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ANTI ARBITRATION INJUNCTION: TRACING THE VEXED PRINCIPLES OF LAW

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INTRODUCTION

'Anti-arbitration Injunction' ("AAI") remains a contentious topic of discussion in the realm of arbitration, wherein different courts have evolved diverse principles in deciding such suits. AAI suit may be understood as a suit for injunction filed by a party restraining the other from commencing or proceeding further with an arbitral proceeding, in pursuance of the arbitration agreement existing between the parties.

Although the Arbitration & Conciliation Act, 1996 ("**the Act**") has by virtue of Section 16 recognized the universally acknowledged principle of "*komptenz-kompetenz*" as also contained in the UNCITRAL Model Law on International Commercial Arbitration, however, the recent decision of a division bench of the Delhi High Court in *Bina Modi vs Lalit Kumar Modi & Ors* [1] ("**Bina Modi's Case**") has opened the floodgates of discussion as to when must a court intervene in granting an injunction against arbitration.

This piece seeks to navigate the murky waters pertaining to the existing law on an AAI in India and the power of courts in granting it, in light of the statutory framework and judicial precedents in India, along with a discussion on the English and European provisions & precedents pertaining to it.

I. STATUTORY FRAMEWORK PERTAINING TO ANTI-ARBITRATION INJUNCTION IN INDIA

The Act consolidates the law pertaining to arbitration in India, however, the Act fails to provide for an injunction against initiating or continuing further with an arbitral proceeding. The only option left to a party is to approach the court through a civil suit under Order XXXIX (Rule 1 & 2) of the Code of Civil Procedure, 1906 seeking an injunction towards it.

That said, it is essential to highlight, under the rubric of the Act, Section 5 provides for minimal judicial intervention by Civil Courts in matters governed by the Act and

ABOUT THE FIRM

AKS Partners (formerly known as A.K. Singh & Co) is a law firm based in New Delhi (India) that provides a comprehensive range of legal services and solutions to domestic and international clients. The Firm offers a unique blend of the local knowledge to apply the regulatory, economic, political and cultural context to legal issues and develop case strategies. We regularly handle technically challenging and complex multi-jurisdictional matters. Our team is spearheaded by one of the highly recognised lawyers with extensive experience in international dispute resolution and strong government and diplomatic backgrounds. This experience gives us the deepest understanding of the key decision points that are critical in navigating complex & complicated matters and managing government regulations.

Section 16 further extends this principle by providing the arbitral tribunal the competence to rule on its own jurisdiction ("*komptenz-kompetenz*").

Till date, the law pertaining to AAI suits has only developed through the contradicting decisions rendered by the different High Courts in India and a finding of the Supreme Court ("**SC**") is still awaited.

II. ENGLISH & EUROPEAN PRINCIPLES OF LAW ON ANTI-ARBITRATION INJUNCTIONS

Similar to the Act in India, the English Arbitration Act, 1996 has no provision pertaining to an AAI however it recognizes the *Kompetenz-Kompetenz* principle. [2] In furtherance to it, the Queen's Bench in *AmTrust Europe Ltd. vs Trust Risk Group SpA* [3] and *Sabbagh vs Khoury* [4] has held that an AAI should be granted in exceptional circumstances and with caution.

French law echoes a similar framework wherein Article 1458 of the Nouveau Code de Procedure Civile (NCPC) crystallizes the principles of *komptenz-kompetenz* by providing that whether a dispute brought before a court, either before initiation of arbitral proceedings or after commencement of it in the presence of an arbitration agreement, the court must declare itself without jurisdiction.

III. DEVELOPMENT OF INDIAN LAW THROUGH JUDICIAL PRECEDENTS ON ANTI-ARBITRATION INJUNCTION

As stated above, to trace the law w.r.t. AAI, reference has to be made to various judicial precedents.

To this effect, the 2001 decision (although reported in 2012) of the SC in *Kvaerner Cementation India Ltd. vs Bajranglal Agarwal* [5] is of significance, wherein the petitioner had filed a civil suit before local courts seeking declaration that there does not exist any arbitration clause and as such the arbitral proceedings are without jurisdiction. In appeal, the SC declined to grant the said relief holding that the arbitral tribunal has the power to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement and the civil court cannot have jurisdiction to go into that question. [6]

In *Oval Investment vs IndiaBulls Financial Services* [7], the Delhi High Court ("**DHC**") ruled emphatically against granting an AAI by holding that such a suit would be hit by Section 5 of the Act. [8]

Similarly the DHC in 2010 in *Handicrafts & Handlooms Exports Corporation of India Limited vs Ashok Metal Corporation* [9] while dealing with a suit seeking injunction from initiating arbitration proceeding, held that the legislative intent behind the act is to keep the civil courts away from the "turf of arbitration proceedings" and that a Civil Court is only allowed to interject in Section 9, 34, 37 of the Act. The DHC in *Roshan Lal Gupta vs Parasram Holdings Pvt. Ltd* [10] while declining to grant injunction against the arbitration, clarified further that the said party had an equally efficacious remedy available to it under Section 16 & 34 of the Act.

In *McDonald's India Private Limited vs Vikram Bakshi* [11], the DHC dismissed an ad-interim injunction against arbitration initiated before the LCIA [12], by stating that if there exists an arbitration agreement between the parties, it is the mandate of the courts to refer the parties to arbitration. However, the Court also noted that the courts in India have the power to injunct arbitration proceedings which must be exercised rarely and only on principles analogous to Section 8 and 45 of the Act.

The twist in the tale comes from a latest decision of 2020 by Calcutta High Court ("**CHC**") in *Balasore Alloys vs Medima LLC* [13] which examined the issue whether courts have power to grant an AAI against foreign seated arbitration. CHC held that courts in India have the power to grant AAIs but this power is to be used sparingly and with abundant caution. [14] The CHC further imported the principles of granting an anti-suit injunction ("**ASI**") to an AAI in light of the observations in *Modi Entertainment Network vs W.S.G. Cricket*. [15]

In the Modi Entertainment's case, the SC had held that while exercising discretion to grant an ASI the court must see that:

a) *the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;*
b) *if the injunction is declined, the ends of justice will be defeated; and*
c) *the principle of comity.*

The SC further held that while exercising discretion to grant ASI the court will see-

a) *The appropriate forum having regard to the convenience of the parties.*
b) *The terms of the contract to determine the question of jurisdiction.*
c) *Proof presented by the party contending that forum of choice is inconvenient, oppressive or vexatious upon it.*

Further, the decision by DHC in Bina Modi's Case has reopened the discussion on AAI which is currently under appeal before the Supreme Court. The same is discussed as under.

IV. THE BINA MODI VS LALIT MODI CASE

In Bina Modi's Case [16], a division bench ("**DB**") of the DHC has granted an injunction against arbitration instituted by Mr. Lalit Modi in Singapore by overruling the single judge bench ("**SB**") judgment which declined the injunction on the basis of the decision of the Supreme Court in *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal*. [17]

The husband of Bina Modi had executed a trust deed wherein Bina Modi and their children Lalit, Charu and Samir Modi were made trustees. Pursuant to the death of the husband, certain disputes arose between the parties and in accordance with the arbitration clause present in the trust deed, Mr. Lalit Modi invoked the arbitration clause and filed an emergency application before ICC Singapore. However, Mrs. Bina Modi sought an AAI by filing a suit before the DHC.

Single Judge Bench Ruling

The SB dismissed the suit at the threshold without issuing any summons in it, based on the ruling in Kvaerner (*supra*). The judge limited his ruling as to the forum which is to decide the said questions, ultimately ruling in favor of the arbitral tribunal.

Interestingly, Section 41(h) of the Specific Relief Act, 1963 is a provision that disallows an injunction when an equally efficacious remedy is available. Applying the same principle to the case of Bina Modi's Case [18], the SB observed that as the relief sought could be granted by the Arbitral Tribunal as per the Act, an AAI will not lie. [19]

Division Bench Ruling

The DB expressly overruled the SB judgment by referring to the SC's ruling in *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd*. [20], which held that while dealing with an application under Section 8 of the Act, the issue of arbitrability cannot be left to the arbitrator and must be settled by the court.

Furthermore, reliance was placed on the decision in *Vimal Kishor Shah v. Jayesh Dinesh Shah* [21], which

concluded that disputes which arose under the Indian Trusts Act, 1882, were not arbitrable.

The DB further noted the decision in *Mcdonald's* which had held that the Court can grant an AAI, where the party seeking the injunction can show that the agreement is null and void, inoperative or incapable of being performed.

The AAI sought by Bina Modi was thereby granted by the DB as it held the SB in error and held that "*Section 16 of the Arbitration Act is only an enabling provision and does not confer exclusive jurisdiction on the Arbitration Tribunal—without rendering a decision on the issue of 'non-arbitrability' of the subject disputes*". [22]

Mr. Lalit Modi has now approached the SC in appeal and the outcome of it is much awaited. It will be interesting to see how the apex court will create a tandem between the established principle of "*minimum judicial interference*" and the evolving need of the hour.

CONCLUSION

It is undeniable that the courts should ensure that Section 5 of the Act is confirmed, however, the courts should also ensure that it should not act as a blanket provision preventing interference of the courts in cases where necessary. It needs to be noted that arbitration may be a convenient and effective mode of adjudication, however, at the same time it is a highly expensive and time-consuming means for dispute resolution. The same has also been recognized by the Supreme Court. [23]

Additionally, it can be seen that the Supreme Court [24] has rejected the argument with respect to a petition under Section 11 of the Act that the arbitral tribunal has the exclusive jurisdiction to decide the existence or validity of the arbitration agreement. However, this was nullified by an amendment of the Act in 2015 in favour of the arbitral tribunal.

Furthermore, till date there exists a disagreement of opinion between different High Courts as to the issue of grant of any such relief. It has only been recently seen that the courts have started providing favourable rulings towards granting an AAI where it is deemed absolutely necessary in interest of justice.

Thus, due to existing vagueness on the rules surrounding the relief of an AAI and also ASI, which currently is granted on equity or on a case-to-case basis, an authoritative pronouncement on the issue by the Supreme Court is awaited.

REFERENCES

[1] 2020 SCC OnLine Del 1678

[2] Section 30 of the English Arbitration Act, 1996 - Competence of tribunal to rule on its own jurisdiction:

(1)Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

(a)whether there is a valid arbitration agreement,

(b)whether the tribunal is properly constituted, and

(c)what matters have been submitted to arbitration in accordance with the arbitration agreement.

[3] [2015] EWHC 1927 (Comm)

[4] [2019] EWCA Civ 1219

[5] (2012) 5 SCC 214

[6] Ibid, para 3

[7] 2009 (165) DLT 652

[8] Ibid, para 36

[9] 2010 SCC OnLine Del 2099

[10] 2009 (109) DRJ 101

[11] 2016 SCC OnLine Del 3949

[12] London Court of International Arbitration

[13] Decision dated 12.08.2020 in CS No. 59 of 2020

[14] Ibid, para 13

[15] (2003) 4 SCC 341

[16] Supra note 1

[17] (2012) 5 SCC 214

[18] CS(OS) 84/2020

[19] Ibid, para 30 (G)

[20] (2011) 5 SCC 532

[21] (2016) 8 SCC 788

[22] Supra note 1, para 85

[23] Dolphin Drilling Ltd. vs M/s. Oil and Natural Gas Corporation Ltd. [(2010) 3 SCC 267]

[24] SBP & Co. vs Patel Engineering Ltd [AIR 2006 SC 450]

NEWS AND UPDATES

DOMESTIC ARBITRATION

PROVISO TO SECTION 36 OF INDIAN ARBITRATION AND CONCILIATION ACT, 1996 ("A&C ACT") PROVIDES THAT COMPLIANCE UNDER ORDER 41 RULE 5(5) OF THE CPC IS TO BE FULLY AND MANDATORILY FOLLOWED

The Calcutta High Court in Fair Deal Supplies Limited vs. R. Piyarelall Iron and steel Pvt. Ltd. held that under Section 36 of the A&C Act, the Court is required to take due regard to the provisions relating to grant of stay of a money decree under the Code of Civil Procedure, 1908 ("CPC"). The proviso to section 36 of A&C Act makes it abundantly clear that compliance under Order 41 Rule 5(5) of the CPC is to be fully and mandatorily followed. However, in exceptional circumstances the court may consider undue hardship and grant stay with a reduced amount of security.

THE DISCRETION TO AWARD COSTS UNDER SECTION 31A OF THE A&C ACT, 1996 IS NOT SUBJECT TO THE AGREEMENT BETWEEN THE PARTIES UNLESS THAT AGREEMENT IS ENTERED INTO AFTER THE DISPUTES HAVE ARISEN

The Delhi High Court ("DHC"), in Union of India v. Om Vajrakaya Construction Company held that the provisions of a contract cannot be read to override the provisions of Section 31A (5) of the A&C Act unless the parties enter into such a contract after the disputes have arisen. The DHC held that the terms of an agreement providing that the parties would bear their own costs, would amount to an agreement that a party would bear part of the costs (as provided under Section 31A(1)), and such an agreement entered into before the disputes have arisen would not be valid under Section 31A(5).

RECENT UPDATE

Our Partner Anish Jaipuriar, was awarded the 'Young Lawyer of the Year (Merger and Acquisition) 2021' at the **10th Annual International Conference** by **Indian National Bar Association**

IBC

ENTIRE RESOLUTION PROCESS HAS TO BE COMPLETED WITHIN THE PERIOD STIPULATED UNDER SECTION 12 OF THE IBC

The Supreme Court ("SC") in Committee of Creditors of Amtek Auto Limited through Corporation Bank v. Dinkar T. Venkat Subramanian and Ors. reiterated that the approved resolution plan has to be implemented at the earliest as mandated under the Insolvency and Bankruptcy Code, 2016 ("IBC"). The Corporate Insolvency Resolution Process ("CIRP") has to be completed within the period stipulated under Section 12 of the IBC and any deviation would defeat the object and purpose of providing such a time limit. However, the SC stated that the time limit can be condoned in view of the various litigations pending between the parties and in the peculiar facts and circumstances of the each case

POWER TO ATTACH PROPERTY UNDER SECTION 5 OF THE PREVENTION OF MONEY-LAUNDERING ACT, 2002 ("PMLA") CEASES ONCE MEASURES UNDER REGULATION 32 OF THE LIQUIDATION REGULATIONS 2016 ARE APPROVED BY ADJUDICATING AUTHORITY UNDER IBC

In the case of Nitin Jain Liquidator PSL Limited V. Enforcement Directorate through: Raju Prasad Mahawar, Assistant Director PMLA the DHC held that the power of the Enforcement Directorate ("ED") under PMLA to provisionally attach the properties of the corporate debtor would stand foreclosed once the Adjudicating Authority ("AA") comes to approve the mode selected in the course of liquidation. The court thus established primacy of IBC over PMLA in liquidation proceedings to this extent. The DHC further held that from the date when the AA approves the sale of the corporate debtor as a going concern, the cessation as contemplated under Section 32A of the IBC will deemed to have come into effect.

NCLT CANNOT ORDER PARTIES TO RESOLVE A DISPUTE WHILE EXAMINING A PETITION UNDER SECTION 7 IBC

The SC in ES Krishnamurthy vs. Bharath Hi Tech Builders Pvt. Ltd held that the AA and the Appellate Authority under IBC can encourage settlements but cannot direct them by acting as courts of equity. Further, the Court held that the AA while declining to admit the petition under Section 7 of the IBC acted outside the terms of its jurisdiction under Section 7(5) of the IBC.

CORPORATE

IBBI ISSUES INSOLVENCY PROFESSIONALS TO ACT AS INTERIM RESOLUTION PROFESSIONALS, LIQUIDATORS, RESOLUTION PROFESSIONALS AND BANKRUPTCY TRUSTEES (RECOMMENDATION) (SECOND) GUIDELINES, 2021

The Insolvency and Bankruptcy Board of India ("**IBBI**") has issued guidelines aimed at curbing administrative delay in the CIRP. Accordingly, the guidelines require the formation of a Panel of Insolvency Professionals ("**IPs**") recommended by the IBBI, from which the AA can pick up any name for while issuing an appointment order. The key recommendations include, inter alia, preparation of a common Panel of IPs for appointment as Interim Resolution Professional, Liquidator, Resolution Professional and Bankruptcy Trustee, and sharing of the same with the AA (i.e. NCLT and DRT). The Panel list is to be prepared Zone wise, based on the registered office of the IP and a new panel is to be re-constituted every six months. The AA has the discretionary power to pick any name from the panel. These guidelines shall come into effect from January 1, 2022 and shall supersede the earlier Guidelines i.e. the Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustee (Recommendation) Guidelines, 2021 issued on June 1, 2021.

SEBI ISSUES CIRCULAR ON PUBLICATION OF INVESTOR CHARTER AND DISCLOSURE OF INVESTOR COMPLAINTS BY STOCK BROKERS

The SEBI vide circular dated December 2, 2021 published an Investor Charter wherein Stock Brokers have to inter alia provide details regarding services provided, investor's rights as well as do's and don'ts of investing in the stock market and grievance redressal mechanism. The charter also provides for 3-level grievance redressal mechanism and timelines for complaint resolution process at Stock Exchanges against Stock Brokers in order to observe highest standard of compliances and transparency. The circular will come into effect from January 1, 2022.

SEBI NOTIFIES SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS (THIRD AMENDMENT) REGULATIONS, 2021

The SEBI vide notification dated December 6, 2021, released the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Third Amendment) Regulations, 2021. SEBI made the said regulations to further amend the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Among other things, the new regulations have inserted a new clause in regulation 2, in sub-regulation (1), after clause (f) namely (fa) that states "Delisting Regulations means the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2021"

MINISTRY OF CORPORATE AFFAIRS ("MCA") ISSUES CLARIFICATION ON HOLDING OF ANNUAL GENERAL MEETING (AGM) THROUGH VIDEO CONFERENCE (VC) OR OTHER AUDIO VISUAL MEANS (OAVM)-REG.

The MCA vide circular dated December 8, 2021, while referring to the General Circulars dated May 5, 2020 and January 13, 2021, has allowed companies to conduct their AGMs on or before June 30, 2022 with requirements laid down in the General Circular dated May 5, 2020. The MCA also clarified that this should not be conferred as an extension of time for holding of AGMs by the companies under the Companies Act, 2013 and companies not adhering to the relevant timelines shall be liable to legal action under the appropriate provisions of the Act.

SEBI ISSUES CIRCULAR FOR PORTFOLIO MANAGEMENT SERVICES TO UNDERTAKE 10% TRANSACTIONS IN CORPORATE BONDS VIA REQUEST FOR QUOTE PLATFORM

The SEBI *vide* circular dated December 9, 2021 decided that on a monthly basis Portfolio Management Services ("PMS") shall undertake at least 10% of their total secondary market trades by value in Corporate Bonds ("CBs") in that month by placing quotes through one-to-one ("OTO") or one-to-many ("OTM") mode on the Request for Quote Platform of stock exchange ("RFQ"). This framework has been introduced in order to enhance transparency pertaining to debt investments by PMS in CBs and to increase liquidity on exchange platform. The PMS are permitted to accept the Contract Note from the stock brokers for transactions carried out in OTO and OTM modes of RFQ. The new framework will come into force with effect from April 1, 2022.

RBI GRANTS GENERAL PERMISSION FOR INFUSION OF CAPITAL IN OVERSEAS BRANCHES AND SUBSIDIARIES AND RETENTION/ REPATRIATION/ TRANSFER OF PROFITS BY BANKS INCORPORATED IN INDIA

According to the existing practice, banks incorporated in India seek prior RBI approval for infusion of capital in their overseas branches and subsidiaries and retention of profits in, and transfer or repatriation of profits from these overseas centres. In order to provide operational flexibility to Scheduled Commercial Banks other than foreign banks, RBI has decided that such process can be done by mere approval from their board, provided they meet the regulatory capital requirements (including capital buffers). However, Banks have been mandated to report all such instances within 30 days of such action, to the Chief General Manager-in-Charge, Department of Regulation, Central Office, Mumbai.

RBI MAKES 'LEGAL ENTITY IDENTIFIER' MANDATORY FOR TRANSACTIONS 50 CRORES AND ABOVE

The RBI vide notification dated December 10, 2021 has mandated Legal Entity Identifier ("LEI"), a 20-digit number used to uniquely identify parties to financial transactions worldwide with an intent to improve the quality and accuracy of financial data systems. The LEI will be introduced in a phased wise manner. From October 1, 2022, AD Category I banks, are required to obtain the LEI number from the resident entities

(non-individuals) undertaking capital or current account transactions of ₹50 crore and above (per transaction) under The Foreign Exchange Management Act, 1999.

RBI ISSUED THE PROMPT CORRECTIVE ACTION ("PCA") FRAMEWORK FOR NON-BANKING FINANCIAL COMPANIES ("NBFCS")

RBI vide Press Release No. 2021-2022/1352 dated December 14, 2021 has put in place a PCA Framework for NBFCs, to further strengthen the supervisory tools applicable to NBFCs. This framework shall be applied to all deposit taking NBFCs (excluding Government Companies), all non-deposit taking NBFCs in middle, upper and top layers [excluding - (i) NBFCs not accepting/not intending to accept public funds; (ii) Government Companies, (iii) Primary Dealers and (iv) Housing Finance Companies]. The PCA Framework shall come into effect from October 1, 2022, based on the financial position of NBFCs on or after March 31, 2022.

PROMPT CORRECTIVE ACTION (PCA) FRAMEWORK FOR NON-BANKING FINANCE COMPANIES ("NBFCS")

The RBI vide notification dated December 14, 2021 issued prompt corrective action ("PCA") framework for NBFCs by introducing three risk threshold categories. According to the framework, RBI will put in place a PCA Framework on NBFCs if there is any breach of risk threshold wherein if the net non-performing assets is in between 6-9 percent (risk threshold 1), 9-12 percent (risk threshold 2) & more than 12 percent (risk threshold 3). The PCA framework will exclude NBFCs not accepting/not intending to accept public fund, government companies, housing finance companies and primary dealers. The PCA framework for NBFCs will come into force on October 1, 2022, based on the financial position of NBFCs as on or after March 31, 2022.

SEBI ISSUES CIRCULAR ON CUT-OFF TIME FOR GENERATION OF LAST RISK PARAMETER FILE (RPF) FOR CLIENT'S MARGIN COLLECTION PURPOSE AND MODIFICATION IN FRAMEWORK TO ENABLE VERIFICATION OF UPFRONT COLLECTION OF MARGINS FROM CLIENTS IN COMMODITY DERIVATIVES SEGMENT

The SEBI vide Circular dated December 16, 2021 under Section 11 (1) of the SEBI Act, 1992, issued that for commodity derivatives segment, clearing corporations shall send an additional minimum two snapshots for commodity derivative contracts which are traded till 9:00 PM and additional minimum three snapshots for the commodity derivatives contracts which are traded till 11:30/11:55 PM. Margins/EOD margins shall be determined as per the relevant RPFs. The said Circular shall be effective from January 15, 2022.

OTHER UPDATES

APPLICATION BY AN OBSTRUCTOR RAISED REGARDING RIGHT, TITLE OR INTEREST IN THE PROPERTY, DURING EXECUTION PROCEEDINGS BY A DECREE HOLDER, TO BE ADJUDICATED BY THE EXECUTING COURT

The SC in the case of Bangalore Development Authority ("BDA") v. N. Nanjappa & Anr. while allowing the appeal raised by BDA, held that since BDA submitted its objections in the execution proceedings itself, the same needs to be adjudicated by the executing court at that stage only, considering the application under Order XXI Rule 97 or Rule 99 CPC. Therefore, effectively establishing that in lieu of Order XXI Rule 101 CPC, an application filed under Order XXI Rule 97 with respect to resistance or obstruction claiming right, title or interest in the property have to be determined by the Court dealing with the execution application.

NO REQUIREMENT OR JUSTIFICATION FOR THE CHIEF METROPOLITAN MAGISTRATE ("CMM") TO FIX A TIME LIMIT FOR TAKING POSSESSION OF THE SECURED ASSET UNDER SECTION 14 OF SARFAESI ACT

In the case of Housing development finance corporation ltd. v. Rajesh Kumar & Ors, the DHC there is no requirement or justification for the CMM to fix a time limit for taking possession of the secured asset while exercising jurisdiction under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act"). Further, the DHC held that in view of Section 34 of the SARFAESI Act, a civil court does not have jurisdiction to adjudicate the rights of a secured creditor or the enforcement of such rights by the secured creditor. Such rights can only be challenged by the borrower or any affected person before the Debts Recovery Tribunal under Section 17 of the SARFAESI Act.

IF THE BORROWER'S PROPOSALS WERE OTHERWISE CONSIDERED, SARFAESI PROCEEDINGS ARE NOT INVALIDATED DUE TO THE BANK'S FAILURE TO RESPOND TO OBJECTIONS

The SC in Arce Polymers Private Limited v. M/s. Alpine Pharmaceuticals Private Limited and Others, held that a creditor's or bank's failure to respond to the borrower's objections as per Section 13(3A) of the SARFAESI Act does not entitle the debtor to discretionary relief. If the Court is satisfied that the creditor has considered the debtor's representation and given it adequate time to repay the debt such proceedings are not invalidated. The Borrower can challenge other measures, steps and procedures which preceded the ultimate sale, even if barred by the limitation period of forty five days.

WRIT OF MANDAMUS CANNOT BE ISSUED FOR DIRECTING THE BANK TO GRANT BENEFIT OF 'ONE-TIME SETTLEMENT' ("OTS") TO BORROWER

In the case of *Bijnor Urban Cooperative Bank Limited, Bijnor vs Meenal Agarwal*, the SC held writ of mandamus cannot be issued by a High Court in exercise of powers under Article 226 of the Constitution of India, directing a financial institution bank to positively grant the benefit of OTS Scheme to a borrower. The SC also observed that any financial institution cannot be compelled to accept a lesser amount under the OTS. A borrower cannot as a matter of right, pray for grant of benefit of OTS and, it is always to be presumed that the financial institution/bank shall take a prudent decision whether to grant the benefit or not.

IN CASE OF A CIVIL SUIT, HIGH COURT CANNOT DIRECT THE IMPLEADMENT OF AN ADDITIONAL DEFENDANT

The SC in the case of IL&FS Engg. And Constructions Co. v. Bhargavarna Constructions & Ors., while setting aside the HC judgment, held that the plaintiff is the 'dominus litus' as per settled proposition of law. No issue was raised before the trial court on non-joinder of parties. Therefore, the SC observed that whether an application of impleadment of an additional defendant would be maintainable or not was required to be first considered and decided by the HC. The SC directed the HC to consider a catena of decisions by the SC on how to deal and decide a first appeal under Section 96 and Order XLI Rule 31 of CPC, and remanded the appeal back to the HC for fresh consideration on merits.

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