 3 and which party has derived a higher benefit becomes immaterial.

The CCI had granted a reduction in penalty of 100% to Globecast and its employees due to its "vital disclosure" in the form of exchange of correspondences, role of ex employees, exchange of commercially sensitive information which in turn helped CCI form a prima facie opinion and disclose the modus operandi of the cartel. On the other hand, even ESCL was granted 30% reduction in penalty due to its role in providing additional information such as non disclosure agreement between the parties and the correspondence exchanged.

CONCLUSION: STILL A LONG WAY AHEAD

Despite several orders being passed in the short span of time after enforcement of Amended Regulations and provision of leniency to contraveners of Section 3, there are still a lot of loopholes that continue to make leniency provisions less impactful. Regulation 4 of the Amended Regulations mentions in the provision the words "may" and "added value" which leaves it to the discretion of the CCI to decide upon how much reduction in penalty is to be provided to a contravener despite them/him being the first applicant in the matter, taking into account considerations like the quality of information disclosed and when the application was filed with the Commission. Equally, ambiguous is the term "added value" finding place in the same Regulation no. 4 of the Amended Regulations. What constitutes an added value is highly vague and ambiguous and falls upon the discretion of the CCI. For instance, in the Brushless DC fans case, despite M/s. Pyramids Electronics being the first priority applicant, it couldn't secure a 100% reduction in penalty.

Such ambiguity in provisions is significant enough to make the contraveners apprehensive and reluctant to blow the whistle and come out in open about the contravention which would ultimately defeat the purpose behind the leniency regulations. The proactive and aggressive role of the Commission has been playing to enforce a free competition market is highly appreciable but there is still a long way road ahead to give the intended effect to the leniency provisions in India.

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REMEDIES AVAILABLE UNDER INDIAN LEGAL FRAMEWORK VIS-À-VIS ENVIRONMENTAL PROTECTION: AN OVERVIEW

Rishab Khare & Arjun Patel

INTRODUCTION

In India, there are a plethora of legal provisions which seek to protect the environment from attacks from the human race. Along with the various Constitutional provisions, there are several legislative enactments passed by the Parliament of India in order to achieve the constitutional objective of ensuring a wholesome environment to the citizens of India. To name a few, they are Water (Prevention and Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981; Environment (Protection) Act, 1986. Also, there are several provisions under the Indian Penal Code, 1860, which highlight the penal provisions in case of injury sustained by any individual on account of environmental damage caused by any other individual. Also, there are ample remedies available under the common law vis-à-vis environmental protection such as nuisance, trespass, negligence and strict liability.

CONSTITUTIONAL PROVISIONS VIS-À-VIS ENVIRONMENTAL PROTECTION

The directive principles of State Policy and the chapter on fundamental duties explicitly enunciate the national commitment to protect and improve the environment. "It is now well settled judicial principle that right to pollution free environment is the fundamental right and human right of a citizen."[1] "The Supreme Court in its judicial pronouncements held that the "precautionary principle" and "polluter pay principle" is law of land.[2]"

Before the 42nd Amendment, the word 'environment' was not mentioned in the Indian Constitution. By this Amendment, Article 48-A was added in the directive principles of state policy and by Article 51-A, a new provision was inserted in the form of fundamental duty. According to Article 48-A "the State shall Endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country".

As per the sub-clause (g) of Art. 51-A, "It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures".

In *Rural Litigation and Entitlement Kendra v. State of UP*[3], the Hon'ble Supreme Court observed that protection of environment is not only a duty of the state under Article 48-A, but the citizens of India are also duty bound to protect the environment under Article 51-A (g) of the Constitution. Originally fundamental duty incorporated in the Constitution was not directly enforceable. However, with the passage of time and through judicial activism, necessary stimulus was provided to achieve the objective behind the incorporation of fundamental duty in the Constitution for the protection of environment. In *L. K. Koolwal v. State of Rajasthan and Ors*[4], the court explained the ambit of Article 51-A. It is true that it is the duty of the citizen to protect the environment under Article 51-A (g) of the Constitution but this Article also creates a right in the favour of the citizen to move to the court for the enforcement of the Article 51-A(g).

In *M.C.Mehta v. State of Orissa*[5] , court observed that there cannot be any right without the duty. So if there is insanitation in the environment it will severely affect the life of citizens and hence it is the violation of fundamental rights of citizens. Hence, it is the duty of the citizen to see that the rights which are provided to them under the constitution are fulfilled by the state.

In *AIIMS Students' Union v. AIIMS and Ors*[6], Supreme Court observed that even though fundamental duties are not enforceable by the court of law, it still gives important guidance for the interpretation of constitutional provisions for the protection of environment. Court also emphasised that fundamental

1 *Subhash Kumar v. State of Bihar, AIR 1990 SC 420*

2 *Vellore Citizens Welfare Forum v. Union of India (1996) 5 SCC 647 at 659-660.*

3 *AIR 1987 SC 359*

4 *AIR 1988 Raj 2.*

5 *AIR 1992 Ori 225*

6 *JT 2001 (8) SC 218*

duties should be given its full meaning as intended by the 42nd constitutional amendment. When the court is approached to give effect to directive principles of state policy and fundamental rights, it cannot run away from its responsibility by saying that priorities are a matter of policy.

Part III of the Constitution deals with Fundamental Rights. Herein, Article 21 deals with right to life. This right would be meaningless if there is no healthy environment for the citizens to live in. In *M.C. Mehta v. Union of India*[7] the Supreme Court held that the right to live in pollution- free environment is a part of fundamental right to life under Article-21 of the Constitution. In *Subhash Kumar v. State of Bihar*[8], Hon'ble Supreme court held that right to life under Article 21 includes the right to enjoyment of pollution free water and air. In *P.A. Jacob v. Superintendent of Police, Kottayam*[9], the court held that subjecting an unwilling person to disastrous levels of noise pollution would amount to infringement of fundamental right of an individual under Article 21 of the Constitution of India.

REMEDIES AVAILABLE UNDER COMMON LAW VIS-À-VIS ENVIRONMENTAL PROTECTION

A) NUISANCE

Nuisance is related to unlawful interference with one's enjoyment of land or any right arising from it, thereto. It may be categorized into Public Nuisance or Private Nuisance. As the name suggests, public nuisance deals with interference with a right pertaining to public. Whereas, private nuisance is interference with right which is exercised exclusively by a private entity or an individual. There are a few remedies available vis-à-vis public nuisance in Criminal Procedure Code, 1973. Section 91 of the Criminal Procedure Code, 1973 prescribes that a suit may be filed to obtain a suitable relief or injunction for any cause of action affecting or likely to affect public nuisance. Also, in Criminal Procedure Code, a magistrate is empowered to restrain any person from carrying out an act that may give effect to public nuisance.[10] In *Ramlal v. Mustafabad Oil and Oil Ginning Factory*[11], the Punjab and Haryana Court observed that once a noise is found to be above the necessary threshold to attract the liability of public nuisance, it is no valid defense to contend that such noise arose out of any legal activity. Apart from this, public nuisance has been made punishable under the Indian Penal Code, 1860.[12]

B) NEGLIGENCE

It is a point to note that in order to bring a successful action vis-à-vis negligence, it is necessary to establish a direct nexus between negligence and the damage caused. The other ingredient that constitutes negligence is that the respondent did not take sufficient care to avoid public nuisance that the person was required to take such care under the law. In *Naresh Dutt Tyagi v. State of Uttar Pradesh*[13], fumes released from the pesticides leaked to a nearby property through ventilators that resulted in the death of three children and foetus in a pregnant woman. It was held by the court that it was a clear-cut case of negligence.

C) TRESPASS

It is an unlawful interference with another's possession of property. The primary ingredient to establish a case of trespass is that there should be an intentional invasion of another's physical possession of property. Thus, two primary ingredients to establish a case of trespass are:

i.) There should be intentional interference

ii.) Such interference should be direct in nature

D) STRICT LIABILITY

The concept of strict liability started from the case of *Rylands v. Fletcher*[14], "the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his own peril and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape"[15]. The exceptions to the rule of strict liability are as follows:

i.) Act of God

7 *AIR 1987 SC 1086 (Popularly Known as Oleum Gas Leakage Case).*
8 *AIR 1990 SC 420*
9 *A.I.R. 1993 Ker. 1*
10 *Section 133 of Criminal Procedure Code, 1973*
11 *AIR 1968 P&H. 399*
12 *Section 268 of Indian Penal Code, 1860.*
13 *1995 Supp (3) SCC 144*
14 *1868 LR 3 HL 330*
15 *Ibid.*

ii.) Act committed by a third party

iii.) Any fault committed by plaintiff himself

iv.) An act committed after obtaining expressed or implied consent of the plaintiff

v.) Natural use of land by the defendant

The locus classicus vis-à-vis strict liability in Indian setting is *M C Mehta v. Union of India*[16], popularly known as Oleum Gas Leak Case. In this case, the Hon'ble Supreme Court observed that if a hazardous or inherently dangerous activity is being carried out in any premises and in case of a release of such toxic substance any damage is caused, such enterprise is strictly and absolutely liable for all the damages arising thereto, and any of the exceptions listed out above are not applicable as a defense in a case of strict liability.

In addition to this, the court also held in the *Union Carbide Corporation v. Union of India*[17] that the compensation has to be directly proportional to magnitude and capacity of the enterprise because such compensation needs to have a deterrent effect.

PENAL PROVISION VIS-À-VIS ENVIRONMENTAL PROTECTION

There are specific penal provisions in various legislations for the protection of environment. Chapter XIV of the Indian Penal Code (hereinafter referred as IPC), containing section 268 to 294-A, deals with offences relating to public health, safety etc. The main object of these provisions is to protect the public health, safety and convenience by rendering those act\s punishable which make the environment polluted and dangerous to the life of an individual.

Section 268 of the Indian Penal Code, 1860, defines the term public nuisance and section 290 of the IPC makes public nuisance punishable. Thus, under these provisions if any act or omission causing injury to any person by polluting the environment takes place, the same can be subjected to prosecution. Noise pollution is also punishable under Section 268 of IPC.

In *K Ramkrishnan v. State of Kerala.*[18], the court held that smoking in public place comes under the category of public nuisance. It is punishable under section 290 of Indian Penal Code. Also, in *Murli S. Deora v. Union of India*[19], the Supreme Court held that under Article 21, smoking in public place is a violation of fundamental right of those who don't smoke.

Sections 269 to 271 deal with negligent acts which are likely to spread infection of diseases dangerous to the life of people. These acts are punishable under sections 269 to 271. The punishment provided u/s 269 and 271 is imprisonment up to six months or fine or both. Section 277 can be used for preventing the water pollution. Under section 277 punishment of imprisonment is up to three months or a fine up to 500 Rupees or both. Apart from these, under section 426, 430, 431 and 432 of IPC, pollution caused by mischief is also punishable.

There are two primary legislations that enlist penal provisions for violation of the law propounded in those legislations. They are The Water (Prevention and Control of Pollution) Act, 1974, and Environment (Protection) Act, 1986. According to Section 47 of The Water Pollution Act, a person is vicariously liable for the offence committed by the company if such person is in charge of the functions committed by the company or for conduct of business of the company. This is indispensible ingredient to constitute a case under S. 47 of the Act. However, the defense available under this section is that the offence in question must have been committed without knowledge or consent of the accused in question.

"It also needs to be noted that Section 16 of Environment Act and Section 47 of The Water Act are parimateria to each other. Herein, it is paramount that the complaint contains specific averments against the accused. It is not out of place to mention that the provisions of Section 16 of the Environment (Protection) Act 1986 are parimateria to the Section 141 of the Negotiable Instrument Act as well as Section 25 of the Contract Labour (Regulation and Abolition) Act, 1970, and Section 278 B of the Income Tax Act. The Hon'ble Supreme Court while dealing with the cases under Negotiable Instruments Act in *National Small Industries Corporation Ltd. vs Harmeet Singh Pental and another* reported in 2010 (3) S.C.C. 330 has held that it is mandatory for the complainant to make averments in the complaint petition that the accused is directly in

16 *A.I.R 1987 S.C. 1086.*

17 *1991 4 SCC 584*

18 *A.I.R. 1999 Ker. 385.*

19 *2001 8 SCC 765*

charge and was responsible to the company for the conduct of the business of the company. The Hon'ble Supreme Court said that if the said necessary ingredient is missing in the complaint petition, then in that case, prosecution launched against the accused cannot be sustained."[20]

CONCLUSION

It has been observed that there are more than enough legislations that try to deal with the menace of environment degradation. The massive amount of legislation has led to a situation of confusion and difficulty in enforcement. To deal with the same, there is a need for a strong integrated legislation that can provide a much clearer and integrated approach which can provide the necessary protection to environment. Also, the pollution boards have been given the powers to launch prosecution before the court of law to bring the violators to book as far as environmental degradation is concerned. The idea of giving quasi-judicial powers to these boards can be considered so they can impose penalty upon those who violate the law and also reduce the burden on the already overburdened courts.

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20 *Prakash Chandra Tibrewal and Ors v. The Regional officer Jharkhand State Pollution, W.P.(Cr.) No. 26 of 2015*

NATIONAL WORKSHOP ON INTELLECTUAL PROPERTY RIGHTS ORGANIZED BY MAITREYI COLLEGE IN ASSOCIATION WITH SINGH & ASSOCIATES

Department of Botany, Maitreyi College, University of Delhi in association with Singh & Associates, Founder: Manoj K. Singh, Advocates and Solicitors organized a "National Workshop On Intellectual Property Rights (IPR): Current Status And Future Prospects" on 3rd October, 2018 at Maitreyi College, University of Delhi. The workshop aimed at facilitating knowledge sharing and raising IPR awareness among the participants on the current status and future prospects of Intellectual Property Rights. Besides this, the workshop also envisioned to inspire students and research scholars to benefit from the IPR rights.

The workshop opened with a welcome address by Dr. Haritma Chopra, Principal of Maitreyi College, University of Delhi. The program had various interactive sessions on *Patents & Information Technology Based Intellectual Property Rights*, *Industrial Design and Biotechnology Related Aspects of Intellectual Property Rights*, *Plant Genetic Resources and Intellectual Property Rights*. The technical presentations analyzed in detail about the different IPR rights including Patent, Design, Trademark, Copyright and Plant Varieties Act. Apart from the technical presentations, there were hands-on session on Patent & Trademark searches and live demonstration of e-filing system in India for Patent filings.

The participants at the workshop comprised graduation students, research scholars, guest faculties from the reputed institutions across the country and faculty members of Department of Botany, Maitreyi College, who were also the organizers of the workshop.

The key speakers presenting the sessions on different topics were Mr. Shrimant Singh, Senior Principal Associate, Singh & Associates, Ms. Suchi Rai, Senior Principal Associate, Singh & Associates and Dr. Arun Kumar Maurya, Assistant Professor, CCS University, Meerut, U.P.


NATIONAL WORKSHOP
INTELLECTUAL PROPERTY
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