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Withdrawal of corporate insolvency proceeding even prior to formation of committee of creditors

By **Abhilasha Jha**

The article in this issue of Corporate Amicus discusses a recent decision of the Hon'ble Supreme Court establishing that a plea for the withdrawal of the Corporate Insolvency Resolution Process ('CIRP') can be allowed by the adjudicating authority even prior to the establishment of the committee of creditors ('CoC'). The article in this regard notes that the Apex Court has held that Section 12A of the Insolvency and Bankruptcy Code does not explicitly prohibit the consideration of applications for withdrawal before the constitution of the CoC, and that the NCLT possess inherent powers under Rule 11 of the NCLT Rules to either permit or reject an application for withdrawal of the CIRP even prior to the formation of the CoC. The author observes that the Supreme Court has not only addressed the existing gap in Section 12A of the IBC by affirming that IBC proceeding can be withdrawn prior to constitution of CoC even if CIRP is initiated, but it has also recognized the obligatory status of Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons), 2016.

Withdrawal of corporate insolvency proceeding even prior to formation of committee of creditors

By Abhilasha Jha

The Honourable Supreme Court, in the matter of *Abhishek Singh* v. *Huhtamaki PPL Ltd. and Ors.*[1] recently rendered a significant ruling, establishing that a plea for the withdrawal of the Corporate Insolvency Resolution Process ('**CIRP**') can be allowed by the adjudicating authority even prior to the establishment of the committee of creditors ('**CoC**'). This interpretation has devolved in accordance with Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons), 2016, ('**IBBI Regulations**') and the same is also in consonance with Section 12A of the Insolvency and Bankruptcy Code, 2016 ('**IBC/Code**').

Case overview:

In the present case Huhtamaki PPL Ltd. ('**Operational Creditor**') initiated Section 9 Proceeding against Manpasand Beverages Ltd. ('**Corporate Debtor**'). The said Proceeding was filed before the Hon'ble National Company Law Tribunal, Ahmedabad ('**NCLT**'). The NCLT admitted the Section 9 Petition, Interim Resolution Profession ('**IRP**') was appointed, and Corporate Insolvency Resolution Process ('**CIRP**') was initiated.

Subsequently, before the constitution of CoC, the Operational Creditor and Corporate Debtor reached a settlement. After the terms of the settlement were honoured, IRP filed an application under Regulation 30A of the IBBI Regulations before the NCLT for withdrawal of the CIRP against the Corporate Debtor ('**Withdrawal Application**'). Considering the same, the Operational Creditor also filed an application under Section 12A of the IBC.

The NCLT rejected the Withdrawal Application, citing various reasons, including:

a. Payments to the Operational Creditor from the Corporate Debtor have been made during the moratorium period, which was in violation of the moratorium provision.

b. Allowing the Withdrawal Application would negatively impact the rights of other creditors who had already filed their respective claims against the Corporate Debtor.

c. The NCLT deemed that Regulation 30A of the IBBI Regulations did not hold binding authority.

[1] [MANU/SC/0312/2023]

Against the decision of the NCLT ('**Impugned Order**'), the Corporate Debtor appealed before the Hon'ble National Company Law Appellate Tribunal ('**NCLAT**'). NCLAT *vide* its order stayed the formation of the CoC till the disposal of the application filed by the Operational Creditor under Section 12A of the IBC. Further, the issues arising in the Impugned Order were challenged before the Hon'ble Supreme Court *vide* a Special Leave Petition, and the Hon'ble Apex Court framed the following issues for consideration:

Issues:

a. Whether an application for withdrawal of the CIRP under Section 12A of the IBC can be allowed by the NCLT prior to the constitution of the CoC?

b. Whether Regulation 30A of the IBBI Regulations is binding upon the NCLT?

The legal position on the withdrawal of CIRP is as follows:

I. Section 12A of the IBC Code enables the withdrawal of CIRP that has been admitted under Section 7, 9, or 10 of the Code. However, the same is permitted only with the approval of ninety percent of the voting share of CoC as per the manner prescribed.

II. Regulation 30A of the IBBI Regulations outlines the stages regarding withdrawal of IBC Proceeding:

   a. Before the formation of CoC: The applicant can submit the withdrawal application through IRP.

   b. After the constitution of CoC: The applicant can make the withdrawal application through the interim resolution professional or the resolution professional, depending on the case.

Analysis and findings:

In the matter at hand, the Honourable Supreme Court allowed the appeal and made the following observations:

1. Section 12A of the Code does not explicitly prohibit the consideration of applications for withdrawal before the constitution of the CoC.

2. Despite being of subordinate nature to the IBC, the IBBI Regulations carry binding authority over NCLT.

3. Reliance was placed on the precedent set by the case of *Swiss Ribbons (P) Ltd.* v. *Union of India*[2] wherein it held that at any stage where the COC is not yet constituted a party can approach the NCLT and the tribunal *vide* its inherent powers under Rule 11 of NCLT Rules 2016 may allow or disallow an application for withdrawal or settlement.

4. Regulation 30A of the IBBI Regulations was amended to allow the consideration of applications for withdrawal of CIRP even before the formation of the CoC. It was clarified that Regulation 30 of the IBBI Regulations does not conflict with Section 12A of the

[2] WRIT PETITION (CIVIL) NO. 99 OF 2018

IBC; rather, it complements the provisions introduced by Section 12A of the IBC.

5. Besides, the NCLT possess inherent powers under Rule 11 of the NCLT Rules of 2016 to either permit or reject an application for withdrawal of the CIRP even prior to the formation of the CoC.

6. The other creditors of the Corporate Debtor will retain their independent rights against the Corporate Debtor, which would remain unaffected even if the settlement between the Corporate Debtor and the Operational Creditor is accepted and the proceedings are allowed to be withdrawn.

In light of the above considerations, the Hon'ble Supreme Court has set aside the Impugned Order. Furthermore, it has expressly clarified that its observations shall not impact the rights of other creditors, who shall retain the freedom to assert their independent claims in appropriate proceedings, which shall be adjudicated in accordance with the relevant legal provisions. Moreso, through its ruling, the Supreme Court has not only addressed the existing gap in Section 12A of the IBC by affirming that IBC proceeding can be withdrawn prior to constitution of CoC even if CIRP is initiated, but it has also recognized the obligatory status of Regulation 30A of the IBBI.

[The author is an Associate in Corporate and M&A practice at Lakshmikumaran & Sridharan Attorneys, Hyderabad]

Notifications & Circulars

- Business Responsibility Sustainability Report (BRSR) Core framework for assurance and ESG disclosures for the value chain introduced
- Regulatory framework for sponsors of a mutual fund notified
- SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 amended for timely disclosure of material events
- Food Safety and Standards (Advertising and Claims) Second Amendment Regulations, 2022 – Date of enforcement extended
- SEBI (Ombudsman) (Repeal) Regulations, 2023 notified
- SEBI (Alternative Dispute Resolution Mechanism) (Amendment) Regulations, 2023 notified to introduce Dispute Resolution clause in many Regulations

Business Responsibility Sustainability Report (BRSR) Core framework for assurance and ESG disclosures for the value chain introduced

The Securities and Exchange Board of India ('**SEBI**') *vide* Circular No. SEBI/HO/CFD/CFD-SEC-2/P/CIR/2023/122 dated 12 July 2023 has introduced the Business Responsibility Sustainability Report ('**BRSR**') Core framework for assurance and ESG disclosures for the value chain (means partners contributing to 75% of the listed company's purchases or sales by value). The circular states that the BRSR Core shall be a subset of the BRSR which shall consist of Key Performance Indicators ('**KPIs**'). The BRSR Core incorporates in itself new KPIs like that of job creation, openness of business, and gross wages paid to women. Further, to increase global comparability, the BRSR Core stresses the inclusion of intensity ratios based on revenue adjusted for Purchasing Power Parity (PPP). The circular also mentions that the applicability of the BRSR Core to the top listed companies shall be made on the basis of their market capitalization with a phase-wise implementation in the years to come. ESG disclosures for value chain have been introduced which shall require the listed companies to report the KPIs specifically from the BRSR Core to the listed company's top upstream and downstream partners.

Regulatory framework for sponsors of a mutual fund notified

The Securities and Exchange Board of India ('**SEBI**') *vide* Circular No. SEBI/HO/IMD/IMD-PoD 2/P/CIR/2023/118 dated 7 July 2023 has notified a regulatory framework for sponsors of a Mutual Fund ('**MF**') by way of introducing an alternative set of eligibility criteria for the sponsors in order to better facilitate the entry of new players into the market. Following are some of the important criteria to be eligible henceforth as a sponsor of a mutual fund:

(a) Acquisition of an Asset Management Company ('AMC')

It has been decided that in case of change in control of an existing AMC due to acquisition of shares, the sponsor shall ensure that the positive liquid net worth of the sponsor or the funds tied up by him shall at least be equal to the market value of the shares that are to be acquired.

(b) Pooled Investment Vehicle as sponsor of a mutual fund

Private Equity Funds (PEs) having at least five years of experience and managing a committed and drawn-down capital of a minimum of INR 5,000 crore are hereby permitted amongst the pooled investment vehicles.

(c) Reduction of stake and disassociation of sponsor

A sponsor is now allowed to voluntarily reduce its stake in an AMC and become a 'self-sponsored AMC' subject to certain conditions.

(d) Re- Association of the Sponsor(s),

Where a sponsor fails to meet the requirements of a 'self-sponsored AMC', a disassociated sponsor and/or any new entity can become sponsor of the mutual fund subject to the certain conditions.

(e) Deployment of liquid net worth by AMC.

AMCs shall be required to deploy the minimum net worth required, either in cash, money market instruments, government securities, treasury bills, repo on government securities, or listed AAA rated debt securities. Such investments shall be unencumbered and without such features that may increase liquidity risk.

Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 amended for timely disclosure of material events

The Securities and Exchange Board of India ('**SEBI**') has *vide* Circular No. SEBI/HO/CFD/CFD-PoD 1/P/CIR/2023/123, dated 13 July 2023 and made effective from 15 July 2023, amended the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('**LODR Regulations**') by way of adding annexures under Regulation 30 and 30A in order to promote better transparency and timely disclosure of material events. Accordingly, the following four annexures were inserted: (i) Annexure I – details ought to be provided while disclosing events given under Part A of Schedule III of the LODR Regulations such as acquisitions, demergers, issuance of securities, being some of the events amongst other mentioned; (ii) Annexure II – timelines being 12 hours or 24 hours as specified therein in the annexure for disclosing the events given under Part A of Schedule III; (iii) Annexure III – Detailing a guidance on when an event is said to have actually occurred for the disclosure obligations to trigger thereupon; and (iv) Annexure IV – Detailing a guidance on the criteria for determining the materiality of events with one of the criteria being omission of an event whose value or the expected impact in terms of value is lower than 2 per cent of turnover, as per the last audited consolidated financial statements of the listed company; 2 per cent of net worth as per as per the last audited consolidated financial statements of the listed company, except in cases where the arithmetic value of the net worth is negative; and 5 per cent of the average of absolute value of profit or loss after tax, as per the last three audited consolidated financial statements of the listed company.

Food Safety and Standards (Advertising and Claims) Second Amendment Regulations, 2022 – Date of enforcement extended

The FSSAI issued a direction *vide* F. No.1-94/FSSAI/SP(Claims and Advertisement)/2017 dated 5 July 2023, extending the date of enforcement of sub-regulation (7) under Regulation 4 of the Food Safety and Standards (Advertising and Claims) Second Amendment Regulations, 2022 that deals with the specifications for dimensions of disclaimer on a label, by a further period of six months starting 13 June 2023.

SEBI (Ombudsman) (Repeal) Regulations, 2023 notified

The Securities and Exchange Board of India ('**SEBI**') *vide* Notification No. SEBI/LAD–NRO/GN/2023/138 dated 3 July 2023 has notified Securities and Exchange Board of India (Ombudsman) (Repeal) Regulations, 2023 to repeal the SEBI

(Ombudsman) Regulations, 2003. However, it is clarified that the repeal shall not affect the previous operations, rights, obligations, punishments, legal proceedings etc under the Ombudsman Regulations.

SEBI (Alternative Dispute Resolution Mechanism) (Amendment) Regulations, 2023 notified

The Securities and Exchange Board of India ('**SEBI**') *vide* Circular No. SEBI/LAD NRO/GN/2023/137 ADVT.-III/4/Exty./247/2023-24, dated 3 July 2023 has notified the SEBI (Alternative Dispute Resolution Mechanism) (Amendment) Regulations, 2023 thereby inserting a 'Dispute Resolution' clause to the following set of Regulations namely: SEBI (Merchant Bankers) Regulations, 1992, SEBI (Registrars to an Issue and Share Transfer Agents) Regulations, 1993, SEBI (Debenture Trustees) Regulations, 1993, SEBI (Mutual Funds) Regulations, 1996, SEBI (Custodian) Regulations, 1996, SEBI (Credit Rating Agencies) Regulations, 1999, SEBI (Collective Investment Schemes) Regulations, 1999, SEBI KYC (Know Your Client) Registration Agency Regulations, 2011, SEBI (Alternative Investment Funds) Regulations, 2012, SEBI (Investment Advisers) Regulations, 2013, SEBI (Research Analysts) Regulations, 2014, SEBI (Infrastructure Investment Trusts) Regulations, 2014, SEBI (Real Estate Investment Trusts) Regulations, 2014, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, SEBI (Foreign Portfolio Investors) Regulations, 2019, SEBI (Portfolio Managers) Regulations, 2020 and SEBI (Vault Managers) Regulations, 2021.

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Ratio Decidendi

- Liquidation – Section 327(7) of Companies Act, 2013, which declares Sections 326 and 327 inapplicable in cases of liquidation under IBC, is constitutionally valid – Supreme Court
- Arbitration – Order passed under Section 16 can be challenged under Section 34 only after the final award is passed – Same cannot be challenged under Article 227 unless there are exceptional circumstances – Calcutta High Court
- Arbitration – 'Counter balancing' not achieved when a party is allowed to choose only one arbitrator from a restrictive panel provided by the opposite party while the remaining (2/3rd) members are appointed by the party providing the panel itself – Delhi High Court

Liquidation – Section 327(7) of Companies Act, 2013, which declares Sections 326 and 327 inapplicable in cases of liquidation under IBC, is constitutionally valid

The Supreme Court, in a batch of Writ Petitions, has upheld the constitutionality of Section 327(7) of the Companies Act, 2013 ('**Companies Act**') and Section 53 of the Insolvency and Bankruptcy Code, 2016 ('**IBC/Code**').

Brief facts:

Section 327 (7) of the Companies Act was introduced in 2016 to restrain the application of Sections 326 and 327 in the event of liquidation process under the IBC. Sections 326 and 327 provide for preferential payments of dues to workers during winding up. However, Section 53 of IBC provides that workmen's dues for the period of 24 months prior to the commencement of liquidation shall be treated and ranked equally between workmen and secured creditor (if the secured creditor has relinquished the security in accordance with Section 52 of the IBC). Thus, various writ petitions were filed claiming Section 53 of IBC is violative of Right to Livelihood and Right to Equality of the workmen considering that it restricts the preferential treatment as provided under Section 326 and Section 327 of the Act.

A prayer has also been made to exclude Section 53 of IBC as the waterfall mechanism for settlement of workmen's claims during the liquidation process.

Submission on behalf of the Petitioners:

- Section 327(7) is arbitrary and violative of Article 21 of the Constitution of India, 1950 **('Constitution')** since as per Section 53 of IBC statutory dues such as Gratuity, Provident fund, and Pension fund, payable to Workmen are included in the realized liquidation fund of the Company, whereas the same was permitted under Sections 326 and 327 of the Act. Therefore, the same violates Article 21 of the Constitution.
- As per Section 53 of the IBC, 'workmen's dues' are to be treated at par with secured creditors (if the secured creditor has relinquished security as per the manner envisaged in Section 52 of IBC). Hence 'workmen dues' are not given preferential treatment which is in contravention to the provisions of the Act. Therefore, Section 327 (7) which bars the application of the Act, in case of liquidation process under IBC, is unreasonable and violative of Article 14 of the Constitution.

Contentions of the Respondent:

- Contrary to Petitioner's contention, workmen's dues are given top priority in the waterfall mechanism provided under Section 53 of the IBC. Section 36 of the IBC protects statutory dues under gratuity, provident and pension fund by taking out the same from the ambit of the liquidation process consciously.
- The IBC is a mechanism which aims to comprehensively consolidate the process provided under other statutes to maximize asset value in a time-bound framework,

considering the interest of all the stakeholders involved. The objectives of the Act and IBC are distinct in addressing liquidation and winding up respectively.

Decision:

The Hon'ble Apex Court held that the Companies Act does not deal with insolvency and bankruptcy when the companies are unable to pay their debts or the aspects relating to the revival and rehabilitation of the companies and their winding up if revival and rehabilitation is not possible. In principle, the revival or winding up of the company on the grounds of insolvency and inability to pay debts are different from cases where companies are wound up under Section 271 of the Act. Hence, the Companies Act and IBC cannot be kept on the same pedestal in relation to Article 14 of the Constitution.

Section 53 of the IBC should be read along with Section 36(4)(a)(iii) of the IBC which excludes statutory dues payable to workmen such as pension fund, gratuity fund, provident fund, from the liquidation recovery process thereby consciously protecting the interests of workmen as stakeholders. Hence, Article 21 of the Constitution is not violated.

The Hon'ble Apex Court further held that as per the waterfall mechanism provided under IBC, the unpaid dues of the workmen are adequately and significantly protected and the same is in accordance with the objectives sought to be achieved by the IBC.

While upholding the constitutional validity of Section 327(7) of the Act and Section 53 of IBC, the Supreme Court held that the waterfall mechanism is based on a structured mathematical formula, and the hierarchy is created in terms of payment of debts in order of priority with several qualifications, therefore striking down any one of the provisions or rearranging the hierarchy in the waterfall mechanism may lead to several trips and disrupt the working of the equilibrium as a whole and stasis, resulting in instability. Every change in the waterfall mechanism is bound to lead to cascading effects on the balance of rights and interests of the secured creditors, operational creditors and even the Central and State Governments.

[*Moser Baer Karamchari Union* v. *Union of India* 2023, Judgement dated on 2 May 2023, 2023 SCC OnLine SC 547, Supreme Court of India]

Arbitration – Order passed under Section 16 can be challenged under Section 34 only after the final award is passed – Same cannot be challenged under Article 227 unless there are exceptional circumstances

The Calcutta High Court has held that the remedy under Article 227 of the Constitution cannot be invoked to challenge an order of an Arbitral Tribunal rejecting a jurisdictional objection under Section 16 of the Arbitration and Conciliation Act, 1996 (**'Arbitration Act'**) until and unless there are exceptional circumstances. While stating so, the Court took note of the intention of the legislature to reduce excessive judicial interference in arbitration proceedings.

Brief facts:

Respondent in this case, had entered into a leave and license agreement dated 27 June 2019 (**'Agreement'**) with the Petitioners allowing them to carry on their business on the premise owned by Respondent. Invoking the arbitration clause in the Agreement, the Respondent filed an application under Section 11 of the Arbitration and Conciliation Act, 1996, which was allowed, and a sole arbitrator was appointed.

In the proceeding before the learned arbitrator, the Petitioners filed an application under Section 16 of the Act raising objections to the jurisdiction of the arbitrator and for the dismissal of the arbitral reference since the Agreement was unstamped and unregistered. Said application was dismissed by the learned arbitrator and, thereafter, the Petitioner filed a revision Petition under Article 227 of the Constitution.

Submission by the Petitioners:

- The Petitioners submitted that the application under Section 16 of the Act was filed since the Agreement containing the arbitration clause is an unstamped and unregistered agreement. By virtue of the embargo under Section 35 of the Indian Stamp Act, 1899 it is a settled position that an unstamped document cannot be acted upon or placed as evidence before any Court or Tribunal.
- On the issue of maintainability, any challenge to the jurisdiction of the Arbitral Tribunal under Section 16 of the Arbitration Act if accepted by the arbitrator then the remedy of appeal would lie as per Section 37(2)(a) of Arbitration Act. However, if the objection is overruled and application under Section 16 is dismissed then no remedy of appeal is provided under the Act. Considering the same, Petition under Article 227 of the Constitution should be allowed to be maintainable.
- Under Article 227 of the Constitution, the Hon'ble High Court has extraordinary power of superintendence over all courts and tribunals throughout the territories to which it exercises jurisdiction, which includes the power of judicial review, and existence of an alternative remedy does not preclude the High Court from exercising its powers under Article 227.

Submission by the Respondent:

- The Respondent contended that the impugned order of the learned arbitrator was a subject matter of challenge under Section 34 of the Act and cannot be challenged through a revision petition under Article 227 of the Constitution.
- Petitioners have a remedy against the impugned order under the Arbitration Act itself by way of Section 34, the rule of alternative remedy comes into operation, rendering the present petition not maintainable.

Judgement:

In the present case, the question which has arisen is whether an order of the Tribunal rejecting Section 16 application regarding the challenge to the jurisdiction of the Arbitral Tribunal can be intervened by Courts considering the remedy provided under the Act.

Firstly, the Court inquired whether there was an alternate remedy available to the Petitioner within the Arbitration Act before invoking the constitutional remedy. For this purpose, the Court referred to the order of the Hon'ble Apex Court in *Deep Industries Ltd.* v. *ONGC*, (2020) 15 SCC 706, wherein it was held that when a Section 16 application is dismissed, no appeal is provided, and the challenge of the aggrieved party has to wait till the passing of the final award. After the award is passed, the aggrieved party can challenge the award under Section 34 of the Act on the ground of jurisdiction, pursuant to the challenge earlier made under Section 16 of the Act. Therefore, the Court in Deep Industries (*Supra*) held that the Petitioner has not been left remediless and has statutorily been provided a chance of appeal, however, the challenge has to wait till passing of the final award.

Secondly, the Court examined whether it could exercise its plenary powers under Article 227 of the Constitution in the facts of the present case. Referring to the decisions of the Supreme Court in *Deep Industries* (*Supra*) and *Bhaven Construction* v. *Executive Engineer, Sardar Sarovar Narmada Nigam Ltd.*, (2022) 1 SCC 75, it stated that the remedy under Article 227 of the Constitution can be invoked on the *ground of patent lack in inherent jurisdiction or exceptional circumstances or 'bad faith' of the other party*. The Court found that none of the abovementioned grounds exists so far as the present case is concerned.

Hence, the Court observed that since the Petitioner is not left remediless and has a chance of appeal under Section 34 of the Arbitration Act, the well-recognised principle of alternative remedies would apply and held that the present revision petition is not maintainable.

[*M.D. Creations & Others* v. *Ashok Kumar Gupta* – Judgement dated 9 June 2023 in C.O. 2545 of 2022, Calcutta High Court]

Arbitration – 'Counter balancing' not achieved when a party is allowed to choose only one arbitrator from a restrictive panel provided by the opposite party while the remaining (2/3rd) members are appointed by the party providing the panel itself

The Delhi High Court has held that in case of an appointment procedure which involves appointment from a panel made by one of the contracting parties, the panel must be sufficiently broad-based for a party to choose its nominee. Moreover, a clause in the arbitration agreement which provides for appointment of two-thirds of the members of the arbitral tribunal by one party tilts the scale in favour of that party, making the agreement unworkable.

Brief facts:

A Request for Proposal ('**RFP**') was issued by Railtel Corporation of India Ltd. (**'Railtel' /' Respondent'**) with respect to the selection of a Digital Entertainment Service Provider for delivering Content on Demand services for Indian Railways, which was awarded to Margo Networks Pvt. Ltd. (**'Margo' / 'Petitioner'**). The RFP provided for arbitration as the dispute resolution mechanism by a panel of three arbitrators.

The clause regarding the appointment of arbitrators provided that, for the appointment of the arbitrators, Railtel should send a list of arbitrators and Margo was required to suggest back at least two of the names from said list. Out of these two, the Respondent would appoint one as Margo's nominee and would appoint the rest either from the list or outside the list **('Clause 3.37 of the RFP')**

The Petitioner raised certain claims against the Respondent through a demand-cum-invocation notice dated 10 January 2022 (**'Demand Notice'**). Wherein, the Petitioner had also challenged the procedure for appointment of arbitration as stipulated under Clause 3.37 of the RFP to be one-sided and illegal. Thereafter, the Petitioner proposed its own process for appointment wherein both the parties would appoint one arbitrator each and the two arbitrators so appointed would appoint the presiding arbitrator to constitute the tribunal.

The Respondent refused to adhere to the appointment procedure suggested by the Petitioner in the Demand Notice and asked the Petitioner to strictly conform to Clause 3.37 of the RFP. Consequently, the Respondent sent a list of 10 people who were former Railtel employees and asked the Petitioner to revert with their nominee, so the Tribunal can be appointed. The Petitioner then approached the High Court under Section 11 of the Arbitration and Conciliation Act seeking the constitution of an independent Arbitral Tribunal.

Submission by Petitioner:

- The Petitioner argued that Clause 3.37 of the RFA is contrary to the law laid down in various judgments of the Supreme Court including *Voestalpine Schienen Gmbh* v. *Delhi Metro Rail Corporation*, (2017) 4 SCC 665 since the procedure for appointment prescribe therein is one-sided, restrictive and does not achieve counterbalancing.
- With reference to the judgement in *CORE* v. *ECI-SPIC-SMO-MCML (JV)*, (2020) 14 SCC 712, which was relied upon by the Respondent, the Petitioner argued that the ratio as laid down in *CORE* (*Supra*) cannot be applied to this case since the facts are distinguishable.

Submission by Respondent:

- The Respondent relying on the decision in *CORE* (*Supra*) submitted that the constitution of the arbitral tribunal must strictly be in accordance with the terms specified in the agreement between the parties and there can be no derogation from the same.
- It further submitted that merely because the arbitrators in the panel consist of names of retired employees of the Railtel, the same does not make such retired employees ineligible to act as arbitrators.

Decision:

The Court examined the applicability of the decision in *CORE* (*Supra*) and held that the judgment in *CORE* was an authority only in respect of the propositions identified therein and its applicability cannot be extended for all cases. The two issues which were at the core of the present case, which were unanswered by *CORE* (*Supra*) were:

(1) Whether in case of an appointment procedure which involves appointment from a panel made by one of the

contracting parties, is it mandatory for the panel to be sufficiently broad based?

(2) Whether 'counter balancing' is achieved in a situation where one party must choose an arbitrator from a panel provided by other party while the remaining (2/3) members are appointed by the other party?

With respect to the first issue, the Court reiterated the principle laid down in *Voestalpine* (*Supra*), which has been followed in numerous judgments relating to validity of appointment procedures. It stated that a party must have a wide choice for nominating its arbitrator from a broad-based panel. In the present case, the panel offered by the Respondent to the Petitioner consisted of ten people, each of them admittedly being former employees of either the Railways or RailTel and as such the Court found the panel to be restrictive and not broad-based.

On the second issue of counterbalancing, the Court highlighted the underlying principle laid down by the Supreme Court in *TRF* v. *Energo Engineering*, (2017) 8 SCC 377 and *Perkins Eastman Architects DPC* v. *HSCC*, 2019 SCC Online SC 1517, which was also reiterated in *CORE* (*Supra*) as relied upon by the Respondent. As per these judgments, when one party has the right to prescribe a panel of persons from which the parties would nominate their arbitrator, this advantage must be counter-balanced by the power of the other contracting party to choose therefrom.

Making reference to a coordinate bench judgment of the Hon'ble Delhi High Court in *CMM Infraprojects* v. *IRCON International*, 2021:DHC:2578, followed in *Pankaj Mittal* v. *Union of India*, ARB.P. 607/2021, the Court found that where the 2/3rd strength of the arbitral tribunal is nominated by the Respondent, the scale tilts in favour of Respondent which would lead to the conclusion that the clause will not be workable.

Hence, the Court held that the appointment process contained in Clause 3.37 of the RFP fails to pass the counter-balancing requirement and even the panel offered by the Respondent to the Petitioner was found to be restrictive and not broad-based. Therefore, the Court found it necessary to exercise its jurisdiction under Section 11 and constitute an independent and impartial Arbitral Tribunal.

[*Margo Networks Pvt. Ltd. & Anr.* v. *Railtel Corporation of India Ltd.* – Judgement dated 10 July 2023 in Arbitration Petition No. 400/2022, Delhi High Court]

News Nuggets

- Insolvency – Limitation for appeal – Exclusion of holidays can be allowed only from 30-day limitation period and not from subsequent 15-day period under IBC Section 61(2)
- Liquidation – Notice period of at least 30 days to be given in case of e-auction of corporate debtor's assets though provision for same absent in IBBI Liquidation Regulations
- Arbitration – Plea of presence of tripartite agreement when not correct
- Arbitration – Venue to be considered as seat of arbitration in absence of significant contrary indicia in agreement
- Ambiguity in the law governing arbitration agreement would not render arbitration agreement invalid
- Arbitral Tribunal's finding of existence of an arbitration agreement when cannot be interfered
- Insolvency – No provision for constitution of Committee of Creditors (CoC) in case of a single operational creditor

Insolvency – Limitation for appeal – Exclusion of holidays can be allowed only from 30-day limitation period and not from subsequent 15-day period under IBC Section 61(2)

The National Company Law Appellate Tribunal, New Delhi, ('**NCLAT**') has held that the benefit of exclusion of public holidays or holidays while calculating the limitation period for submitting an appeal is only applicable to the 30-day limitation period specified in Section 61(2) of the Insolvency and Bankruptcy Code, 2016 and not applicable in cases of the additional 15-days period granted by the proviso to Section 61(2). While adjudicating an appeal filed in *Sandeep Anand* v. *Gopal Lal Baser* [Judgment dated 3 July 2023], it was observed that the appellant had filed for an appeal against the order of the Adjudicating Authority beyond the time-period of 30 days as well as the time-period of 15 days, providing for condonation of delay under proviso to Section 61(2). The appellant submitted that the 45th day provided as the limit to file an appeal fell on a 'public holiday' and so it should be treated as if the appeal was filed well within the prescribed limitation period. In this regard, the NCLAT held that its right to condone a delay beyond the period of 30 days was only limited to a maximum period of 15 days and that it cannot condone any further delay. Further, it also observed that the benefit of public holiday can only be allowed while computing limitation under the 30-days period and the same benefit cannot be extended to the subsequent 15-days condonation period allowed under the proviso to the Section 61(2).

Liquidation – Notice period of at least 30 days to be given in case of e-auction of corporate debtor's assets though provision for same absent in IBBI Liquidation Regulations

The National Company Law Appellate Tribunal, New Delhi ('**NCLAT**') has held that where an e-auction for the sale of assets ought to be held, there shall be a minimum notice period of 30 days before the conduct of such e-auction. In the case of *Naren Seth* v. *Sunrise Industries & Ors.* [Judgement dated 4 July 2023], the adjudicating authority had admitted the corporate debtor into Corporate Insolvency Resolution Proceedings ('**CIRP**'). Due to the absence of resolution plans for the revival of the corporate debtor, the adjudicating authority appointed a liquidator, and the liquidator so appointed called for the sale of assets *via* e-auction and concluded the process within 5 days. In this regard, it was held by the adjudicating authority that the e-auction was conducted in haste while not giving the bidders appropriate time to think through the bidding. While conforming the order of the adjudicating authority, the NCLAT placing reliance on Rule 8 of the SARFAESI Security Interest (Enforcement) Rules, 2002 that provides for a notice period of 30 days in case of sale of immovable asset, held that though the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ('**Liquidation Regulations**') do not mention a specific period to be provided for notice of sale of assets, the liquidator in the present case ought to have given a sufficient time of at least 30 days for sale of corporate debtors assets through e-auction.

Arbitration – Plea of presence of tripartite agreement when not correct

The Delhi High Court has held that when an agreement between two parties provides for arbitration, the fact that a third entity is not present shall not prevent the High Court from allowing either party to invoke arbitration for the want of maintainability. In the case of *Wave Geo-Services Pvt. Ltd.* v. *Devi Engineering and Construction Pvt. Ltd.* [Judgement dated 3 July 2023], where the petitioner filed a petition under Section 11 of the Arbitration Act, 1996, ('**Arbitration Act**') and the respondent claimed that it had entered into separate agreements with the petitioner and a technical collaborator being a third entity for the same project, and thus the agreements were supposed to be treated as a tripartite agreement between all the three parties. Further, the respondent went on to claim that since the third entity is a foreign entity, only the Supreme Court and not the High Court shall have the power to entertain petitions under Section 11. However, the High Court while appointing a sole arbitrator held that the respondent's claim that there existed a tripartite agreement between all three parties could not be accepted because the arbitration clause in the agreement between the petitioner and the respondent provided that the clause was exclusive to both parties, implying that the rights and obligations would be interpreted on the basis of the stipulations made in the bilateral agreement. The High Court further stated that the agreement between the parties to the case was bilateral, indicating that the technical collaborator was not a party to the agreement. Therefore, since neither party was foreign entities, the High Court exercised its jurisdiction to appoint a sole arbitrator and held that the respondent's claim could be adjudicated upon by an arbitral tribunal.

1. Arbitration – Venue to be considered as seat of arbitration in absence of significant contrary indicia in agreement
2. Ambiguity in the law governing arbitration agreement would not render arbitration agreement invalid

While dealing with an application under Section 45 of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**') for referring the suit to arbitration, the Calcutta High Court has held that in cases where the arbitration agreement does not provide for a seat of arbitration, the venue of the arbitration shall be the seat of the arbitration. In the case of *Orissa Metaliks Pvt. Ltd.* v. *SBW Electro Mechanics Import Export Corporation* [Judgement dated 22 June 2023], the petitioner had contended that the arbitration agreement only provides for the venue of arbitration and does not provide for the seat of arbitration. The High Court while relying on the case of *BGS SGS Soma* held that since there is no designation of an alternative place as the 'seat' and in absence of any significant contrary indicia, the venue shall be the seat of arbitration.

Further, it was also held that merely because there is an ambiguity in the law governing the arbitration agreement, it would not render the arbitration agreement as invalid. The petitioner had contended that the arbitration agreement

between the petitioner and the respondent was vague, indefinite and invalid because the governing law of the arbitration agreement was provided to be 'International Arbitration Laws' and there existed no such laws, therefore, since there is no valid arbitration agreement between the parties, the High Court cannot refer the parties to arbitration proceedings. The High Court in this regard observed that judicial interference as per Section 45 of the Arbitration Act shall not be allowed on the ground that the agreement is ambiguous or uncertain with regards to the law governing the agreement when the agreement evidently shows that there is a clear intention of the parties to refer a dispute to arbitration.

Arbitral Tribunal's finding of existence of an arbitration agreement when cannot be interfered

The Calcutta High Court has held that *vide* the powers conferred under Section 48 of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**') the Court may not be in a position to revisit the evidence or interfere with the finding of an Arbitral Tribunal in determining if there exists an arbitration agreement except if it evidently seen that there is no existence of an arbitration agreement. In the case of *Jaldhi Overseas PTE Ltd* v. *Steer Overseas Pvt. Ltd.* [Judgement dated 23 June 2023], the Arbitral Tribunal had acknowledged the existence of an arbitration between the petitioner and the respondent and held that it possessed jurisdiction to decide the petitioner's claims while publishing a partial award in favor of the petitioner. In furtherance of the decision of the arbitral tribunal, the petitioner applied for enforcement of the award under Part II of the Arbitration Act. However, the respondent contended that the there was no concluded agreement between the parties which was evident from the fact that the respondent had made a counteroffer to the offer made by the petitioner, and that the final contract was executed between the petitioner and the sister company of the respondent, thereby evidencing no privity of contract between the petitioner and the respondent. The High Court while upholding the Arbitral Tribunal's view, held that the decision of the Tribunal in deciding that there exists an arbitration agreement was after careful examination of material evidence and circumstances along with the parties' conduct such as the several milestones achieved in execution of the work agreed in compliance with their original understanding, despite the counter offers that were made.

Insolvency – No provision for constitution of Committee of Creditors (CoC) in case of a single operational creditor

The National Company Law Appellate Tribunal, Chennai ('**NCLAT'**) while deciding an appeal, has held that the Insolvency and Bankruptcy Code, 2016 ('**IBC'**) does not contain any provision that expressly allows constituting a CoC in cases where there is only one operational creditor, and his claim is the only claim against the corporate debtor. In the case of *V. Duraisamy* v. *Jeyapriya Fruits and Vegetables Commission Agent* [Judgement dated 23 June 2023], the appeal was preferred from an order of the adjudicating authority wherein the operational debtor had filed a petition under Section 9 of the IBC for initiating Corporate Insolvency Resolutions Proceedings ('**CIRP**') against the corporate debtor after the corporate debtor

was struck down by Registrar of Companies ('**RoC**') for non-filing of financial statements, and the adjudicating authority had admitted the petition for CIRP, had directed the Interim Resolution Professional ('**IRP**') to constitute a CoC and admit the claim of the operational debtor. Against such order of the adjudicating authority, on an appeal to the NCLAT by the IRP, the NCLAT set aside the order of the adjudicating authority while stating that the IBC does not warrant such a constitution in the light of the fact that no claims were received by the IRP except from that of the only operational creditor even after public announcement, and that since the corporate debtor was also struck off by the RoC, the admission for CIRP did not hold good.

NEW DELHI
5 Link Road, Jangpura Extension, Opp. Jangpura Metro Station, New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing, Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street, Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center, Brigade Gateway Campus, 26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Phone : +91-80-49331800 Fax:+91-80-49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road, Opp. Methodist Church, Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924 E-mail :lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII, Nehru Bridge Corner, Ashram Road, Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road, Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building 41, Chowringhee Road, Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59, Sector 26, Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

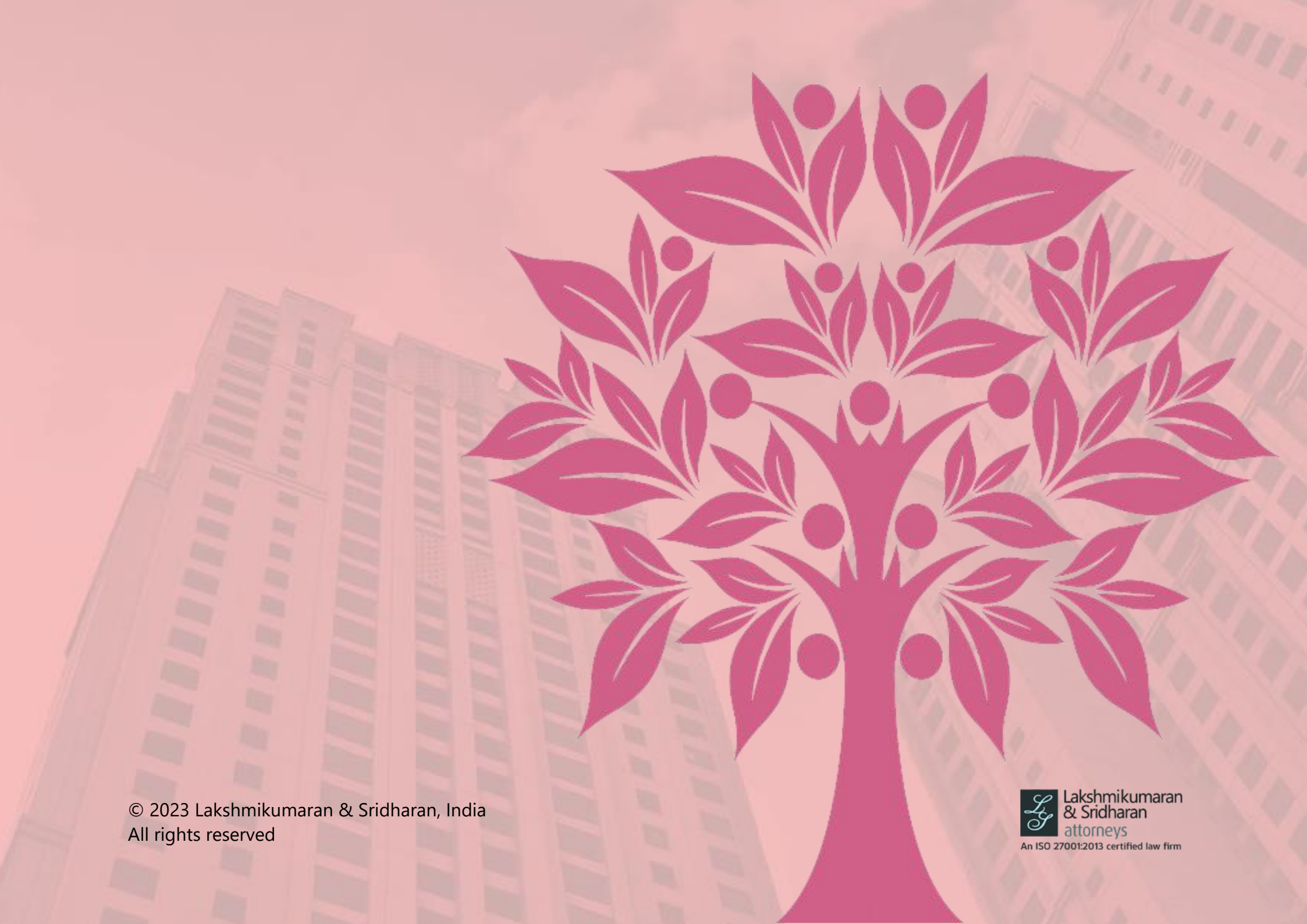
GURGAON
OS2 & OS3, 5th floor, Corporate Office Tower, Ambience Island, Sector 25-A,
Gurgaon-122001
phone: +91-0124 - 477 1300 Email: lsgurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)
3/1A/3, (opposite Auto Sales), Colvin Road, (Lohia Marg), Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan, Palliyil Lane, Foreshore Road, Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@laskhmisri.com

JAIPUR
2nd Floor (Front side), Unique Destination, Tonk Road, Near Laxmi Mandir Cinema Crossing, Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com

NAGPUR
First Floor, HRM Design Space, 90-A, Next to Ram Mandir, Ramnagar,
Nagpur - 440033
Phone: +91-712-2959038/2959048
E-mail : lsnagpur@lakshmisri.com



Lakshmikumaran & Sridharan attorneys
An ISO 27001:2013 certified law firm