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Article

'Fall-back liability' under the Consumer Protection (e-Commerce) Rules, 2020: Stricter norms in digital diaspora

By **Vidhi Madan**

Introduction:

It is no surprise that within a short span of time e-commerce has had a tremendous impact on consumers all over the world. Such dramatic change in the current environment for both businesses and consumers has also posed new challenges, which made it imperative to bring a codified legislation to cater to the interests of the consumers of the e-commerce space.

In a bid to prioritize and safeguard the interests of the consumers against the possible exploitation by e-commerce entities, the Ministry of Consumer Affairs, Food and Public Distribution, Government of India, in exercise of its powers conferred under the Consumer Protection Act, 2019 ('**Act**'), notified and made effective the provisions of the Consumer Protection (E-Commerce) Rules, 2020 ('**E-Commerce Rules' or 'Rules**') from 24 July 2020. These Rules are intended to regulate an 'e-commerce entity', which is broadly defined to mean any person who owns, operates, or manages a digital or electronic facility or platform for e-commerce. These Rules also define an 'inventory-based e-commerce entity' as an entity which owns the inventory of goods or services and sells such goods or services directly to the customers.

Additionally, the Government of India, on 21 June 2021, has proposed certain amendments to the E-commerce Rules and received comments or suggestions from the stakeholders in the industry to such amendments. The proposed amendments, once notified, will not only impact the e-commerce operators (both marketplace as well as inventory-based model entities) but also entities (such as sellers, distributors and logistics partners) which are engaged by such operators, in fulfilment of orders placed by buyers on an electronic portal or mobile based application.

The objective of the proposed amendments is to regulate and deter predatory and unethical e-commerce practices, which includes fraudulent flash sales and mis-selling or misrepresentation of goods and services. Another key amendment is in relation to the appointment of grievance redressal mechanisms and increasing the liability of e-commerce entities.

Applicability:

The E-Commerce Rules apply to all e-commerce entities involving goods or services, including e-commerce entities which are not established in India but systematically offer goods or services to consumers in India.

Further, the E-Commerce Rules also prescribe: (a) liabilities of marketplace e-commerce entities; (b) duties of sellers on marketplace platform; and (c) duties and liabilities of inventory e-commerce entities (including single brand and multi-channel single brand retailers).

Fall-back liability clause - Increasing the liability and responsibility of marketplace entities:

Apart from the enormous impact that the Rules may have on the marketplace entities, the issue that begs our attention is the inclusion of the "fall-back liability" clause. E-commerce Rules define fall-back liability as '*the liability of the*

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marketplace e-commerce entity where a seller registered with such entity fails to deliver the goods or services ordered by a consumer due to negligent conduct, omission or commission of any act by such seller in fulfilling the duties and liabilities in the manner as prescribed by the marketplace e-commerce entity which causes loss to the consumer.'

In other words, the clause makes a paradigm shift in the liability of online retailers, who up until now majorly functioned in the nature of middlemen, but with these Rules coming into force, will become directly and vicariously responsible for the damage caused by the vendor to the customer. This implies that even, in cases of negligent conduct by the seller, the onus of liability shall fall upon the e-commerce entity, if any losses are incurred by the end consumers. Additionally, this clause also holds the e-commerce entity liable for any default on the part of logistics service provider, i.e., if there is a failure of delivery of goods and services, the liability shall be on the e-commerce platform itself. This has been criticised by many stakeholders as grossly unfair to e-retailers.

Judicial position relating to vicarious liability in India:

Various consumer complaints have been filed before the consumer forums in the past, claiming liabilities against the e-commerce entities. One such order was recently passed by the Chhattisgarh State Consumer Redressal Commission ('**Commission'**), where Amazon Seller Services Private Limited ('**Amazon India'**) was absolved from its liabilities as against the other respondents.

The complaint was filed regarding the deficiency in services and breach of warranty conditions, where Amazon India argued that it is only a facilitator, and that at the time of registration on the website, the complainant had accepted the "Conditions of Use" which categorically provided that the contract of sale and purchase of items was strictly a bipartite contract between a registered seller and customer. It was further argued that, as per the conditions of sale, there is no privity of contract between Amazon India and the buyer, and therefore it cannot be held negligent for conduct of other parties. While absolving Amazon India, the Commission observed that Amazon India was merely acting as a shopping platform and has no connection with manufacturing, repairing or any other services in relation to the product. It was further observed that unless the person who visits the site agrees to the terms and conditions of the website, the transaction cannot proceed.

Although, the arguments made by Amazon India had merit, the position has been settled by the subsequent judgment of National Consumer Dispute Redressal Commission, in the case of *Hello Travels* v. *Harish Jain*,[1] reaffirming its earlier position in the case of *Amazon Seller Services Pvt. Ltd.* v. *Gopal Krishan*[2].

In said case, through a web domain (online portal) owned, managed and controlled by Amazon India, a mobile handset Xiaomi Redmi Note 3 was purchased by Sh. Gopal Krishan on 11 May 2016. Payment was made online and the handset was found defective. In said case, it was observed that it was the duty of the facilitator to ensure that goods sold through any individual are manufactured as per the quality standard. If the goods purchased online are found not up to the mark, online portal through which goods were purchased cannot escape its liability. It was held that,

> *"8……. An agent, who sells a product, is duty bound to ensure its quality, and if the product is found defective, agent shall be vicariously liable for the loss caused to the purchaser, alongwith the manufacturer of the product."*

[1] 2020 SCC OnLine NCDRC 615.
[2] First Appeal No. 27 of 2017 decided on 17.02.2017.

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Implication of the Rules for the online retailers:

From the above-mentioned judgments, it is amply clear that the Courts in India have always prioritized the welfare of the consumer, irrespective of the nature of the service provided. Thus, the judicial trend or outlook appears to be in alignment with the rationale behind the fall-back liability clause.

In essence, the fall-back liability clause puts a burden and accountability on the operator of the platform, who is merely acting as a technology platform for facilitating and fulfilling the orders of the customers. While the E-Commerce Rules have been drafted with consumer interests as their prime focus, this regulatory requirement expects an e-commerce entity to keep its house in order. Excessive monitoring and compliances would also end up increasing the costs for such entities, which would affect relatively small players. Additionally, this would cause entities and brand owners to actively monitor the market to identify and procure products only from legitimate sources to avoid any liability at a later stage, thus filtering out the small vendors from getting their goods listed. This is likely to aggravate the existing market disparity.

Conclusion:

Even though the E-Commerce Rules have been appreciated by many, there also exist the likes of NASSCOM (National Association of Software and Service Companies) and FHRAI (Federation of Hotel & Restaurant Associations of India), which opine that there needs to be some leniency for the online retailers in the interest of promoting trade in the country. It cannot be completely justified to pressure online retailers with excessively stringent regulations.

In such a scenario a ‘fall-back liability’ clause is likely to cause more harm than good, by placing e-retailers on an unfavourable footing. At this instant, the clause requires more clarity, guidelines and carve-outs within the same clause, where if the e-retailer can prove that they had exercised enough diligence and precautions, and a fall-out was due to the negligence of the seller, no liability be imposed on the marketplace. While a practical alternative could have been to include a provision to guarantee timely refunds to the aggrieved customer, the fall-back liability clause may encourage unnecessary litigation.

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Notifications and Circulars

Last date for filing Cost Audit Report to the Board extended: The Ministry of Corporate Affairs (‘**MCA**’) has *vide* Circular dated 27 September 2021 extended, to 31 October 2021, the last date for filing of the Cost Audit Report to the Board of Directors, under Rule 6(5) of the Companies (Cost Records and Audit) Rules, 2014 for the FY 2020-21. The Report is to be filed in e-form CRA-4, within 30 days from the date of receipt of the report by the company from

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the cost auditor. In case a company has got extension of time for holding its Annual General Meeting, then the e-form CRA-4 may be filed within such extended timelines.

Format for filing financial information of issuers of Non-Convertible Securities notified: The Securities and Exchange Board of India ('**SEBI**') has *vide* Circular dated 5 October 2021 specified the revised format for disclosure of financial results by entities that have listed non-convertible securities. *Vide* an earlier Notification dated 7 September 2021, SEBI had amended Regulation 52 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('**LODR Regulations**') by mandating all entities that have listed non-convertible securities to disclose financial results on a quarterly basis, including assets & liabilities and cash flows. *Vide* the revised format, particulars such as Statement of Profit and Loss, Statement of Cash Flows prepared under the indirect method as prescribed in Accounting Standard-3/ Indian Accounting Standard 7, etc., have been instructed to be disclosed. The said format is also to be published in newspapers, in terms of Regulation 52(8) of the LODR Regulations, in the format specified in Annex-I to the circular. Any delay in submission of the disclosure will have to be backed up by written reasons submitted to SEBI.

Mechanism for exit option to dissenting unit holders under the SEBI (Real Estate Investment Trusts) Regulations, 2014 and SEBI (Infrastructure Investment Trusts) Regulations, 2014 revised: The SEBI has *vide* Circular dated 5 October 2021 amended its earlier Circular dated 17 July 2020 which provides the manner and mechanism of providing exit option to dissenting unit holders pursuant to Regulation 22(6A) and Regulation 22(8) of SEBI (Real Estate Investment Trusts) Regulations, 2014 ('**REIT Regulations'**). Similar amendments have also been made in the SEBI (Infrastructure Investment Trusts) Regulations, 2014. As per the latest amendments in REIT Regulations:

- 'relevant date' means the last day of voting for a resolution under Regulation 22(6A) or Regulation 22(8). In case of an acquisition triggered pursuant to an open offer under the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 ('**SAST Regulations'**), the relevant date shall be the date of public announcement made for the acquisition;
- Clause 2.5A has been added in Annexure-I of the earlier circular which provides the timelines for various activities in case the acquisition is triggered by an open offer as per the SAST Regulations. Accordingly,
  - (i) Acquirer to give first notice to Manager regarding the acquisition along with the public announcement under the SAST Regulations,
  - (ii) the Manager to intimate the stock exchange(s) within 24 hours of notice,
  - (iii) Acquirer to give second notice to the Manager for obtaining approval of unit holders, which confirms that exit option shall be provided to dissenting unit holders, and includes a declaration by the sponsor to the Manager that eligibility has been satisfied in terms of the REIT Regulations, within 2 working days of completion of acquisition,
  - (iv) the Manager to intimate the stock exchange(s) after second notice, within 24 hours of notice, and thereafter, convene a meeting of unit holders for voting. The voting to be completed within 3 working days from the cut-off date, and within 21 days of receipt of second notice,

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(v) the Manager to intimate results of voting to the acquirer and stock exchange(s), to be called the 'date of intimation' and to be done within 48 hours of closure of voting,

(vi) Acquirer to send Letter of Offer (LoF) to all dissenting unit holders, file a copy with the stock exchange(s), within 3 working days of date of intimation,

(vii) Acquirer to create an escrow account for depositing the aggregate amount of consideration, within 2 working days prior to opening of tendering period,

(viii) Acquirer to intimate tender date and tender period, being 5 working days, from the 7th day of date of intimation, and thereafter, pay consideration to the dissenting unit holders, within 3 working days from closure of tendering period, and

(ix) The Lead Manager to submit a report to the Manager confirming payments, and Manager to update the details of tender, payments etc. with the stock exchange(s) within 2 working days from date of payments.

- Clause 3.4 has been added to Annexure-I of the earlier circular, as per which in case of an acquisition triggered by an open offer under the SAST Regulations, the exit option price shall also stand enhanced by an amount equal to a sum determined at the rate of ten per cent per annum for the period between the first notice date and second notice date.

Master Circular on Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to advances notified: The Reserve Bank of India ('**RBI**') has notified the latest Master Circular on Prudential Norms on Income Recognition, Asset Classification('**IRAC**') and Provisioning pertaining to advances on 1 October 2021 ('**Circular**'). The Circular consolidates all the relevant RBI Guidelines/ Directions/ Instructions/ Revisions which have been implemented till the issuance of Circular. These prudential norms have been implemented for the advances portfolio of the banks for greater consistency and transparency in the published accounts. The Circular is primarily divided into two parts-

- **Part A** includes Income recognition, asset classification, provisional norms for various assets, writing off NPAs, NPA management.
- **Part B** of the Circular lays down the Framework for Resolution of Stressed Assets, Prudential Norms Applicable to Restructuring and annexes.

Certain relevant elements from the Circular are as follows-

(i) The policy of income recognition should be objective and based on record of recovery rather than on any subjective considerations.

(ii) The classification of assets of banks must be done on the basis of objective criteria which would ensure a uniform and consistent application of the norms.

(iii) The provisioning should be made based on the classification of assets per the period for which the asset has remained non-performing and the availability of security and the realisable value thereof.

(iv) The banks are not supposed to charge/ debit interest in any Non-Performing Asset (NPA) account and for taking to income account (i.e. income recognition), including for Government guaranteed accounts. However, interest on advances against Term Deposits/ NSC/ IVP/ KVP/ Life policies

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may be recognised on the due date (i.e. without realisation), provided adequate margin is available.

(v) Banks are required to classify the NPAs into three categories viz., Sub-standard, Doubtful or Loss Assets, based on the period for which the asset has remained non-performing and/ or the dues have remained unrealised. Banks are required to conduct the exercise of classification of assets on the basis of objective criteria to ensure a uniform and consistent application of the Prudential Norms.

(vi) The Bank Management and Statutory Auditors are responsible for ensuring that requisite/ adequate provisioning has been made, based on the realisable value of the available security under respective accounts, for compliance with the Prudential Norms.

Master Directions – Reserve Bank of India (Market-makers in OTC Derivatives) Directions, 2021 notified: The RBI has *vide* Notification dated 16 September 2021 issued the Master Directions for (Market-makers in OTC Derivatives) Directions, 2021. These Directions shall come into force on 3 January 2022. These directions shall apply to entities permitted to act as market-makers in Over-the-Counter (‘**OTC**’) derivatives in terms of the governing Directions. Certain key elements of the Directions are as follows-

(i) Point 3 of the Master Direction lay down the procedure for governance. The Board of Directors (or equivalent forum) and senior management of the market-maker shall ensure implementation of:

a. Adequate and effective risk management and internal control policies and procedures, commensurate with the complexity of the products;

b. Appropriate organization structure (with clear lines of responsibility and accountability), staff and other resources for prudent conduct of the derivative business, risk management function, internal control function and internal audit;

c. Adequate and effective measures towards regulatory compliance; and

d. Adequate and effective measures to address observations from internal and external audits.

(ii) Point 4 lays down directions to include the process for evaluation and approval of ‘Permitted products’, Due diligence and their Pricing and Valuation.

(iii) Due diligence for the introduction of a new product shall include an assessment of the following aspects of the product:

a. Objective(s);

b. Type of targeted client and how the product addresses their need(s);

c. All risks that a client would potentially face; and

d. Pay-off profile;

(iv) Pricing of the products. The details of the pricing and valuation methodology of the products shall be documented. The pricing of the product shall be on the basis of the following preferential hierarchy:

a. Marking the product (or its components) to market; and

b. Marking the product (or its components) to a model;

c. For each transaction, a deal confirmation shall be provided to the user, for all transactions undertaken by the user on a particular day. Confirmation of the same

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shall be obtained from the user in a manner that ensures its legal enforceability.

d. All business, control and monitoring records should be preserved up to the existing statutory retention periods. Wherever statutory retention periods are not stipulated, such records shall be preserved as per the internal policy of the market-maker subject to the condition that they are preserved for at least two years after the life of the product/transaction.

(v) Costs and fees, along with analysis of their components, to be incurred by a client; and

(vi) Measures necessary to mitigate any conflict of interest.

Liquidators to disclose notices for public auction on IBBI's electronic platform: The Insolvency and Bankruptcy Board of India ('**IBBI**') has *vide* Circular dated 30 September 2021 mandated all liquidators to upload the public notice of every auction of any liquidation asset, w.e.f. 1 October 2021, at www.ibbi.gov.in on the date of publication of the notice in newspapers. This has been done, in line with Regulation 12(3) of the IBBI (Liquidation Process) Regulations, 2016, to centralize the announcements of auctioning of liquidation assets to improve visibility and to expedite process of sale.

Relaxation on procedural matters related to Issues and Listing by SEBI: The SEBI has *vide* Circular dated 1 October 2021 provided a relaxation to the Rights Issues opening up to 31 March 2022, provided that the Lead Manager(s) shall comply with point (v) of the earlier SEBI Circular dated 6 May 2020 dealing with the relaxation on account of pandemic Covid-19. As per point (v), the issue along with Lead Manager(s) is to ensure the existing process of compliance is followed to the maximum extent, while provided additional options such as (i) in case of disclosures to be made of demat account details by physical shareholders for credit of rights entitlements (REs), physical shareholders may be allowed to submit their applications for crediting in an alternate method provided by the issuer and Lead Manager(s), and (ii) In case of making an application for rights issue to be made through ASBA (Application Supported by Blocked Amount) facility, an optional mechanism (non-case mode) is to be provided. The issuer company should also conduct a Vulnerability Test for optional mechanism (non-cash mode only) to accept applications in Rights Issue from an independent IT Auditor and submit the report to the concerned stock exchange(s). The issuer must also provide an FAQ, online dedicated investor helpdesk, for guiding investors through the application process. For all offer documents filed until 31 July 2020, authentication/ certification/ undertaking(s) may be done using digital signatures, and procedure for inspection of material documents shall also be electronic.

Timelines for Investment Advisors to conduct annual audit extended: The SEBI has *vide* Circular dated 30 September 2021 extended the timelines for investment advisors to conduct annual audit in respect of compliance of SEBI (Investment Advisers) Regulations, 2013 ('**IA Regulations**') and circulars issued thereunder, along with to obtain an annual certificate from an auditor confirming compliance with client level segregation requirements under Regulation 22 of the IA Regulations, by three months *viz.*, up to 31 December 2021 for FY 2020-21. To submit any adverse findings of the audit, the same is to be done by 31 January 2022. The certificate is also to be obtained from the auditor by 31 December 2021.

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Ratio Decidendi

Notification banning online rummy played for stakes quashed for being arbitrary, illegal and violative of fundamental right to trade and commerce: Kerala High Court

In a writ petition challenging the validity of Notification No. G.O.(P)No.26/2021/HOME ('**Notification'**), dated 23 February 2021 by the State of Kerala, that brought online rummy played for stakes within the purview of the Kerala Gaming Act, 1960 ('**Act'**), the Kerala High Court has held that the Notification is arbitrary, illegal and violative of the fundamental right to free trade and commerce.

Brief facts:

a. The State Government Notification had added the phrase 'except online rummy played for stakes' to a notification under Section 14A(1) of the Act, thereby bringing online rummy played for stakes within the ambit of the Act.

b. The Petitioners were companies and businesses involved in the development of online games and also offered online games of skill throughout India. The Petitioners filled a Writ Petition challenging the Notification in the instant case.

Submissions:

a. The Petitioners argued that the Notification prohibited playing online rummy within the State while playing rummy offline in physical settings was still permitted. Such prohibition of online rummy alone was arbitrary and without any rationale, since there was no difference between playing the game online and offline. Further, Section 14 of the Act specifically excluded games of skill from prohibition. It was argued that mere addition of real-money element would not convert online rummy from a game of skill to a game of chance. The game of online rummy involves predominant skills of counting cards, holding & discarding cards, memorising cards, etc., exactly like playing rummy in a physical setting.

b. On behalf of the State, it was argued that online rummy is a very addictive game which is injurious to public interest and it was concerned about children playing it easily. Further, betting and gambling comes under the State list and the State is empowered to make legislations for it. It was argued that online rummy does not involve predominant skill, as a factor of cheating and manipulative dealing of cards is involved. Additionally, the right to trade and commerce under Article 19(1)(g) would not include gambling businesses within its purview, since it was never intended to form a part of the country's ancient trade practices.

Decision:

a. The High Court allowed the writ petition and observed that rummy being a game of predominant skill will be exempt from the provisions of the said Act even without the operation of Section 14A. It observed that a bare reading of Section 14 & 14A of the Act would show that the skill in playing any game does not in any way depend upon the presence of stakes. Therefore, online rummy, played with or without stakes, will be a 'game of skill' and does not fall within the purview of 'gambling' or 'gaming'.

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b. Further, the Court held that Section 14A was just a superfluous section since a game that was found under Section 14 to be a game of mere skill was already exempted from the provisions of the Act. Therefore, the Notification was held arbitrary, illegal and violative of fundamental rights guaranteed under Articles 14 and 19(1)(g) of the Constitution. The restriction on online rummy played for stakes was held not a reasonable restriction.

[*Head Digital Works Private Limited* v. *State of Kerala* – Judgment dated 27 September 2021, 2021 SCC OnLine Ker 3592, Kerala High Court]

Chairman of a company is ineligible to act as an arbitrator to resolve dispute between the company and another party

In an interesting dispute regarding the appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (‘**Arbitration Act**’), the Supreme Court has observed that the chairman of one of the parties will be ineligible to act as arbitrator due to his non-independence and non-impartiality.

Brief facts:

a. The Respondent and Petitioner had entered into a distribution agreement for distribution of certain goods, for a period of two years, in Jaipur, Rajasthan (‘**Agreement’**). Clause 13 of the Agreement provided that any dispute arising out of the Agreement should be referred for arbitration to the Chairman of the Petitioner as the sole arbitrator. Disputes arose between the parties and in 2019, the Respondent approached the arbitrator, being the Chairman, for resolution in accordance with the arbitration clause of the Agreement.

b. During the pendency of the arbitration proceedings, the Respondent had also approached the Rajasthan High Court for appointment of an arbitrator under Section 11 of the Arbitration Act. The High Court, considering Section 12(5) of the Arbitration Act, allowed the application and appointed a fresh arbitrator. Aggrieved by the order, the Petitioner filled this Petition before the Supreme Court.

Submissions:

a. The Petitioner argued that Section 12(5) would not be applicable to the Agreement as the Section was added to the Act after the Agreement was made. Additionally, the High Court cannot interfere during the pendency of arbitral proceedings and the proceedings cannot be appealed against, unless the aggrieved party has a right to appeal under Section 37 of the Arbitration Act.

b. The Respondents argued that the chairman of the Petitioner would be ineligible to act as an arbitrator according to Section 12(5) of the Act.

Decision:

The Supreme Court dismissed the Petition and held that Section 12(5) makes it clear that where any arbitrator falls within any category in the Seventh Schedule to the Act, he shall become ‘ineligible’ to become an arbitrator, and thus he becomes ineligible to discharge the functions of an arbitrator. Further, according to the Court, the object of adding Section 12(5) was to provide for unbiased arbitrators or neutrality of arbitrators and the section also lays down that, notwithstanding any prior or previous agreements, the arbitrator must not fall within the Seventh Schedule of the Act. The Court observed that impartiality and independence of an arbitrator is a necessity for any arbitration

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proceedings, as rule against bias is one of the principles of natural justice.

[*Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited & Ors.* v. *Ajay Sales & Suppliers* – Judgment dated 9 September 2021, 2021 SCC OnLine SC 730, Supreme Court]

Arbitration – Interim relief application when already heard and reserved for orders by Court, it is not feasible to be considered before Arbitral Tribunal

In an appeal regarding reference of interim application to the Arbitral Tribunal under Section 9(3) of the Arbitration and Conciliation Act, 1996 (‘**Arbitration Act**’) the Supreme Court has clarified the meaning of the term ‘entertain’ under said Section and held that the bar of Section 9(3) would not operate once an application has been entertained and taken up for consideration by the Court, as in the instant case where hearing was concluded, and judgment was reserved.

Brief facts:

a. Dispute arose between the parties and the Appellant sent a notice of arbitration to the Respondent. The Appellant approached the Gujarat High Court for appointment of Arbitral Tribunal under Section 11 of the Arbitration Act.

b. The Appellant filed an application under Section 9 before the Commercial Court for interim relief and the Respondent also filed another application under Section 9 before the Commercial Court, which was heard together. The Commercial Court heard the parties and reserved the applications for orders. Meanwhile, the High Court appointed a 3-member Arbitral Tribunal. The Appellants then filed an interim application for transferring the Application for interim relief to the newly appointed Arbitral Tribunal. The same was dismissed by the Commercial Court. This was challenged before the High Court where it was dismissed. The High Court’s order was challenged before the Supreme Court.

Submissions:

a. The Appellants argued that once the Arbitral Tribunal has been appointed, the Commercial Court cannot continue to entertain the application for interim relief. Section 9(3) of the Arbitration Act restricts the role of the Commercial Court once the Arbitral Tribunal has been appointed. The term ‘entertain’ in Section 9(3) includes the entire adjudication process until orders are passed on merits. It was against Section 9(3) for the Commercial Court to continue to hear the interim relief application, even where orders are reserved, after the Arbitral Tribunal had been constituted.

b. The Respondent argued that the restriction under Section 9(3) will not be attracted since the interim relief application was already entertained, heard on merits and reserved for orders before the Arbitral Tribunal was constituted. The term ‘entertain’ in Section 9(3) would mean ‘admit in order to deal with’ or ‘admit into consideration’. Section 9(3) was neither an ouster clause nor a non-obstante clause and therefore as soon as the Arbitral Tribunal was constituted, it would not automatically make the erstwhile proceedings as without jurisdiction. The purpose of the interim relief would be frustrated if the applications were referred to the Arbitral Tribunal because a lot of judicial time, money & resources was spent in hearing the interim relief applications.

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Decision:

a. The Supreme Court held that priority to the orders of Arbitral Tribunal can only be given where the legislation provides for the same and not otherwise, thereby balancing the powers of both the Arbitral Tribunals and Courts in the procedure of arbitration. It held that where the interim relief application is already heard and reserved for orders and the Court's time and resources have been spent on it, it would not be feasible to consider the application before the Arbitral Tribunal afresh.

b. It was of the view that the bar of Section 9(3) would not operate, once an application has been entertained and taken up for consideration, as in the instant case, where hearing was concluded, and judgment was reserved.

c. Further, observing that there can be no question of usurpation of jurisdiction of the Arbitral Tribunal under Section 17 of the Arbitration Act before the Arbitral Tribunal is constituted, it was held that the Court is obliged to exercise power under Section 9 of the Arbitration Act, if the Arbitral Tribunal is yet to be constituted.

[*ArcelorMittal Nippon Steel (India) Ltd.* v. *Essar Bulk Terminal Ltd.* – Judgment dated 14 September 2021, 2021 SCC OnLine SC 718, Supreme Court]

More flexible capital reorganization for private companies – Reclassification of equity shares as preference shares not impermissible

In an interesting application for sanctioning a scheme of amalgamation, which involved conversion of equity shares into preference shares, the National Company Law Tribunal ('**NCLT**') has held that such reclassification is permissible and could not be deemed to be impermissible.

Brief facts:

a. The shareholders of one of the Petitioner companies had requested for regular dividends/ redemption of their investment as they were not interested in management of the company. The Petitioner company stated that it was not in a position to provide dividends and consequently proposed to convert the equity shares into 9 per cent non-cumulative optionally convertible redeemable preference shares. The Petitioners applied to the NCLT for sanctioning the Scheme of Arrangement and amalgamation of the Petitioner companies under Sections 230 to 232 of the Companies Act, 2013. Through the said Scheme of Arrangement, it was decided to convert certain class of Equity Shares into 9 per cent non-cumulative optionally convertible Redeemable Preference shares of INR 10 each.

b. The Petitioner companies approved the scheme of Arrangement and amalgamation through a Board Resolution on 25 February 2019 and the same was jointly filed before the NCLT Mumbai Bench along with an order dated 22 June 2020 passed by the NCLT Mumbai and the Petitioners undertook to comply with all the statutory requirements of the Companies Act, 2013 ('**Companies Act'**). The Registrar of Companies (ROC), Pune objected to the said scheme of amalgamation, terming the conversion of shares as impermissible.

Submissions:

a. The Petitioners argued that the Companies Act does not bar the conversion of one kind of shares to another, for example conversion of equity shares to preference

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shares. Under Section 43 of the Companies Act, both equity and preference shares fall under the category of share capital and therefore a change in the type of the shares will just be a nomenclature change. Such a conversion only amounts to reorganisation of share capital which is permitted under Section 61 of said Act. A scheme of arrangement or compromise can involve consolidation, reduction, subdivision, or increase in the share capital, therefore the scheme cannot be deemed to be impermissible.

b. The ROC, Pune argued that the Petitioners cannot convert equity shares into preference shares. It is not permissible for the Petitioner to issue redeemable preference shares since the value terms and rights of the equity shares are different from preference share and therefore the same cannot be treated at par with exchange of the same type of shares in a ratio of consideration.

Decision:

The NCLT accepted the explanation given by the Petitioner Companies, concluding that when shares of one class are converted to another, the value of paid up share capital does not undergo any change. Such reclassification only has the effect of changing the nomenclature of the shares without having any impact on the subscribed and paid up share capital of the company. Further, it approved the Scheme of Arrangement and Amalgamation and found the scheme to be fair and reasonable and ordered the dissolution of the transferor companies.

[*In Re; Protrans Supply Chain Management Private Limited & Ors.* – Judgment dated 20 September 2021, C.P. (CAA) 996/MB-II/2020, National Company Law Tribunal, Mumbai Bench]

News Nuggets

Production Linked Incentive (PLI) scheme for automobile and auto components notified

The Ministry of Heavy Industries of India, on 24 September 2021, has notified the Production Linked Incentive scheme (‘**Scheme’**) for the automobile and auto components industry. The scheme is a financial incentive to boost domestic manufacturing of advanced automotive technology products and attract investments in the automotive manufacturing value chain. It is designed to incentivize advanced automotive technology products only *viz.* eligible advanced automotive product on standalone basis at component level or in integration with the vehicle. According to the Scheme, the existing automobile manufacturers should have global revenue of INR 10,000 crore and global investment in fixed assets at INR 3000 crore, while existing auto components manufacturers should have global revenue of INR 500 crore and investment of INR 150 crore. Further, non-automotive company or its group company(ies) can also qualify provided they present a clear business plan to invest in India and generate revenues. The incentives for

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the auto manufacturers range between 13 to 16% while auto component manufacturers would get the benefit from 8 to 11% on year-on-year growth.

Production Linked Incentive (PLI) scheme for textiles notified

The Ministry of Textiles has on 24 September 2021 notified the Production Linked Incentive ('**PLI**') Scheme ('**Scheme'**) for the Textile Industry intending to promote production of Man-made Fibre ('**MMF**') Apparel & Fabrics and Technical Textiles products in the country to enable the Textiles Industry to achieve size and scale. The Scheme also aims of increasing employment opportunities for people while increasing competition in the market. The Scheme covers 14 categories of MMF fabrics, 10 categories of technical textiles and 40 categories of MMF apparel and will provide a benefit of around INR 10,683 crore. It may be noted that before commencement of investment under this Scheme, the Applicant will be required to form a separate company under the Companies Act, 2013 and only a manufacturing company registered in India will be eligible to participate under the Scheme. Further, only one company of a group will be allowed to be registered for PLI for Textiles and none of their other group companies will be eligible for participation in this Scheme as a second participant.

Timelines extended to ease compliance

The Central Government has increased the time limit for intimation of Aadhar number to the Income tax Department for linking of PAN with Aadhaar from 30 September 2021 to 31 March 2022. Accordingly, the due date for completion of penalty proceedings under the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 has been extended to 31 March 2022 as well. The time limit for issuance of notice and passing of order by the Adjudicating Authority under the Prohibition of Benami Property Transactions Act, 1988 has also been extended to the same date.

Contractual employees cannot approach principal employer to exercise their rights; should approach the contractor instead

In a dispute regarding inclusion of contract employees in the list of workers of a company, the Bombay High Court has reiterated the well-settled position that contractual employees are not the employees of the principal employer. Rather, contract employees are engaged by contractors and should approach the contractor in the case of any grievances. Further, the Court observed that where a dispute has arisen over whether a person is an employee of a company or not, it must be settled by an appropriate forum before a complaint can be filed under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labor Laws Practices Act, 1971. Further, noting that the employees were employees of the contractor and not the principal employer, it was held that the employees cannot file a complaint against the Petitioner, being the principal employer, for unfair labour practice.

The Petitioner had outsourced contract labourers for certain peripheral activities, and registered itself under the Contract Labour Act, 1970 as the principal employer of such contract employees. In response to a representation seeking to include the contractual workers to the list of its own workers, the Petitioner informed the contractual workers that they should approach the concerned Labour Officer, who rejected their plea. Against such rejection, the Respondent-contractual workers filed a case in the jurisdictional Labour Court for unfair trade practice against the Petitioner and said Labour Officer. The Petitioner, in said case of

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Mahindra and Mahindra Ltd. v. *Satish and Others* [Judgment dated 20 September 2021] had filed an application earlier for dismissing the complaint before the Labour Court which had been rejected.

Liquidation – 90 days available to auction-purchaser to pay, even when liquidation pending before 25 July 2019

Amended Clause 12 of Schedule I of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, introduced on 25 July 2019, is applicable even to liquidation processes pending before such amendment. The National Company Law Appellate Tribunal (**'NCLAT'**), while holding so, observed that the amended provision is an open-ended provision relating to procedural law which in no way states that it will not apply to pending liquidation processes on the date of substitution. The new Clause 12 permits the Liquidator to receive payments from the auction purchaser up till 90 days after the sale, instead of the earlier provision of 15 days. The IBBI Circular dated 26 August 2019, which clarified to the contrary, was held as not legally enforceable to interpret applicability of the amended Clause. The Tribunal in Mr. Sundaresh Bhat, Liquidator of ABG Shipyard Ltd. [Judgment dated 20 September 2021] was of the view that such circular cannot substitute existing regulation in the name of guidelines, and that the guidelines which are inconsistent with the subordinate legislation would not be enforceable. It held that if the provision is clear, external aid, that too inconsistent, cannot be applied.

E-booklet on Boost to Ease of Doing Business and Investment released

The Ministry of Information and Broadcasting has released an e-booklet titled 'Boost to Ease of Doing Business and Investment in the Country'. The booklet elaborately covers the topic of decriminalization of offences under the Companies Act, 2013. It consists of two chapters dealing with the nature and manner of implementation of reforms as well as the benefits of decriminalization. The booklet provides the statistical data of criminal cases filed during the review period, segregated into defaults which are purely procedural and technical in nature and defaults which are serious in nature and may involve larger public interest. Basis the same, the former defaults have been sought to be decriminalized to reduce burden on courts.

Cyber Security Awareness Campaign launched by IRDAI

Vide a Public Notice dated 1 October 2021, the Insurance Regulatory and Development Authority of India ('**IRDAI**') has brought out the do's and don'ts for carrying out insurance transactions, in relation to cyber security. Various helplines for reporting cyber-crimes have been included in the brochure, such as https://cybercrime.gov.in/Webform/Helpline.aspx and https://digitalpolice.gov.in/Default.aspx, for filing cyber-crime related complaints and obtaining antecedent verification of prospective employees.

Paytm Payments Bank has been notified as a Scheduled Bank

RBI, *vide* its Notification dated 7 October 2021, has included Paytm Payments Bank Limited as a 'Scheduled Bank' under the Second Schedule of the Reserve Bank of India Act, 1934. With the inclusion, Paytm Payments Bank shall now enjoy all the benefits of a Scheduled Bank, thus becoming eligible for loans/ debts at the low-interest rates specified by the RBI, getting membership in clearing houses, access to currency storage facilities amongst others.

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