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Article

Ban on online gaming: The saga continues

Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Ordinance, 2022

By **Ayush Sharma**

The State of Tamil Nadu promulgated the Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Ordinance, 2022 ('**Ordinance 2022**') on 3 October 2022 for the regulation of online gaming in the State. It has already been assented to by the Governor. This is the second attempt on part of the State government for regulating online games. In November 2020, Tamil Nadu government had introduced an Ordinance to amend the Tamil Nadu Gaming Act, 1930 ('**TN Gaming Act**') which was later called as Tamil Nadu Gaming and Police laws (Amendment) Act, 2021 ('**Amendment Act'**). Said Ordinance put a complete ban on the online games of skill on the pretext that the youngsters were being cheated by the online gaming providers and were committing suicides due to online gaming.

The Amendment Act was challenged in the High Court of Madras ('**HC**'), wherein the petitioners stated that said Act prohibited all forms of games in cyberspace and removed the exemption of games of skill, and therefore the same is arbitrary and unreasonable. In the matter of *Junglee Games India Pvt. Ltd. & Anr* v. *The State of Tamil Nadu & Ors*[1]., the HC struck down the Amendment Act. It ruled that the law was unconstitutional in its entirety. According to the Court, it failed the test of proportionality, said law was unreasonable, arbitrary and was in violation of the principles established by the Supreme Court of India.

In the cases of *RMD Chamarbaugwala* v. *Union of India*[2] and *KR Lakshmanan* v. *State of Tamil Nadu*[3], the Supreme Court had opined that, under Entry 34 List II of the Constitution of India, the State has the legislative competence to make laws with respect to gambling or betting on games of chance, and that Entry 34 does not cover games of skill under its ambit. Relying on *KR Lakshmanan* case, HC also observed in *Junglee Games* that the games of skill were protected under Article 19(1)(g) of the Constitution of India as it was considered a business activity and not gambling under the law. According to the HC, the restrictions imposed on games of skill were excessive and were disproportionate to the object sought to be achieved through the legislation. Therefore, the HC struck down the Amendment Act. However, the High Court observed that the State may derive the legislative competence from other Entries of the Constitution of India in relation to regulation of games of skill.

The State Government, thereafter, took cue from the observation of the HC, and constituted a five-member committee under the chairmanship of retired Justice Thiru. K. Chandru for advising

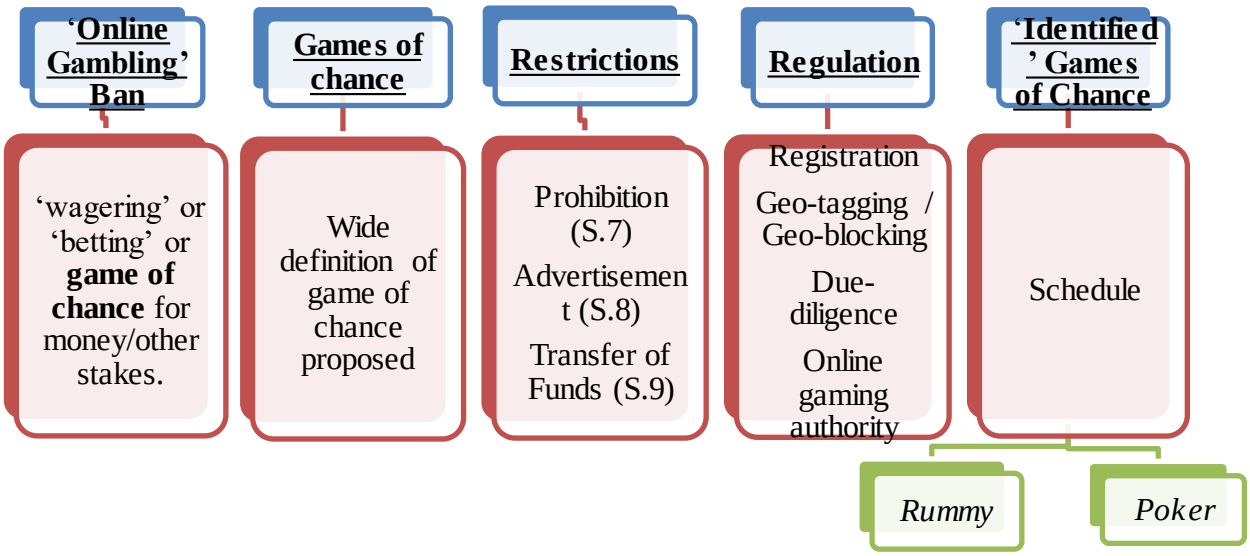
[1] 2021 SCC OnLine Mad 2762

[2] AIR 1957 SC 628

[3] 1996 2 SCC 226

on the enactment of new legislation, in order to regulate online games. Following the suggestions of the committee, vide the reports and surveys formulated, the State government introduced the Ordinance 2022 seeking to regulate and prohibits online gaming at the same time.

Overview of the key provision of the Ordinance 2022:



The Ordinance 2022, under Section 7, prohibits online gambling, and playing of online games of chance with money or other stakes. As per the definition of 'online game of chance', it involves elements of both chance and skill, where the element of chance dominates element of skill or involves an element of chance that can be eliminated only by superlative skill. The State government, through a Schedule under the Ordinance 2022, has identified 'rummy' and 'poker' as games of chance, thereby prohibiting the individuals or companies from offering or playing said games. At present, playing or offering of games listed in the Schedule will constitute an offence under the Ordinance 2022. Further, the advertisement in relation to online gaming and games of chance (viz., Poker and Rummy) is prohibited and there are restrictions on the transfer of funds for the purpose of the online gambling or for listed games of chance in the schedule. The local online games providers are required to obtain a certificate of registration from the authority before conducting online games in the State.

The State Government has once again enacted a law which may go against the principles established by the Supreme Court and other High Courts, wherein the courts have differentiated between games of chance and games of skill. The Ordinance 2022 equates games of chance and games of skill and identifies rummy and poker as game of chance. It may be noted that various judicial forums have earlier held rummy and poker as a game of skill. In the case *A.P. v. K. Satyanarayana*[4], it was determined that rummy involves substantial amount of skill and is not merely a game of chance. It was observed that rummy involves memorizing the fall of cards and it requires a great degree of skill. Similarly, in the cases of *Indian Poker Association* v. *State of Karnataka* and *Indian Poker Association* v. *State of West*

[4] AIR 1968 SC 825

Bengal, it was concluded that poker is a game of skill. The Government, by way of the Ordinance 2022, has neglected the judicial decisions and has tried to circumvent the same in the guise of protection of youngsters from addictions and cheating.

The Government has considered factors like randomness involved in the online games and manipulation through artificial intelligence. However, they failed to consider that there is no vested interest of the organizers involved in the game as all the winnings go to the players and not to the organizer. As rummy and poker are considered games of skill as per the judicial dicta, the Government may be in violation of a settled law that states preponderance of skills is protected under Article 19(1)(g) of the Constitution of India. However, the Ordinance 2022 provides for setting up of Tamil Nadu Online Gaming Authority which will be a regulatory body who will be responsible to regulate online games. Therefore, there might be a case that the committee may take a case to case approach for the regulation of different online games.

The stakeholders and gaming companies may challenge the Ordinance 2022 on the issue of reasonability, arbitrariness, and violation of established principles of the Supreme Court and other courts. Therefore, it will be on the courts to decide the future of the Ordinance 2022.

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Notifications and Circulars

Companies (Corporate Social Responsibility Policy) Rules, 2014 amended: The Ministry of Corporate Affairs, *vide* Notification G.S.R. 715(E) dated 20 September 2022, has amended the Companies (Corporate Social Responsibility Policy) Rules, 2014, to provide that a company having any amount in its Unspent Corporate Social Responsibility Account as per sub-section (6) of Section 135 shall constitute a CSR Committee and comply with the provisions contained in sub-section (2) to (6). In this regard, in Rule 3 (1), after the proviso, another proviso has been inserted. Further, sub-rule (2) of Rule 3 has been omitted. It provided for that a company which ceased to meet the criteria under Section 135(1) for three consecutive financial years would not be required to constitute a CSR committee or comply with the provisions of sub-section (2) to (6) of Section 135.

In Rule 4, sub-rule (1), has been amended to provide that a Section 8 company, public charitable trust, or a registered society, which is exempted under sub-clauses (iv), (v), (vi) and (via) of Section 10(23C) of the Income Tax Act, 1961 is also eligible to become an implementation agency for CSR. Also, MCA has revised Rule 8(3), clause (c), and now the threshold for permitted expenditure towards

mandatory impact assessment has been revised to INR Fifty lakh or 2% of the total CSR expenditure, whichever is higher. (Earlier it was 50 lakh or 5%, whichever is less.) MCA has also amended Annexure II to the CSR Rules which prescribes the disclosures of CSR compliance under the annual report.

IBBI (Insolvency Professionals) Regulations, 2016 amended: The Insolvency and Bankruptcy Board of India, *vide* Notification No. IBBI/2022-23/GN/REG099 dated 28 September 2022, has amended the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 to allow insolvency professional entities also to enrol as Insolvency Professionals.

Regulation 6(1A) has been inserted to provide that an insolvency professional entity eligible for registration as an insolvency professional may make an application to the Board in Form AA of the Second Schedule along with a non-refundable application fee of INR two lakh. Further, as per the amended regulations, no insolvency professional entity, recognized by the Board under Regulation 13, shall be eligible to be registered as an insolvency professional, if the entity and/or any of its partners or director, is not fit and proper person. Regulation 4(2) has been inserted for this purpose. In regulation 7(2), after clause (h), clause (ha) has been inserted to provide that in case an insolvency professional entity is an insolvency professional, it shall allow only a partner or director who is an insolvency professional and holds a valid authorization for assignment to sign and act on behalf of it. In regulation 13(2) in clause (b) and (c), another proviso has been inserted to provide that in case the insolvency professional entity is enrolled with an insolvency professional agency, the intimation shall also be made to such insolvency professional agency to update its register of professional members. Furthermore, IBBI has inserted Form AA (to be filed as an application for registration as an insolvency professional) in Second Schedule, after Form A.

Effective date for Legal Metrology (Packaged Commodities) Amendment Rules, 2022 extended: The Department of Consumer Affairs, Food and Public Distribution, *vide* Notification G.S.R. 747(E), dated 30 September 2022, has notified Legal Metrology (Packaged Commodities) Amendment (Amendment) Rules, 2022 to notify and extend the date of application of Legal Metrology (Packaged Commodities) Amendment Rules, 2022, from 1 October 2022, being the earlier date, to 1 December 2022.

Information Technology Act, 2000 – First Schedule revised: The Ministry of Electronics and Information Technology, *vide* Notification S.O. 4720(E), dated 26 September 2022 has notified the amendment to the First Schedule of the Information Technology Act, 2000. Amending Entry 1 to the First Schedule, which earlier excluded only 'negotiable instruments (other than cheque)', *a Demand Promissory Note or a Bill of Exchange* issued in favour of or endorsed by an entity regulated by the Reserve Bank of India, National Housing Bank, Securities and Exchange Board of India, Insurance Regulatory and Development Authority of India and Pension Fund Regulatory and Development Authority is also now excluded. Amending Entry 2 to the First Schedule which earlier excluded only a 'power of attorney' as defined in Section 1A of the Powers-of-Attorney Act, 1882, the exclusion to power-of-attorney has now been restricted to that which empowers an entity regulated by the Reserve Bank of India, National Housing Bank, Securities and Exchange Board of India, Insurance Regulatory and Development Authority of India and Pension Fund Regulatory and Development Authority to act for, on behalf of, and in the name of the person executing them. Entry 5 to the First Schedule that excluded any contract for the sale

or conveyance of immovable property or any interest in such property, now stands omitted.

Labelling requirement for breads notified – Food Safety and Standards (Labelling and Display) Second Amendment Regulations, 2022 notified: Food Safety and Standards Authority of India, *vide* Notification F. No. Std/SP-08/A-1-2020/N-01, has notified Food Safety and Standards (Labelling and Display) Second Amendment Regulations, 2022 *vide* which para. 1, sub-para 3 for Sl. No. 1 in Schedule II has been amended, and declaration for Pan Masala and labeling for various types of bread has been notified.

Nomination of Director – Legal Metrology (General) Amendment Rules, 2022 notified: Ministry of Consumer Affairs, Food and Public Distribution, *vide* G.S.R. 763(E), has notified Legal Metrology (General) Amendment Rules, 2022 *vide* which a proviso has been added to Rule 29, which deals with nomination of a Director by the Company under the Legal Metrology Act, 2009 ('**LM Act'**). As per the proviso, where a company has a different establishment or branch or different unit in any establishment or branch, the officer who has the authority and responsibility for planning, directing and controlling the activities of such establishment or branch etc. may be nominated under Section 49(2) of the LM Act to be in-charge of and be responsible for the conduct of business of the establishment, branch or unit.

Guidelines for preferential issue and institutional placement of units by listed InvITs and REITs revised: The Securities and Exchange Board of India has amended the guidelines for the preferential issue and institutional placement of units by listed Infrastructure Investment Trusts ('**InvITs**') and Real Estate Investment Trusts ('**REITs**').

As per Circulars Nos. SEBI/HO/DDHS/DDHS_Div3/P/CIR/2022/129 and 130, both dated 28 September 2022, listed InvITs and REITs may make a preferential issue of units and institutional placement in case units of the same class, which are proposed to be allotted have been listed on a stock exchange for a period of at least six (6) months prior to the date of issuance of notice to its unit holders for convening the meeting to pass the resolution. As per the amended guidelines, no allotment shall be made, directly/indirectly to any institutional investor who is a sponsor(s) or the manager or is a person related to the sponsor(s) or the manager.

However, the allotment of units can be made to the sponsor for unsubscribed portion in the institutional placement subject to the following conditions -

1. At least ninety (90) percent of the issue size has been subscribed.
2. The object of the issue should be the acquisition of assets from that sponsor.
3. The allotted units should be locked in for a period of three (3) years from the date of trading approval.
4. Unitholders approval is taken for unsubscribed portion being allotted to the sponsor.

Commercial Paper by listed InvITs and REITs – Issue and listing: The Securities and Exchange Board of India has allowed emerging investment vehicles, Infrastructure Investment Trusts (InvITs), and Real Estate Investment Trusts (REITs) to issue commercial papers.

As per Circulars Nos. SEBI/HO/DDHS/DDHS_Div3/P/CIR/2022/ 123 and 122, both dated 22 September 2022, InvITs and REITs may issue listed commercial papers

subject to a condition that they shall abide by the guidelines prescribed by the Reserve Bank of India for issuance of commercial papers, and shall abide by the conditions of listing norms prescribed by SEBI. Further, the issuance of listed commercial papers shall be within the overall debt limit permitted under SEBI (Infrastructure Investment Trusts) Regulations, 2014 and SEBI (Real Estate Investment Trusts) Regulations, 2014. It may be noted that in terms of Reserve Bank Commercial Paper Directions, 2017 dated 10 August 2017, InvITs and REITs having a net worth of INR 100 crore or higher are eligible to issue commercial papers.

Extant Regulatory Framework for the Asset Reconstruction Companies introduced: The Reserve Bank of India (RBI), *vide* Notification RBI/2022-23/128 dated 11 October 2022, has introduced the amended extant regulatory framework for the Asset Reconstruction Companies ('**ARCs**') to improve the corporate governance standards in the ARCs. The measures notified include the following:

- Enhancement of governance of ARCs through improvements in the manner of undertaking chair and meetings of Board, tenures of Directors, performance review,
- Introduction of committees of Board such as: Audit Committee and Nomination and Remuneration Committee,
- Fit and proper criteria for appointment of Directors and CEOs,
- Enhanced disclosures such as summary of financial information of the ARC for last 5 years, track record of returns generated for all Security Receipt (SR) investors, track record of recovery rating migration and engagement with rating agencies,
- Provisions for One-time settlement of dues payable by the borrowers,
- Increase in Minimum Net Owned Fund requirement,
- Allowing ARCs to act as Resolution Applicant under Insolvency and Bankruptcy Code, 2016 (IBC), and
- Transfer of Stressed Loans to ARCs.

Credit Guarantee Scheme for Startups notified: The Department of Promotion of Industry and Internal Trade, under Ministry of Commerce and Industry has notified the Credit Guarantee Scheme for Startups ('**CGSS**'/ '**Scheme**') for the purpose of providing credit guarantees to loans extended by Member Institutions (MIs) to finance eligible borrowers being Startups. Following are the salient features of the CGSS:

- Lists down the eligible borrowers and eligible lending/investing institutions
- Responsibilities of the Member Institution (Non-Banking Financial Companies, Banks, Financial Institutions, Alternate Investment Funds engaged in the lending/investing activities) under the Scheme
- Format for providing guarantees, instruments of assistance, ceiling on guarantee cover, extent of the guarantee
- Invocation of guarantee/claim settlement (for transaction-based guarantee cover and for umbrella-based guarantee cover), and
- Establishment of committees such as Management Committee, Risk Evaluation Committee, and other monitoring mechanisms.

Ratio Decidendi

Award by a unilaterally appointed arbitrator is *non-est* – Same not a bar to maintainability of a petition filed subsequently under Arbitration Section 11

Brief facts:

The Petitioner and the Respondent entered into a builder agreement in 2014 ('**Agreement**'), whereby the Respondent would develop a dwelling unit in a residential complex, and the Petitioner would be its buyer. Disputes arose between the parties in relation to the outstanding dues by the Petitioner, and the Respondent unilaterally appointed a sole arbitrator, pursuant to Clause 20 of the Agreement which deals with the resolution of disputes. After an objection was raised by the Petitioner to the unilateral appointment, the sole arbitrator, considered the objection, had unilaterally appointed a second sole arbitrator and recused himself from the proceedings. Aggrieved by the aforesaid, the Petitioner filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (**'Act'**) before the High Court of Delhi (**'Court'**) seeking appointment of a sole arbitrator, which was dismissed. An appeal was preferred against such dismissal by the Petitioner. However, the same was withdrawn with liberty to file a review petition. Thereafter, the second sole arbitrator passed the final award in the proceedings. Subsequently, the Petitioner preferred a review petition before the High Court. Keeping in mind the latest judgment passed of *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.,* 2019 SCC OnLine SC 1517 ('***Perkins Eastman***'), the High Court allowed the review petition and recalled the present Petition for arguments afresh.

Submissions by the Petitioner:

- It was submitted that a preliminary objection to the unilateral appointment by the Respondent under Section 12(5) of the Act was raised, which should have been considered by the Tribunal. However, the sole arbitrator appointed the second sole arbitrator unilaterally, without the mutual consent of the parties. Therefore, this appointment is also contrary to Section 12(5) of the Act.
- It was submitted that, accordingly, both the arbitral proceedings and the final award passed by the second sole arbitrator were *non-est* since the appointment itself was illegal. The case of *Harshad Chiman Lal Modi* v. *DLF Universal Ltd.,* (2005) 7 SCC 791 was relied on in support of their contentions.

Submissions by the Respondent:

- It was submitted that since the High Court dismissed the first petition filed by the Petitioner under Section 11 of the Act, the appointment of the second sole arbitrator stood affirmed and the ensuing proceedings were legal, and the final award passed was valid.
- Further, the Supreme Court did not pass any stay/adverse order in the appeal made by the Petitioner. Therefore, the arbitral proceedings continued, and the final award was passed.
- It was submitted that, since the Petitioner also did not challenge the mandate of the arbitrator under Section 14 of the Act and

has delayed in the filing of the review petition before the Court, they have waived their legal right to the remedies available under the Act.

- Further, the Petitioner took no steps to challenge the award under Section 34 of the Act within the statutory timelines specified therein. Therefore, the award is final and binding.
- After invoking the arbitration agreement, and the appointment of an arbitrator with mutual consent, the arbitration agreement cannot be invoked for the second time for the same cause of action, as held in the case of *Swadesh Kumar Agarwal* v. *Dinesh Kumar Agarwal,* 2020 SCC OnLine SC 556.

Decision:

Relying on the *Perkins Eastman* case wherein it was held that if once a person nominated as an arbitrator falls within any category of ineligibility of the seventh schedule, they become ineligible under Section 12(5) of the Act to both act as an arbitrator and nominate an arbitrator, the Court held that the unilateral appointment of the second sole arbitrator by the first sole arbitrator was *ex-facie* contrary to law and thus, *non-est.* It was held that this ineligibility can only be cured by express consent in writing by the Petitioner. It was observed that the Petitioner participated in the arbitral proceedings before the first arbitrator under protest, and further, did not participate in the proceedings before the second arbitration *ab initio viz*., from the beginning. Accordingly, the Petitioner cannot be deprived of their right to have an independent and impartial arbitrator appointed in terms of Section 11(6) of the Act, notwithstanding the arbitral proceedings and the award. Further, the Court held that by the time the Petitioner had filed the present review petition, the law on unilateral appointments has been clearly established, in light of the judgment of *Perkins Eastman*, and hence, passing the final arbitral award would not affect the maintainability of the present proceedings.

It was also held that, since the review petition was allowed and the present petition has been revived, the proceedings are revived to the date of original filing of the petition on which date the arbitral proceedings were still pending. Accordingly, the Court allowed the petition and appointed another sole arbitrator to adjudicate the arbitral proceedings afresh.

[*Geeta Poddar* v. *Satya Developers Private Limited* – Order dated 31 August 2022 in ARB.P. 133/2019, Delhi High Court]

(i) Default of instalment of Settlement Agreement is not 'operational debt'

(ii) National Company Law Tribunal cannot refer to arbitration when exercising jurisdiction under IBC Sections 7, 9, and 10

Brief facts:

The parties entered into a Master Sale Agreement ('**MSA**') in which the Appellant was the seller, and the Respondent was the buyer of a specified quantity of copper cathodes. After the Respondent failed to perform its obligations under the MSA by failing to pay the dues owed to the Appellant, the parties entered into a Settlement Agreement (**'SA'**) agreeing that the outstanding exposure shall be reduced from INR 63,81,63,368/- to INR 52,50,00,000/- by the Respondent. Thereafter, an amount of INR 12.3 crore was paid by the Respondent to reduce the exposure and no further amounts were paid. The Appellant filed for initiation of the Corporate Insolvency Resolution Process (**'CIRP'**) under Section 9 of the Code for the operational debt

due under the MSA. Said application was dismissed by the National Company Law Tribunal (**'NCLT'**) on the grounds that unpaid amounts under an SA do not constitute an 'operational debt' under Section 5(21) of the Code. Further, in light of the request for reference to arbitration made by the Respondent, the NCLT held that its limited jurisdiction under Sections 7, 9, and 10 of the Code does not extend to referring disputes to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996 (**'A&C Act'**). Aggrieved with the order passed by the NCLT, the Appellant filed the present appeal.

Submissions by the Appellant:

- It was submitted that the cause of action arose from the default committed with the MSA itself, and the SA executed subsequently contains the acknowledgement and admission of the debt by the Respondent-Corporate Debtor. Part-payments have also been made by the Respondent.
- It was further submitted that the MSA is contract for provision of goods and services and hence, the claims arising from the MSA are covered within the definition of 'operational debt' u/s. 5(21) of the Code. The SA is merely an acknowledgement of such operational debt. Accordingly, simply because the parties entered into the SA, the debt due and payable from the MSA does not lose the character of 'operational debt' under the Code.

Submissions by the Respondent:

- It was submitted that the Appellant filed the application under Section 9 in relation to claims arising out of the SA and not the MSA. The cause of action also arose from the non-repayment under the SA.
- It was submitted that the SA provides for payment of a reduced outstanding exposure, and as such, there is no case of repayment of outstanding amounts arising from the MSA. By making the payment of INR 12.3 crore, the conditions under the SA stand fulfilled, and accordingly, there is no case of the debt under the MSA becoming due and there is no 'default'. Accordingly, there is no case of 'operational debt' arising from the SA. The case of *Kesoram Industries & Cotton Mills* v. *Commissioner of Wealth Tax, (1966) 2 SCR 688,* was relied upon in support of the contentions.

Decision:

The NCLAT, referring to the terms of the SA, concurred with the NCLT in both of its holdings that (a) the default of an instalment of a settlement agreement does not constitute 'operational debt' as under Section 5(21) of the Code, and (b) the NCLT has limited jurisdiction under Sections 7, 9, and 10, which does not extend to referring disputes to arbitration under Section 8 of the A&C Act. Further, since a commercial suit is already pending, the prayer for reference to arbitration can be held before the concerned commercial court. Accordingly, the appeal has been dismissed.

[*Trafigura India Pvt Ltd.* v. *TDT Copper Limited*, Order dated 15 September 2022 in Company Appeal (AT) (Insolvency) No. 742 of 2020, National Company Law Appellate Tribunal, Principal Bench, New Delhi]

News Nuggets

Arbitral Tribunal to provide rationale for determination of interest rate in the award

The Supreme Court has ruled that when discretion is vested with an arbitral tribunal to award interest at a rate that it deems reasonable, then a duty would be cast upon the arbitral tribunal to give reasons as to how it deems the rate of interest imposed to be reasonable. Noting that the provisions require interest to be at such rate as the arbitral tribunal deems reasonable, the Court, in *Executive Engineer (R and B) v. Gokul Chandra Kanungo* [Decision dated 30 September 2022], held that when the arbitral tribunal is empowered with such discretion, it would be required to apply its mind to the facts of the case and decide whether the interest is payable on the whole or any part of the money, and also as to whether it is to be awarded to 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. Accordingly, the Supreme Court, observing the facts and circumstances of the case, found it equitable and in the interest of justice to exercise its powers under Article 142 of the Constitution of India and reduce the rate of interest to 9% from 18% per annum.

Arbitration – Limitation for invoking a legal remedy cannot be extended even by consent

Holding that the petitioner's claim against the respondent is *ex-facie* time-barred, the Delhi High Court has held that once it is found that the claim is time-barred as per the Limitation Act, 1963, arbitration cannot be invoked even by consent of parties. The Court, in the case of *Extramarks Education India Private Limited* v. *Shri Ram School* [Judgment dated 23 September 2022], observed that a party may concede a claim at any time but cannot concede availability of a legal remedy beyond the prescribed period of limitation. It was observed that the legal policy is to ensure that legal remedies are not available endlessly but only up to a certain point in time. The Apex Court relied upon its earlier decision in the case of *BSNL* v. *Nortel Networks India Pvt. Ltd.,* wherein it was held that the period of limitation for issuing a notice of arbitration would not get extended by mere exchange of letters or mere settlement discussions, in this regard. In the present case, a petition was filed under Section 11 of the Arbitration and Conciliation Act, 1996 seeking the appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen from the agreement which was terminated vide notice dated 4 January 2017. However, the notice invoking arbitration was issued only on 28 July 2021, which was beyond the 3-year period.

Period of limitation for referring dispute to arbitration commences only after failure of pre-arbitration mechanism

The Delhi High Court, while deciding whether the claims of the Appellant was barred by limitation, has observed that the dispute resolution clause in the agreement required the party to make a reference of the dispute to the chief executives of the parties first, and only upon its failure, such dispute shall be referred for arbitration. The High Court, in the case of *Welspun Enterprises Ltd.* v. *NCC Ltd.* [Order dated 10 October 2022] held that since there was a pre-arbitration mechanism i.e.,

there existed layer of dispute mechanism and each subsequent mechanism can be invoked once the existing mechanism is exhausted. Accordingly, the Court held that the limitation period for initiation of the subsequent proceedings, being arbitration proceedings in the present case, excluded the time taken for the pre-arbitral mechanism. The Court referred to the position of law on pre-arbitration dispute mechanisms from various countries, Section 27 of the Arbitration Act, 1950 and Section 12 of the UK Arbitration Act, 1996, to arrive at the decision. It was noted that even Section 12A of the Commercial Courts Act provides that the period taken up by the pre-institution mediation is not included within the computation for the period of limitation for the commercial court proceedings.

No bar against initiating CIRP against two Corporate Debtors but same amount cannot be realised from both

The Supreme Court has recently held that if there are two borrowers, or if two corporate bodies fall within the ambit of corporate debtors, there is no reason why proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 cannot be initiated against both the Corporate Debtors. However, discussing the contract of indemnity and contract of guarantee, the Court held that the same amount cannot be realised from both the Corporate Debtors. The Court, in *Maitreya Doshi* v. *Anand Rathi Global Finance Ltd.* [Judgment dated 22 September 2022], held that if the dues are realised in part from one Corporate Debtor, the balance may be realised from the other Corporate Debtor being the co-borrower. However, once the claim of the Financial Creditor is discharged, there can be no question of recovery of the claim twice over.

Indemnity of obligations under an agreement is not a 'financial debt' under IBC

The NCLT Bench, Mumbai in an application filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ('**IBC**'), seeking admission of a claim in the capacity of Financial Creditor, has observed that an Obligor Undertaking given for the due payment towards commercial papers is not a 'guarantee' that attracts the definition of 'financial debt' under Section 5(8) of the IBC. The NCLT Bench, in the application filed in *Reserve Bank of India* v. *Reliance Capital Limited* [Order dated 11 October 2022] has also held that the indemnity obligations under an agreement is not a 'financial debt' under Section 5(8) of the IBC. It was observed that the Obligor Undertaking, in the present case, was merely a contingent contract and not a promise towards payment under commercial papers or in discharge of any liability in the event of default. Further, there was no disbursal to the Corporate Debtor for consideration against time value of money, which is an important requisite for being a 'financial debt'.

Electricity being essential for preservation of value of Corporate Debtor, dues for the same must be paid by Resolution Professional during CIRP

The NCLT Principal Bench has held that when the supply of goods or services is essential or critical to protect the value of the corporate debtor, the supply of the same shall not be terminated during the moratorium period, but the same shall be supplied subject to payment of dues. The NCLT Bench, in the case of *Shailesh Verma* v. *Maharashtra State Electricity Distribution Company Limited* [Order dated 22 September 2022] has held that the

argument of the appellant that the payment of the electricity dues, which is necessary for the preservation of the corporate debtor's value, can be made only after the approval of the Resolution Plan was in conflict with the Explanation to Section 14(1) and Section 14(2A) of the Insolvency and Bankruptcy Code, 2016 ('**IBC**') and therefore, cannot be sustained.

No 'insider trading' if transaction surely likely to result in loss

The Supreme Court has held that the sale by a person at a time when the price of the securities is likely to shoot up, on account of price sensitive information coming into the public domain, or the purchase by a person at a time when the price of the shares is likely to go downward, due to price sensitive information getting published, cannot come under the category of insider trading. The Court, in *Securities and Exchange Board of India* v. *Abhijit Rajan* [Judgment dated 19 September 2022], was of the view that if a person enters into a transaction which is surely likely to result in loss, he cannot be accused of insider trading. According to it, while the actual gain or loss is immaterial, but the motive for making a gain is essential. The Apex Court in this regard noted that the words, 'likely to materially affect the price' appearing in the main part of Regulation 2(ha) of the SEBI (Prohibition of Insider Trading) Regulations, 1992 gain significance as the profit motive, if not actual profit, should be the motivating factor for a person to indulge in insider trading. It observed that information in Item No.(vii) of the Explanation under Regulation 2(ha) may have to be examined with reference to the words 'likely to materially affect the price'.

Mandatory registration for sale or distribution of medical devices including in vitro diagnostic medical devices

The Ministry of Health and Family Welfare has, on 30 September 2022, notified the Medical Devices (Fifth Amendment) Rules, 2022 to amend the Medical Devices Rules, 2017. Among other changes, vide the Amendment, the Central Government has now mandated registration of any person who intends to sell, stock, exhibit, or offer for sale or distribute a medical device, including *in vitro* diagnostic medical devices, to apply to the State Licensing Authority for grant of registration certificate to sell, stock, exhibit or offer for sale or distribution. An application for this certificate should be accompanied with fees, as specified in the Second Schedule, details of competent technical staff possessing specified educational qualifications, etc. As per the new Rule 87C, the registration certificate will be valid in perpetuity, subject to payment of registration certificate retention fee before 5 years. Rule 87B provides certain conditions for the registration certificate.

Courts cannot interfere with the terms of a tender

The Supreme Court has reiterated that the terms and conditions of the invitation to tender are within the domain of the tenderer/tender-making authority, and are not open to judicial scrutiny unless they are arbitrary, discriminatory, or *mala fide*. The Apex Court, in *Airport Authority of India* v. *Centre for Aviation Policy, Safety & Research (CAPSR)* [Judgment dated 30 September 2022], was of the view that courts cannot interfere with the terms of the tender prescribed by the Government just because it feels that some other terms in the tender would have been fair,

wiser, or logical. Citing the case of *Michigan Rubber (India) Limited* v. *State of Karnataka,* regarding the law on judicial scrutiny with respect to tender conditions, the Court observed that the Government and their undertakings must have a free hand in setting terms of the tender and only if they are arbitrary, discriminatory, *mala fide* or actuated by bias, the Courts would interfere.

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