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# INTERPLAY BETWEEN THE SCOPE OF CORRECTION AND SETTING ASIDE OF AN ARBITRAL AWARD UNDER THE ARBITRATION & CONCILIATION ACT, 1996

BY RAJAT DASGUPTA AND SHIVAM TIWARI

## INTRODUCTION

Post completion of the arguments in an arbitration matter, when the arbitral award is passed by the arbitral tribunal, the substantive issues might have been held in your favour, but the actual quantitative aspects might have been miscalculated or incongruent to the substantial portions of the award. In such situations it might seem that challenging the award might be the only option. However, Section 33 of the Arbitration and Conciliation Act ("Arbitration Act") might just be the provision you need to rectify apparent errors in the award. Section 33 provides for correction and interpretation of arbitral award. This section is like Section 152 and 153 of the Code of Civil Procedure, 1908 which allows the courts (either of its own motion or on application of any of the parties) to amend any judgment, decree or order to rectify any clerical or arithmetical mistakes arising therein from any accidental slip or omission by the Court while passing such judgment, decree or an order.

Prima facie, it appears that Section 33 of the Arbitration Act intends to provide an opportunity to the parties and the arbitral tribunal to correct any such errors[1] , so that no party is put to disadvantage merely because of such technical or clerical errors in the award. However, the parties may cunningly seek a review or recall or reargue its claim under the garb of seeking clarification or correction under this section which is not only outside the purview of Section 33 of the Arbitration Act but if allowed, may render the entire arbitration process futile.

## ANALYSIS OF SECTION 33 OF THE ARBITRATION ACT

This part of the piece will analyse Section 33 of the Arbitration Act by discussing the scope and the extent of powers and remedy available to various stakeholders such as parties to arbitration agreement and the arbitral tribunal under Section 33 of the Arbitration Act.

## 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.

**Scope of powers**

An application under Section 33 of the Act imposes certain restriction on the parties. The said provision cannot be utilised to review the merits in an arbitral award passed[2]. A party seeking a review against the merits of an arbitral award, cannot be allowed to take siege of Section 33 of the Act. An Arbitral Tribunal or the Arbitrator, as the case may be, can within 30 days from the receipt of the arbitral award, correct any computation, clerical or typographical errors or any other errors of similar nature, but the section does not enable any judicial review of the judgment. The Arbitral Tribunal has specific and limited jurisdiction which cannot traverse beyond the scope of Section 33 of the 1996 Act[3].

The Delhi High Court in Fullerton India Credit Company Ltd. vs Jai Prakash Sharma [4] while dealing with a petition under Section 37 of the Act against the order passed by the Ld. Single Judge. The Ld. Single Judge had granted liberty to the petitioner to move an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 for setting aside the ex-parte award.

The Division Bench held that once an award has been made by an Arbitrator, the only power which the Arbitrator can exercise in respect of the award has been specified under Section 33 of the said Act. The Division Bench observed that Section 33 of the Act does not contemplate the power for setting aside an ex-parte award and accordingly set aside the order passed by the Ld. Single judge.

**Clerical Error**

Section 33(1)(a) of the Arbitration Act allows parties to the arbitration proceedings to request the arbitral tribunal to correct inter alia any computation, technical or typographical errors in arbitral award within 30 days from the receipt of such arbitral award. However, a notice in this regard must necessarily be sent to the other party while making such a request for correction.

The scope of the term 'clerical error' was explained by the High Court of Andhra Pradesh in *Bangaru Reddy vs. The State,[5] and the High Court of Kerala in Instrumentation Ltd. vs. V.E. Kuttapan* [6],

as an error that can be explained only by considering it as a slip or mistake on the part of the arbitral tribunal. It is a mistake or error relating to a peripheral matter and not relating to the merits of the contents of a document or an error in regard to substance of the matter.

Example – The Claimant had sought damages under a particular claim for Rs 20,00,000. However, the arbitrator while allowing the claim completely in favour of the claimant awarded Rs 2,00,000 instead of 20,00,000. The said error would be a permissible ground for filing an application under Section 33(1)(a) of the Act.

**Interpretation**

On the other hand, Section 33(1)(b) of the Arbitration Act allows parties to the arbitration proceedings to seek interpretation of a specific point or part of the arbitral award from the arbitral tribunal.

Akin to Section 33(1)(a) of the Arbitration Act, the notice must necessarily be sent to the other party and their consent be taken while seeking interpretation under Section 33 (1)(b) of the Arbitration Act. Any application for interpretation without obtaining consent of the other party, the arbitral tribunal will be dehors the power to entertain such an application for interpretation[7]. Further, it is important to note here that under the garb of seeking an interpretation of a specific point of part of the award, a party cannot seek to reargue its claim which has already been disallowed by the arbitrator. In other words, the party under Section 33 of the Arbitration Act cannot seek review or recall of the award made by the arbitral tribunal [8].

**Example –** The Claimant invoked Section 33 of the Arbitration Act to seek interpretation in respect of the award of the learned Arbitrator, wherein the latter denied interest to the Claimant. However, the award was amply clear and left no room for interpretation. Accordingly, there is no scope of seeking any interpretation in respect of this part of the award from the learned Arbitrator as there was no ambiguity about it.

Under Section 33 (4) of the Arbitration Act, parties to the arbitration proceedings are allowed to request the arbitral tribunal to make an additional award vis-à-vis claims presented during the arbitral proceedings but omitted from the arbitral award provided it fulfils the notice and consent requirement similar to prescribed under Section 33 (1) (b) of the Arbitration Act. However, the said power can only be exercised for the claims which have been presented before the tribunal during the arbitral proceedings and cannot be applicable to claims which may be raised by a party for the first time in an application under Section 33 (4) of the Arbitration Act.

**Example -** Considering a situation wherein an arbitral award is passed, and the arbitrator fails to render a finding with respect to a specific issue framed by the tribunal, the parties would be at liberty to file an application under Section 33. The said error would be amenable under Section 33(4) of the Arbitration Act.

The Supreme Court of India ("SC") in *McDermott International Inc. vs. Burn Standard Co Ltd* [9], was considering a challenge to an additional award made by the Respondent under Section 34 of the Arbitration Act. In this case, the SC held that Section 33 (4) of the Arbitration Act empowers the arbitral tribunal to make an additional arbitral award in respect of claims already presented to the tribunal in the arbitral proceedings but omitted by the arbitral tribunal subject to conditions inter alia there is no contrary agreement between the parties to the reference, such request is made within 30(thirty) days from the receipt of the arbitral award, the arbitral tribunal considers the request so made to be justified, and additional arbitral award is made within 60 (sixty) days from the receipt of such request by the arbitral tribunal.

Similarly, the High Court of Delhi in *Union of India vs. Nav Bharat Nirman Co.*[10], held that if an arbitrator inadvertently skipped to pass the arbitral award in respect of any claim(s) presented before it, it is empowered to make an additional award on such claim(s) under Section 33 (4) of the Arbitration Act.

## SUO MOTU CORRECTION OF THE AWARD

It is also interesting to note here that by virtue of Section 33 (3) of the Arbitration Act, the arbitral tribunal is entitled to correct any such error as mentioned under Section 33(1)(a) of the Arbitration Act on its own initiative within 30 (thirty) days from the date of making the arbitral award, however, no such power is extended to the arbitral tribunal in case it omits any claim(s) from the arbitral award. Despite the arbitral tribunal becoming aware (within thirty days) about the omission of any claim(s) from the arbitral award, it is devoid of any power to act except to wait for an application under Section 33(4) of the Arbitration Act. Moreover, this anomaly is more alarming in an event where the parties fail to make such an application within the limitation period of 30 (thirty) days from receipt of the arbitral award as prescribed under Section 33 (4) of the Arbitration Act because there is no power given to the arbitral tribunal under the Arbitration Act to condone such delay.

Ironically, under Section 33(6) of the Arbitration Act, the arbitral tribunal is empowered to grant extension to itself if it deems necessary to make a correction, give an interpretation or make an additional award under Section 33(2) and Section 33(5) of the Arbitration Act respectively. The scope of this power will be dealt in more detail in the next section of this piece.

## INTRICACIES UNDER SECTION 33 OF THE ARBITRATION ACT

In this part, we will discuss various loopholes and ambiguities surrounding Section 33 of the Arbitration Act such as lack of power of the arbitral tribunal to condone delay, wide discretion and accountability of the arbitral tribunal.

## NO POWER WITH THE ARBITRAL TRIBUNAL TO CONDONE THE DELAY:

As discussed in the previous section, the arbitral tribunal does not have any power to condone the delay for filing an application under Section 33 (1) unless a period has been agreed between the parties [11]. The Act is silent on whether the delay is condonable for applications filed under Section 33 (4) of the Arbitration Act. Consequently, if the parties to the arbitration proceedings fail to adhere to the limitation period of 30 (thirty) days as prescribed under the above provisions, the said arbitral award will assume finality and the same could be enforced as a decree by virtue of Section 36 (1) of the Arbitration Act. Thereafter, the court cannot assume jurisdiction to interpret the award or correct the mistake or error after expiry of the period of limitation[12].

This means that even in the case of a genuine delay in filing application under Section 33 (1) and Section 33 (4) of the Arbitration Act due to unforeseen circumstances, the aggrieved party will neither be able to seek correction or interpretation of the arbitral award nor will it be able to make a request for the arbitral award. This not only put the parties to disadvantage but also defeats the entire purpose behind the private dispute resolution mechanism. The only remedy which may be available would be to challenge the said award under Section 34 of the Arbitration Act.

## WIDE AND UNFETTERED DISCRETION AVAILABLE TO THE ARBITRAL TRIBUNAL:

As per Section 33 (2) and Section 33 (5) of the Arbitration

Act, the arbitral tribunal is bound to act only when it is satisfied to the extent that the request made under Section 33(1) and Section 33(4) of the Arbitration Act by the parties is justified. However, neither Section 33 nor any other provisions of the Arbitration Act enumerate a mechanism or parameter to determine the justifiability of such requests and the same is left open to the arbitral tribunal to decide.

Moreover, the Arbitration Act neither shoulders any responsibility on the arbitral tribunal to give reasons for rejecting such requests under Section 33(2) and Section 33(5) of the Arbitration Act nor provides any remedy to the aggrieved party in case such a request is not held to be justified by the tribunal and therefore, in authors' opinion the only remedy available to the aggrieved party is to move an application under Section 34 of the Arbitration Act and challenge the said award.

## NO ACCOUNTABILITY OF THE ARBITRAL TRIBUNAL:

Section 33(2) and Section 33(5) of the Arbitration Act fixes the timeline within which the arbitral tribunal must make the correction or give interpretation or make the additional arbitral award. Accordingly, the requests under Section 33(2) and Section 33(5) of the Arbitration Act must be disposed of by the tribunal within 30 and 60 days respectively.

However, the Arbitration Act fails to fix any liability on the arbitral tribunal in case the latter is unable to meet the deadline prescribed under the above provisions. It also fails to address the sanctity of such arbitral award i.e. whether such an award would still hold good in law and enforceable as per Section 36 (1) of the Arbitration Act or the same would be on hold until the requests under Section 33 (2) and Section 33 (5) of the Arbitration Act are disposed of.

Albeit Section 33 (6) of the Arbitration Act empowers the arbitral tribunal to extend the timelines for deciding the requests under Section 33 (2) and Section 33 (5) of the Arbitration Act, there exists ambiguity vis-à-vis the quantum of time which can be extended and the scope of the term 'necessary' under Section 33 (6) of the Arbitration Act.

## REMAND OF MATTER TO THE ARBITRAL TRIBUNAL BY THE COURT UNDER SECTION 34(4)

This part will discuss the concept of remand of the matter to the arbitral tribunal by the Court under Section 34 (4) in order to give former an opportunity to eliminate grounds for setting aside the arbitral award available under Section 34 (2) of the Arbitration Act.

Let's take an example, 'A' makes an application under Section 33 (4) requesting the arbitral tribunal to make an additional award, however, the said request is rejected by the arbitral tribunal without furnishing any reasons for the same. Now, what is the remedy available to 'A'?

While 'A' can certainly file an application for setting aside of the arbitral award under Section 34 (1) and succeed if A is able to establish any of the grounds available under Section 34 (2), it also has an alternate remedy in the form of Section 34(4) under which an application can be filed by 'A' before the court seeking to eliminate the grounds for setting aside the arbitral award.

Accordingly, if the court deems such a request to be appropriate, it can remand back the matter to the arbitral tribunal to eliminate such grounds and keep the

award in abeyance till the matter is decided by the tribunal. However, the said power of the court should not be mistaken to assume that remitting the matter back to the arbitral tribunal by the court is for the purpose of reconsideration on the award or to pass a fresh decision rather it is solely to eliminate, if possible, any ground which might lead to setting aside of the award [13]. It is also important to note here that the court cannot suo motu exercise its power under this provision and can only act upon the request of an aggrieved party. Further, the limited remedy available to the parties under Section 34 (4) is required to be invoked before the arbitral award is set aside by the court as the latter become functus officio on disposal of the main proceedings under Section 34 [14].

Whether the decision of the arbitral tribunal under Section 33 (2) and Section 33 (5) of the Arbitration Act is a curable defect in terms of Section 34(4) of the Arbitration Act?

This part will briefly discuss and analyse various judicial pronouncements in order to address the above concern.

The High Court of Bombay ("BHC") in *Geojit Financial Services Ltd. v. Kritika Nagpal ("Geojit Financial")* [15], observed that in an event where the arbitral tribunal has overlooked a particular claim on which the parties led evidence and addressed arguments and if a request to address such grievance is made by the aggrieved party, the court can exercise its power and remand back the matter to the arbitral tribunal under Section 34 (4).

In *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.* [16], the SC determined that a lack of reasoning or a gap in reasoning is a curable defect under Section 34 (4) so as to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. However, the SC clarified that only in the case of complete perversity in the reasoning of the arbitral tribunal, a challenge can be made under the provisions of Section 34.

Accordingly, if the arbitral tribunal refuses to entertain the request of the aggrieved party for correction or giving an interpretation under Section 33 (2), the said decision can be challenged and a request under Section 34 (4) can be made for eliminating such a ground for challenge. Request under Section 34 (4) can also be made if the arbitral tribunal while rejecting the request under Section 33 (2) fails to provide any reason whatsoever.

Similarly, in light of the BHC's decision in Geojit Financial, a request can be made by the aggrieved party to the court under Section 34 (4) if the arbitral tribunal refuses to make an additional award vis-à-vis claims presented in the arbitral proceedings but omitted from the arbitral awards.

It is also important to note here that an application under Section 34 (4) must be made within the time limit prescribed under Section 34 (3) i.e. within 30 (thirty) days from the date on which that request for correction, interpretation and additional award had been disposed of by the arbitral tribunal.

## CONCLUSION

It is clear from the above discussion that there are two aspects to Section 33. Firstly, that it allows the parties to seek and empowers the arbitral tribunal to make a correction or give an interpretation or make an additional award so that the award is not rendered futile in terms of defects discussed above. Secondly, there exist lacunae under Section 33 such as lack of power to the arbitral tribunal to condone delay, wide discretion available to the arbitral tribunal and lack of accountability in case the tribunal fails to adhere to the timelines prescribed under Section 33 and the same must be addressed in order to ensure that Section 33 does more good than harm.

Further, an inspiration may also be drawn from some of the institutional arbitration rules such as Article 34 of the International Chamber of Commerce ("ICC") Arbitration Rules, 2021 and Rule 32 of the Singapore International Arbitration Centre ("SIAC") Arbitration Rules, 2016 wherein the draft award is submitted to the International Court of Arbitration of ICC and Registrar of the Court of Arbitration of SIAC respectively for scrutiny before final passing of the award.

This practice helps in ensuring that the award is of best possible quality and defect free.

The party aggrieved by the decision of the arbitral tribunal under Section 33 (2) and Section 33 (5), may seek remedy under Section 34 (4) as discussed above, however, the latter provision does not place any restriction upon the arbitral tribunal as to what should be done by the arbitral tribunal if the matter is remitted under Section 34(4). The arbitral tribunal may even refuse to do anything and still get away with it as Section 34 (4) is silent on what action must be taken by the arbitral tribunal if the matter is remitted under Section 34 (4). Therefore, this issue must also be addressed either by way of a legislative amendment or through a judicial pronouncement so that some liability is fixed for the arbitral tribunal under this provision.

## REFERENCES

[1] Section 33(3) of the Arbitration & Conciliation Act, 1996
[2] State of Arunachal Pradesh vs. M/s Damani Constructions, (2007) 10 SCC 742
[3] Chandi Construction v. Executive Engineer 2013 (4) Arb LR 69
[4] Fullerton India Credit Company Ltd. vs Jai Prakash Sharma FAO (OS) 542/2015 High Court of Delhi Decided on 19 November 2015 available at http://164.100.69.66/jupload/dhc/SAS/judgement/23-11-2015/SAS19112015FAOOS5422015.pdf
[5] Bangaru Reddy vs. The State, AIR 1959 AP 95
[6] Instrumentation Ltd. vs. V.E. Kuttapan, (1992) 1 KLJ 24
[7] State of Arunachal Pradesh vs. M/s Damani Constructions, (2007) 10 SCC 742
[8] CMI Ltd. vs. BSNL, 2011 (1) RAJ 480 (Del)
[9] Mcdermott International Inc. v. Burn Standard Co Ltd., (2011) 5 SCC 758
[10] Union of India v. Nav Bharat Nirman Co., 2003 (3) Arb LR 309

[11] Tantia Construction v. Ircon International, OMP (Comm.) 593/2020, High Court of Delhi, Judgment dated 13 April 2021 available at http://164.100.69.66/jupload/dhc/CHS/judgement/16-04-2021/CHS13042021OMPCOMM5932020_214113.pdf
[12] Global Co. v. National Fertilizers Ltd, 1999 (49) DRJ 660
[13] Radha Chemicals v. Union of India (Order dated 10th October 2018 passed by the Supreme Court in Civil Appeal No. 10386 of 2018) https://main.sci.gov.in/supremecourt/2017/41663/41663_2017_Order_10-Oct-2018.pdf
[14] Kinnari Mullick & Ors. v. Ghanshyam Das Damani (2018) 11 SCC 328
[15] Geojit Financial Services Ltd. v. Kritika Nagpal (Judgment dated 25th June 2013 passed by the BHC in Appeal No. 35 of 2013 in Arbitration Petition No. 47 of 2009)
[16] Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., 2019 SCC OnLine SC 1656

# NEWS AND UPDATES

## DOMESTIC ARBITRATION

### EXISTENCE OF ARBITRATION CLAUSE DOES NOT DEBAR COURT FROM ENTERTAINING A WRIT PETITION IN CONTRACTUAL MATTERS

The Supreme Court of India ("Supreme Court") in Uttar Pradesh Power Transmission Corporation Ltd. v. CG Power and Industrial Solutions Limited has held that the existence of an arbitration clause does not debar the court from entertaining a writ petition. The Supreme Court reiterated that relief under Article 226 of the Constitution of India may be granted in a case arising out of contract. However, it was held that the writ jurisdiction under Article 226, being discretionary, the High Courts should usually refrain from entertaining a writ petition which involves adjudication of disputed questions of fact which may require analysis of evidence of witnesses. It was observed that monetary relief can also be granted in a writ petition.

### ARBITRAL AWARD-HOLDER'S CLAIM GETS EXTINGUISHED ON APPROVAL OF AWARD-DEBTOR'S RESOLUTION PLAN UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 ("IBC")

The Calcutta High Court ("CHC") in Sirpur Paper Mills Limited v. I.K. Merchants Pvt. Ltd. has held that an arbitral award-holder's claim would stand extinguished upon the approval of a resolution plan for the award-debtor's revival, if such claim was not pressed during the corporate insolvency resolution process ("CIRP").. It was held that an operational creditor who fails to lodge a claim in the CIRP misses the opportunity for chasing the fruits of an award, even where a challenge to the award is pending before a civil court. Accordingly, since the claim was now extinguished, the setting aside application filed against the award under Section 34 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"), was disposed of as infructuous.

## RECENT THOUGHT LEADERSHIP

- Claims Against The Contracting Party For Goods Supplied To The Sister Concern: An analysis of Ahlcon Parenterals India Ltd v. Scan Biotech
- The Effect Of Moratorium On Parallel Criminal Proceedings
- Saga Of Limitation Under Section 37 Of Arbitration & Conciliation Act, 1996: Supreme Court Finally Settles The Law

## RECENT UPDATE

We are proud to share that **AKS Partners** has been acknowledged **Recommended Firm** and **Mr. Sonal Kumar Singh** has been recognised as **Recommended Attorney** for its **Dispute Resolution** by **Global Law Experts**

## SECTION 9 OF THE ARBITRATION ACT DOES NOT EMPOWER THE COURT TO GRANT FINAL RELIEF

The High Court of Delhi ("DHC")in National Highways Authority of India v. Bhubaneswar Expressway Private Limited has held that Section 9 of the Arbitration Act only empowers the court to issue orders to preserve the claim, and does not empower the court to allow the claim, even before the arbitral tribunal has had an occasion to adjudicate the claim. The DHC observed that in exercise of power under Section 9(1)(ii)(e) of the Arbitration Act, no relief of final nature can be granted, no monetary claim can be allowed, howsoever urgent the same may be, and howsoever just and convenient it may be to grant the same. The DHC further observed that when one party pleads an admission and the other party denies, it is only the forum vested with adjudicatory powers, which would be an arbitral tribunal in an arbitration, which can return a finding in this regard. The DHC held that the Arbitration Act does not envisage adjudication in two stages i.e., summary adjudication by the court under Section 9 of the Arbitration Act and final adjudication by the arbitral tribunal.

## NO SUBSTANTIAL DIFFERENCE BETWEEN THE SCOPE OF JURISDICTION UNDER SECTION 37(2) AND SECTION 34 OF THE ARBITRATION ACT

The DHC in Raghuvir Buildcon Pvt. Ltd. v. IRCON International Limited has held that there is really no substantial difference between the principles to be applied while exercising jurisdiction under Section 37(2) of the Arbitration Act, and those applicable to exercise of jurisdiction under Section 34 of the Arbitration Act. It was also held that if the order of an arbitral tribunal is not interlocutory, and finally decides any issue, an appeal under Section 37(2)(b) of the Arbitration Act would not be maintainable, and the order would have to be challenged under Section 34 of the Arbitration Act.

## PROVISIONS OF ARBITRATION ACT SHALL APPLY TO ARBITRATION UNDER THE MULTI STATES CO-OPERATIVE SOCIETIES ACT, 2002 ("MSCS ACT")

The DHC in National Federation of Fishermen Co-operative Ltd. v. Union of India and Others has held that sub-section (5) of Section 84 of the MSCS Act expressly provides the provisions of Arbitration Act shall apply to arbitration under the MSCS Act as if the proceedings for arbitration were referred for settlement/decision under the Arbitration Act. The DHC has also observed that a plain reading of Section 84 of the MSCS Act indicates that the Registrar has the power to refer certain disputes to arbitration. However, the DHC clarified that no powers are vested with the Registrar to pass any interim orders while exercising its powers under Section 84 of the MSCS Act to refer the disputes to arbitration.

## ANTI-SUIT INJUNCTIONS ARE TO BE GRANTED ONLY IN THE RAREST OF RARE CASES

The DHC in Raaj Unocal Lubricants Limited v. Apple Energy Pvt Ltd and Another has held that anti-suit injunctions are to be granted only in the rarest of rare cases, where the foreign proceedings are oppressive or vexatious, keeping in mind the overarching need to ensure the interests of justice. The DHC further clarified that an anti-suit injunction does not stay proceedings before the foreign court, but merely restrains the party before the Indian court from prosecuting, or continuing to prosecute, the proceedings before the foreign court. The DHC reiterated that the prejudice caused by the foreign proceedings, or any order that might be passed therein, has to be examined vis-à-vis the prosecution of the Indian proceedings, and not vis-à-vis the Indian anti-suit injunction applicant in general.

## WITHDRAWAL OF THE PROCEEDINGS, EVEN IF WITH LIBERTY TO FILE AFRESH, DOES NOT OBLITERATE THE WITHDRAWN PROCEEDINGS

The DHC in Black Diamond Track Parts Private Limited and Others v. Black Diamond Motors Private Limited has held that withdrawal of the proceedings, even if with liberty to file afresh, does not obliterate the proceedings so filed, so as to make the same invisible even for drawing inference of forum shopping therefrom. The DHC held that a suit which has been withdrawn can be looked at to adjudicate the plea of re-litigation or abuse of the process of the court. The DHC observed that considering the multiple options of territorial jurisdiction available to a plaintiff in a suit for permanent injunction to restrain infringement of trade mark and/or passing off, a plaintiff, after failing to get interim relief in one court, would successively approach other courts, making litigation a game of chance. It was held that such conduct amounts to abuse of the process of the court and needs to be strongly condemned.

## COURT CANNOT VENTURE INTO DECIDING THE DISPUTES ARISING BETWEEN THE PARTIES AT PRELIMINARY STAGE

The DHC in IMZ Corporate Private Limited v. Telematics Private Limited has held that in exercising jurisdiction under Section 11 of the Arbitration Act, the court has to only examine if there is an existence of the arbitration agreement, and whether there exist arbitral disputes which are required to be adjudicated. It was also held that the court cannot, at this preliminary stage, venture into deciding the disputes arising between the parties. It was observed that it is only in cases when ex-facie, the arbitration agreement appears to be fabricated, that the court would make a judicial enquiry, and mere allegation of fraud is not enough.

### DISPUTES ARISING FROM AGREEMENT TO ASSIGN TRADEMARK ARE ARBITRABLE

The DHC in Golden Globe Private Limited v. Golden Tobacco Limited has held that disputes arising from an agreement for assignment of trademarks, do not fall within the ambit of statutory bounds of the Trademark Act, 1999 but within the realm of contract, and are thus arbitrable. It was also held that assignment of a trademark is by a contract and is not a statutory fiat, and does not involve any exercise of sovereign functions. In this case, the DHC held that the ground for invoking arbitration was the right to use the trademark was conferred by a particular agreement, and not the grant, registration or infringement of trademarks.

## INTERNATIONAL ARBITRATION

### ASIAN INTERNATIONAL ARBITRATION CENTRE ("AIAC") LAUNCHES NEW ARBITRATION RULES FOR PUBLIC CONSULTATION

The draft rules marks a significant departure from the existing arbitral practice in Malaysia and demonstrates the AIAC's focus on modernising its arbitration rules and widening its appeal to a truly international market. The new rules incorporate the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules and the AIAC's standalone expedited arbitration procedure (dispensing with the need for the AIAC to maintain its current practice of referring to the UNCITRAL Arbitration Rules or maintaining its standalone Fast Track Arbitration Rules). The draft rules also introduce a new summary determination procedure, rules for appointment of the tribunal in multi-party situations, ability to commence a single arbitration under multiple contracts by submitting in parallel an application to consolidate, and provisions on third party funding. In addition, the rules contain refined provisions relating to emergency arbitrators, appointment, challenge and replacement of an arbitrator, the tribunal's powers in the conduct of proceedings, and the scope of technical reviews of draft final awards.

### SINGAPORE EXTENDS THIRD-PARTY FUNDING FRAMEWORK TO DOMESTIC ARBITRATIONS AND SINGAPORE INTERNATIONAL COMMERCIAL COURT ("SICC") PROCEEDINGS

Singapore will permit third-party funding of domestic arbitration proceedings, proceedings in the SICC and related mediation proceedings. Before this, Singapore permitted third-party funding for international arbitration proceedings and related court and mediation proceedings only. In making these changes, the Ministry of Law is demonstrating its willingness to respond to the needs of international commercial parties who are considering Singapore for the resolution of their disputes, whether in mediation, litigation or arbitration. These developments will be of particular interest to funders and parties looking to mitigate the financial risks associated with litigation and arbitration. With these developments, the SICC is likely to become a court of choice. Parties who wish to have their international commercial disputes decided in the Singapore Courts may wish to specify the SICC as the dispute resolution forum so as to avail themselves of the option of third-party funding.

### ECUADOR TO PAY $374M TO OIL COMPANY PERENCO TO SETTLE INVESTMENT DISPUTE

Ecuador's government said that it would pay the USD $374 million award granted to French oil company Perenco, following the country's failure to have an arbitral award granted against it annulled. In 2019, an arbitral tribunal under the aegis of the International Centre for Settlement of Investment Disputes (ICSID) had agreed with Perenco and had ordered the Ecuadorian state to pay the company more than $450 million in damages for the prejudice caused by the promulgation of the law. Ecuador had appealed the decision to the Annulment committee of the ICSID, which rejected Ecuador's application to completely annul the award,

## IBC

### IBC HAS OVERRIDING EFFECT OVER STATE ACTS

The High Court of Karnataka ("HCK") in Bank of India and Others v. Bhuban Madan has held that the provisions of the IBC would have an overriding effect over the Karnataka Protection of Interest of Depositors in Financial Establishments Act, 2004. Accordingly, the HCK passed an order quashing parallel proceedings initiated by the State government against Dreamz Infra India Private Limited, against whom proceedings under the IBC were on-going. The petition against these parallel proceedings was filed by the Insolvency Resolution Professional ("IRP") questioning the legality of parallel proceedings initiated by the State government under the Karnataka Protection of Interest of Depositors in Financial Establishments Act, 2004, during the period when a moratorium under Section 14 of the IBC is in force against Dreamz Infra India Private Limited.

### APPROVAL OF RESOLUTION PLAN DOES NOT BY ITSELF DISCHARGE LIABILITIES OF PERSONAL GUARANTOR OF CORPORATE DEBTOR

The Supreme Court in Lalit Kumar Jain v. Insolvency and Bankruptcy Board of India has held that the approval of a resolution plan does not ipso facto discharge a personal guarantor of a corporate debtor. The Supreme Court further observed that release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e., by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract. The Supreme Court has thus upheld the provisions of IBC which apply to personal guarantors of corporate debtors.

## CORPORATE DEBTOR CAN BE PROCEEDED AGAINST FOR RECOVERY OF DEBT AFTER RIGHT TO RECOVERY AGAINST GUARANTOR HAS BEEN EXTINGUISHED

The National Company Law Appellate Tribunal ("NCLAT") NCLAT in Kanwar Raj Bhagat v. Gujarat Hydrocarbons and Power SEZ Ltd. and Another has held that after the right to recovery against a corporate guarantor has been extinguished, an application under Section 7 of the IBC against the corporate debtor can be filed for recovery of remaining dues. The NCLAT reiterated that a creditor reserves the right to recover the entirety of its dues from both the corporate debtor and the guarantor, and that the passing of a resolution plan in the corporate insolvency resolution process of one of the aforementioned parties, does not extinguish the dues of the other party.

## NO ACTION UNDER SECTION 7(3) OF THE PUBLIC PREMISES (EVICTION OF UNAUTHORIZED OCCUPANTS) ACT, 1971 CAN BE TAKEN DURING MORATORIUM

The National Company Law Tribunal ("NCLT"), Mumbai bench in Ashok Kumar Dewan v. The Development Commissioner has held that no property by an owner or lessor, can be recovered which is under occupation of the corporate debtor when such corporate debtor is under moratorium under Section 14 of the IBC. The NCLT reiterated that Section 238 of the IBC mandates that the provisions of the IBC shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. The NCLT herein held that even if notice Section 7(3) of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 has been issued by the Development Commissioner, the latter has to stay his hands from seeking any action in terms of the notices until the CIRP concludes.

## INELIGIBILITY AT THE TIME OF SUBMISSION OF RESOLUTION PLAN CANNOT BE CURED EX-POST-FACTO

The NCLAT in Martin S.K. Golla v. Wig Associates Pvt. Ltd. and Others has held that if the resolution applicant was ineligible to submit a resolution plan under Section 29A of the IBC at the time of submitting the resolution plan, then such resolution plan cannot be acted upon, even if such resolution applicant becomes eligible at a later stage. The NCLAT observed that ineligibility attaches at the time when the resolution plan is submitted by resolution applicant. It was held in this case that the subsequent introduction of Section 240A of the IBC and subsequent taking of certificate of being an MSME will not cure the ineligibility at the time of submitting the resolution plan, which was not permissible.

### INSOLVENCY PROFESSIONALS TO ACT AS IRPS, LIQUIDATORS, RESOLUTION PROFESSIONALS AND BANKRUPTCY TRUSTEES (RECOMMENDATION) GUIDELINES, 2021

Given that every Insolvency Professional ("IP") is equally qualified to be appointed as the IRP, liquidator, resolution professional ("RP") or bankruptcy trustee ("BT") of any corporate or individual insolvency resolution, liquidation or bankruptcy process, as the case may be, if otherwise not disqualified, and in the interest of avoiding administrative delays, Insolvency and Bankruptcy Board of India ("IBBI") has considered it necessary to have guidelines to prepare a panel of IPs for the purpose of Sections 16(4), 34(6), 97(4), 98(3), 125(4), 146(3) and 147(3) of the IBC. Under these guidelines, IBBI will prepare a common panel of IPs for appointment as IRP, liquidator, RP and BT and share the same with the adjudicating authority. The panel will have zone-wise list of IPs based on the registered office (address as registered with IBBI) of the IP. The panel will have validity of six months and a new panel will replace the earlier panel every six months.

## CORPORATE

### SECURITIES EXCHANGE BOARD OF INDIA ("SEBI") ISSUED CIRCULAR ON BUSINESS RESPONSIBILITY AND SUSTAINABILITY REPORTING ("BRSR") BY LISTED ENTITIES

Pursuant to the decision taken at SEBI Board meeting dated March 25, 2021 on introducing new sustainability related reporting requirements, SEBI has issued a circular containing the format of the BRSR. The BRSR is a notable departure from the existing Business Responsibility Report ("BRR") and a significant step towards bringing sustainability reporting at par with financial reporting. The reporting requirements were finalized based on feedback received from public consultation and extensive deliberations with stakeholders including corporates and institutional investors. Further, a benchmarking exercise with internationally accepted disclosure frameworks was also undertaken. A few of the key disclosures sought under BRSR include overview of the entity's material ESG risks and opportunities, sustainability related goals, environment and social related disclosures, etc.

### ENHANCEMENT OF OVERALL LIMIT FOR OVERSEAS INVESTMENT BY ALTERNATIVE INVESTMENT FUNDS ("AIFS")/VENTURE CAPITAL FUNDS ("VCFS")

SEBI registered AIFs and VCFs were previously permitted to invest overseas, subject to an overall limit of USD 750 million. In consultation with the Reserve Bank of India ("RBI"), the said limit has now been enhanced to USD 1,500 million. Further, all other regulations governing such overseas investment by eligible AIFs/VCFs shall remain unchanged.

### RBI CLEARS AMBIGUITIES SURROUNDING TRANSACTION IN CRYPTO CURRENCIES

The RBI on May 31, 2021 clarified that banks and other regulated entities cannot cite its 2018 circular on cryptocurrencies as it has been set aside by the Supreme Court in March, 2020 in the case of Internet and Mobile Association of India v. Reserve Bank of India. The circular is not valid from the date of the Supreme Court's decision and cannot be cited or quoted from, the RBI said.

However, the RBI asked banks to carry out the necessary customer due diligence process in line with regulations governing standards for Know Your Customer Anti-Money Laundering , Combating of Financing of Terrorism and obligations of regulated entities under Prevention of Money Laundering Act, 2002.

## INDIAN INSURANCE COMPANIES (FOREIGN INVESTMENT) RULES, 2015 AMENDED

The Indian Insurance Companies (Foreign Investment) Rules, 2015 have been amended. The amended rules provide that in an Indian insurance company having foreign investment, a majority of its directors, a majority of its Key Management Persons, and at least one among the chairperson of its Board, its managing director and its Chief Executive Officer, shall be resident Indian citizens.

## COMPANIES (INCORPORATION) FOURTH AMENDMENT RULES, 2021

In exercise of the powers conferred by sub-sections (1) and (2) of Section 469 of the Companies Act, 2013, the Central Government has amended the Companies (Incorporation) Rules, 2014. Under the amended rules, the words, "opening of bank account", have been replaced by the words “opening of bank account and shops and establishment registration”. Further, e-Form No. INC-35 has been amended, which now provides for an application for goods and services tax identification number, employees state insurance corporation registration plus employees provident fund organization registration, professional tax registration, opening of bank account and shops and establishment registration (“AGILE-PRO-S”).

## INVESTOR EDUCATION AND PROTECTION FUND AUTHORITY (ACCOUNTING, AUDIT, TRANSFER AND REFUND) AMENDMENT RULES, 2021

The Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016 have been amended by the Central Government. In the amended rules, Rule 6A has been inserted, which provides for the manner of transfer of shares under sub-section (9) of Section 90 of the Companies Act, 2013 to the Investor Education and Protection Fund (“Fund”). It stipulates that the shares shall be credited to DEMAT account of the Investor Education and Protection Fund Authority (“Authority”) to be opened by the Authority for the said purpose, within a period of thirty days of such shares becoming due to be transferred to the Fund.

These amended rules shall come into force on the date of their publication in the official Gazette.

## SEBI (DELISTING OF EQUITY SHARES) REGULATIONS, 2021

In exercise of the powers conferred by Section 31 read with Section 21A of the Securities Contracts (Regulation) Act, 1956 and Section 30, sub-section (1) of Section 11 and sub-section (2) of Section 11A of the Securities and Exchange Board of India Act, 1992, SEBI has formulated the SEBI (Delisting of Equity Shares) Regulations, 2021, which shall come into force on the date of their publication in the Official Gazette. These regulations shall apply to delisting of equity shares of a company including equity shares having superior voting rights from all or any of the recognised stock exchanges where such shares are listed. However, these regulations shall not apply to the delisting of equity shares of a listed company made pursuant to a resolution plan approved under Section 31 of the IBC, if such plan provides for delisting of equity shares or an exit opportunity to the existing public shareholders at a specified price.

## OTHER UPDATES

### PROVISO 6 TO SECTION 92 OF INDIAN EVIDENCE ACT, 1872 ("EVIDENCE ACT") NOT APPLICABLE IF DOCUMENT IS UNAMBIGUOUS

The Supreme Court in Mangala Waman Karandikar (D) TR. LRS v. Prakash Damodar Ranad has held that proviso 6 to Section 92 of the Evidence Act will not apply if a document is straightforward, without any ambiguity in meaning. Section 92 of the Evidence Act places a bar on giving oral evidence in relation to the contents of a written document. However, proviso 6 to Section 92 of the Evidence Act permits the admission of facts external to the document, which shows in what manner the language of a document is related to the facts of a case. The Supreme Court held that it is only in cases where the terms of the document are not straightforward, that proviso 6 to Section 92 of the Evidence Act could be resorted to.

### CONTEMPT ACTION CAN BE TAKEN ONLY IN RESPECT OF ESTABLISHED WILFUL DISOBEDIENCE OF COURT ORDER

The Supreme Court in Abhishek Kumar Singh v. G. Pattanaik has reiterated that contempt action can be taken only in respect of established wilful disobedience of a court order. The Supreme Court held that in exercising contempt jurisdiction, the primary concern must be whether the acts of commission or omission can be said to be contumacious conduct of the party who is alleged to have committed default in complying with the directions given in the judgment and order of the court. The Supreme Court noted that "wilful" means knowingly intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom, and excludes casual, accidental, bona fide or unintentional acts or genuine inability.

### FOREIGN COURT CANNOT INJUNCT PARTY FROM PURSUING CAUSE BEFORE INDIAN COURTS IF SAID COURTS HAVE JURISDICTION

The DHC in Interdigital Technology v. Xiaomi Corp) has held that a foreign court cannot injunct a party from pursuing its cause before Indian courts, when the relevant jurisdiction is India, and Indian courts are the only forum competent to adjudicate the claim. The DHC also held that perceived infringement of Indian patents can be challenged only in India, patent rights being territorial in nature and patents themselves being granted only by the concerned sovereign state. The DHC also observed that injuncting a party from seeking relief under the Patents Act, 1970 would render the Patents Act, 1970 and the statutory guarantees available thereunder, nugatory.

### PROPERTY OF A PERSON WHO IS NOT A 'TAXABLE PERSON' CANNOT BE ATTACHED UNDER CENTRAL GOODS AND SERVICES TAX ACT, 2017 ("CGST ACT")

The DHC in Roshni Sana Jaiswal v. Commissioner of Central Taxes, GST Delhi (East) has held that under Section 83 of the CGST Act, the authorities cannot attach property including bank accounts of persons who are not "taxable persons". The DHC observed that Section 83(1) of the CGST Act provides that provisional attachment can be ordered only qua property, including bank account, belonging to the taxable person. The DHC held that in the zeal to protect the interest of the revenue, the Commissioner of Central Taxes, GST cannot attach any and every property, including bank accounts of persons, other than the taxable person.

## WHEN APPLICATION FOR INJUNCTION AGAINST INFRINGEMENT OF PATENT IS PENDING, DEFENDANT CANNOT BE ALLOWED TO LAUNCH ALLEGEDLY INFRINGING PRODUCTS

The DHC in FMC Corporation v. Best Crop Science LLP and Another has held that while applications for injunction against the launch of allegedly infringing products is being heard by the court, the defendants should not be allowed to launch such allegedly infringing products as an interim relief. The DHC observed that once allegedly infringing products are in the market, there can be no stay against the infringement and even if any stay were to be granted, the exercise would be fundamentally chimerical in nature. The DHC also held that damages are entirely insufficient as panacea for the holder of a valid patent, which is infringed by another, and that prejudice caused even by a single day's infringement of intellectual property is, in principle, incalculable.

## BEING A COURT OF RECORD, HIGH COURT CAN REVIEW ITS OWN JUDGMENTS UNDER ARTICLE 226 OF THE CONSTITUTION

The KHC in Pottakalathil Ramakrishnan v. Thahsildar, Tirur and Others has held that High Courts as courts of record could review their own orders. The KHC observed that the jurisdiction to recall their own orders is inherent by virtue of the fact that High Courts are superior courts of record. The KHC also observed that there was no need for a High Court to search for another provision apart from Article 226 of the Constitution that allowed it to review its own judgments. It was held herein that if it is found that there was material suppression, and the High Court opines that it was not right in granting a verdict in favour of the writ petitioner due to suppression of material facts, the High Court has the power to review such verdict.

## TAKEAWAY ORDERS FROM RESTAURANTS DO NOT ATTRACT SERVICE TAX UNDER FINANCE ACT, 1994 ("FINANCE ACT")

The Madras High Court ("MHC") in Anjappar Chettinad A/C Restaurant v. Joint Commissioner has held that takeaway orders or food parcels procured from restaurants will not attract service tax under the Finance Act. The MHC held that such provision of food and drink to be taken away in parcels by restaurants amounts to sale of food and drink and not service and would, therefore, not attract service tax. The MHC noted that several elements that result in attraction of service tax are absent in takeaway such as seating, décor, music and services of a host, etc. Thus, it was held that only those services commencing from the point where the food and drinks are collected for service at the table till the raising of the bill, are covered for levy of service tax.

## FAILURE TO DISCLOSE LIABILITY OF DRAWER, SUPPLY LIST OF WITNESSES DOES NOT VITIATE COMPLAINT UNDER SECTION 138 OF THE NEGOTIABLE INSTRUMENTS ACT, 1881 ("NI ACT")

The Jammu and Kashmir High Court in Narinder Singh v. Sharjeel Malik has held that a complaint under Section 138 of the NI Act will not be vitiated due to failure by the holder of the cheque to disclose in his/her complaint that the cheque was received for discharge of legally enforceable debt or liability on the part of drawer of the cheque. The Jammu and Kashmir High Court held that Section 139 of NI Act creates a presumption that the holder of the cheque received the cheque for discharge of any debt or other liability unless the contrary is proved. The Jammu and Kashmir High Court also observed that the defect of not supplying the list of prosecution witnesses is only an irregularity and the same would not vitiate the proceedings unless it has led to failure of justice.

CONTACT US

Building No. G-16, 3rd Floor, Saket, New Delhi 110017, India

T: +91-11-40522433
40536792

F: +91-11-41764559

E: delhi@akspartners.in
info@akspartners.in

www.akspartners.in

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# MONTHLY NEWSLETTER

JUNE 2021

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