Corporate
amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

May 2023 / Issue–140

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Article

Arbitration agreement, which is part of an unstamped contract, has no existence

By **Manasa Tantravahi and Aman Gupta**

The Constitutional Bench of the Supreme Court recently in the case of N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. held that arbitration cannot be invoked when the arbitration agreement or clause is contained in an unstamped or insufficiently stamped agreement or contract. The article in this issue of Corporate Amicus analyses in this regard the said decision, considering the factual and historical background, and jurisprudence on the question of law. According to the authors, even though this issue arises at the preliminary stage of the arbitration i.e., appointment of the arbitrator as per Section 11 of the Arbitration and Conciliation Act, 1996 and dealing with the same may result in the main issues being stalled and resulting in increased judicial intervention, the Apex Court had ordered to ensure sufficient stamping of the instruments, thereby reiterating the essence of the provisions of the Stamp Act, 1899.

Arbitration agreement, which is part of an unstamped contract, has no existence

By Manasa Tantravahi and Aman Gupta

Introduction:

In the recent case of *N.N. Global Mercantile Pvt. Ltd.* v. *Indo Unique Flame Ltd* (Judgment dated 25 April 2023), the Supreme Court held that arbitration cannot be invoked when the arbitration agreement or clause is contained in an unstamped or insufficiently stamped agreement or contract. The main question of law in this case was: *Whether the arbitration agreement or the arbitration clause can be considered as legally enforceable or can be lawfully invoked if the instrument, agreement, or the contract which contains the arbitration clause, or the arbitration agreement is not duly stamped as per the Indian Stamp Act, 1899.*

Factual background:

The Appellant and the Respondent, in the concerned case, had a sub-contracting arrangement in the form of a Work Order. Clause 10 of the Work Order provided for an Arbitration Clause. According to Clause 9 of the Work Order, the Appellant had furnished a bank guarantee, which was invoked by the Respondent due to certain disputes arising between the parties. After the aforementioned guarantee was invoked, the Appellant filed a lawsuit against the encashment of the bank guarantee.

The Respondent submitted an application for reference of the dispute to an arbitral tribunal, under Section 8 of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'), which had been rejected by the Commercial Court. The Respondent had thereafter filed a writ petition to contest the Commercial Court's order rejecting the application made according to Section 8 of the Arbitration Act, and the main contention raised by the Respondent was that the Arbitration Agreement become unenforceable as the Work Order was unstamped. The main issue before the Court was whether the Arbitration Agreement would be enforceable and acted upon, even if the Work Order is unstamped and unenforceable under the Indian Stamp Act, 1899 ('**Stamp Act**').

Historical background:

A 3-Judge Bench of the Apex Court in the *N. N. Global Mercantile Pvt. Ltd.* v. *Indo Unique Flame Ltd.*,[1] had earlier held that the Arbitration Agreement is not included in the Schedule of the Stamp Act as an instrument chargeable to stamp duty. The Court found that that there was a non-payment or deficiency on the stamping of the Work Order, which was chargeable to payment of stamp duty. The Court, however, found that such non-payment or the deficiency on the Work

[1] *N.N.Global Mercantile Pvt. Ltd.* v. *Indo Unique Flame Ltd.* - (2021) 4 SCC 379.

Order did not invalidate the contract, but merely rendered it inadmissible in evidence, until the defect is removed. It was observed that Section 35 of the Stamp Act did not make the unstamped instrument invalid, non-existent or unenforceable in law. The Court found that, that being so, the Arbitration Agreement was a distinct and an independent contract between parties. The Arbitration Agreement is also not included in the Schedule of Stamp Act as an instrument chargeable to stamp duty. On applying the Doctrine of Separability, it was held that the arbitration agreement would thus not be rendered invalid, unenforceable, or non-existing, even if the substantive contract, in which it is contained, was inadmissible in evidence or could not be acted upon, in view of it not being stamped.

A substantial question was raised while the three Judge Bench of the Apex Court were deciding the case[2], and as a consequence, the same was referred to the Constitution Bench consisting of 5. After careful deliberation of the case, a majority of 3 judges overruled the judgments passed on the position of law previously and gave a new landmark order holding that the arbitration clause cannot be invoked when the arbitration agreement or clause itself is contained in a document or contract which is not duly stamped or insufficiently stamped.

In the process, the Bench also overruled the decisions given in *SMS Tea Estates Private Limited* v. *Chandmari Tea Company Private Limited*, (2011) 14 SCC 66 and *Garware Wall Ropes Limited* v. *Coastal Marine Constructions & Engineering Limited,* (2019) 9 SCC 209 which had held that the Arbitration Agreement is an independent agreement between the parties, and it is not chargeable to payment of stamp duty, and therefore, the non-payment of stamp duty on the commercial contract would not invalidate the arbitration clause, or render it unenforceable, since it has an independent existence of its own.

Jurisprudence on the question of law:

The Hon'ble Supreme Court of India in *SMS Tea Estates Pvt. Ltd.* v. *Chandmari Tea Co. Pvt. Ltd.*[3] has held that where an arbitration clause is contained in an unstamped agreement, the provisions of the Indian Stamp Act, 1899 require the judge hearing the Section 11 application to impound the agreement and ensure that stamp duty and penalty, if any, are paid thereon before proceeding with the Section 11 application.

Having regard to Section 35 of the Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Therefore, when a lease deed or any other instrument is relied upon and contended as the arbitration agreement, the court should consider at the outset, whether an objection in that behalf is raised or not viz., whether the document is properly stamped. If it comes to the conclusion that it is not properly stamped, it should be impounded and dealt with in the manner specified in section 38 of the stamp act. The court cannot act upon such documents or the arbitration clause therein. But if the deficit duty and penalty is paid in the manner set out in section 35 or section 40 of the Stamp Act, the document can be acted upon or admitted in

[2] (2021) 4 SCC 379.

[3] (2011) 14 SCC 66.

evidence. The Court in *Garware Wall Ropes Limited* v. *Coastal Marine Constructions & Engineering Limited*[4] had found an unstamped agreement to be unenforceable under section 2 (h) of the Indian Contract Act, 1872. The Judges were of the opinion that the Arbitration Clause contained in the sub-contract would not exist as a matter of law until the sub-contract was duly stamped. The same had been upheld and approved in *Vidya Drolia and Ors.* v. *Durga Trading Corporation*.[5]

In contradiction to all the above-mentioned decisions, in the case of *Honey Bee Multi-trading Pvt. Ltd.* v. *Ruchi Soya Industries Ltd.*[6], the Hon'ble Bombay High Court had directed the appointment of an arbitrator pending payment of stamp duty. It was held that at a '*pre-appointment stage, the matters cannot be kept hanging and that there is no legal impediment to the enforceability of the arbitration agreement, pending payment of stamp duty on the substantive contract.*' Since the arbitration clause contained in the lease agreement was not in dispute nor was its invocation is in dispute, it was held to be appropriate to exercise the power conferred under section 11 for the appointment of sole arbitrator by the Court.

The Hon'ble Court in the case of *Weatherford Oil Tool Middle East* v. *Baker Hughes Singapore,*[7] observed that considering the time-sensitivity while dealing with arbitration issues, and that all these matters were still at a pre-appointment stage, it cannot be left hanging until the larger bench settles the issue. It was decided that, till the constitution Bench determines the issue, the arbitration will be carried on.

Ratio decidendi:

While the minority dissenting judgement of the Hon'ble Apex Court were of the opinion that the main objective behind the enactment of the Arbitration and Conciliation Act, 1996 was to *inter alia* avoid procedural complexity and delay in litigation before courts. It was observed that impounding and stamping at the Section 11 stage, which is solely for the appointment of arbitrator, would indeed frustrate the very purpose of the Arbitration Act as there will be further delay and the issues would be stalled. It was also held that the preliminary issues including insufficiently/ unduly stamped, thereby questioning the validity of the arbitration agreement etc., are referrable to the Arbitrator or the arbitral tribunal under Section 16 of the Act, 1996 which, by virtue of the *Doctrine of Kompetenz – Kompetenz,* as per which the arbitral tribunal itself decides its jurisdiction with respect to disputes, has the power to do so.

The minority of the Constitution Bench was of the view that judicial intervention at the stage of Section 11 of the Arbitration Act should be minimal and should be confined only to the prima facie examination of 'existence of an arbitration agreement' alone keeping in view the object of 2015 amendment to Arbitration Act and the courts must strictly adhere to the time schedule for the appointment of Arbitrator prescribed under Section 11(13) of the Arbitration Act.

[4] (2019) 9 SCC 209.

[5] (2021) 2 SCC 1.

[6] 2023 SCC OnLine Bom 652

[7] 2022 SCC OnLine SC 1464.

Accordingly, it was recommended that the existence of a copy/certified copy of an arbitration agreement whether unstamped/ insufficiently stamped at the pre-referral stage be enough to treat it as an enforceable document for the purposes of appointment of an Arbitrator under Section 11(6A) of the Act, 1996.

However, the 3-judge majority out of Constitution Bench upheld the rationale in *SMS Tea Estates* Case and *Garware Wall Ropes* case, by considering the relevant provisions of the Stamp Act, The Registration Act and the Indian Contract Act, 1872 and reached to various conclusions, such as (a) that the Stamp Act is a fiscal enactment and the courts are duty bound to always interpret in favour of enforcement of the law in question and not its breach, (b) that the court after being presented with an unstamped/ insufficiently stamped instrument or contract ought to impound the same in accordance with Section 33 of the Stamp Act, (c) that the unstamped/ insufficiently stamped instrument would only be enforceable in law within the meaning of Section 2(h) of the Contract Act after it is validated as per the Stamp Act, and (d) that the contracts or agreements are to be duly stamped to avoid further intervention when it is not sufficiently stamped and thereby proceeding further with the arbitration process. *For a detailed understanding of the various submissions in the case and the final ratio, the Ratio Decidendi portion of this Amicus below may be referred.*

Conclusion:

The landmark verdict passed by the Majority Constitution Bench answered the substantial question that whether the arbitration clause can be enforceable if the underlying instrument is not stamped duly as per the provisions of the Indian Stamp Act. Even though this issue arises at the preliminary stage of the arbitration i.e., appointment of the arbitrator as per Section 11 of the Arbitration and Conciliation Act, and dealing with the same may result in the main issues being stalled and resulting in increased judicial intervention, the Apex Court had ordered to ensure sufficient stamping of the instruments, thereby reiterating the essence of provisions of the Stamp Act as laid down in the cases of *SMS Estates* and *Garware Wall Ropes*.

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Notifications & Circulars

- Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2023 notified
- Companies (Removal of Names of Companies from the Register of Companies) Second Amendment Rules, 2023 notified
- Increase in the EPF contribution pursuant to the Supreme Court Judgment notified
- Modifications in the requirement of filing of offer documents with SEBI by Mutual Funds
- Remittances to International Financial Services Centers (IFSCs) in India under the Liberalized Remittance Scheme (LRS) amended
- Levy of charges on forex prepaid cards/ store value cards/ travel cards, etc. in INR only
- Central Consumer Protection Authority advisory for e-commerce platforms

Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2023 notified

The Ministry of Corporate Affairs *vide* Notification G.S.R. 367(E) F.No.2/31/CAA/2013–CL.V Part dated 15 May 2023 has notified amendments to the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. Accordingly, sub-rule (5) and (6) of the Rule 25 have been substituted to mean that an objection or suggestion by the Registrar or the Central Government on the scheme of merger or amalgamation under Section 233 of the Companies Act, 2013 if is not received within 30 days of the receipt of such copy of the scheme, and the Central Government feels that it is in public interest to do so, it may issue the confirmation order in Form CAA.12 within 15 days after the expiry of said 30 days period. Further, if the Central Government does not issue a confirmation order within a period of 60 days from the date of receipt of the scheme, it shall be deemed that it has no objection to the scheme. Also, if the objections or suggestions received from the Registrar or the Official Liquidator within the period of 30 days, are found to be not sustainable by the Central Government, it may go ahead and issue the confirmation order in Form CAA.12. However, if the Central Government is of the opinion that the scheme is not in the interest of the public, it may within 60 days of the receipt of the scheme, file an application stating the objections/ opinion to consider scheme under Section 232 of Companies Act, 2013, before the Tribunal.

Companies (Removal of Names of Companies from the Register of Companies) Second Amendment Rules, 2023 notified

The Ministry of Corporate Affairs *vide* Notification G.S.R. 354(E), dated 10 May 2023 notified the Companies (Removal of Names of Companies from the Register of Companies) Second Amendment Rules, 2023 ('**Amendment Rules**'). The Amendment rules have, by way of a proviso under Rule 4 of the original rules included that an application for the removal of name of a company shall not be made unless such company has filed overdue financial statements under Section 137 of the Companies Act, 2013 (Companies Act), and filed overdue annual returns under Section 92 of Companies Act until the end of the financial year in which the company ceased to carry its business operations. Further, if a notice for removal of company's name has been sent by the Registrar under Section 248(1) of Companies Act, the company shall be required to file all pending financial statements under Section 137 of Companies Act and all pending annual returns under Section 92 of Companies Act, before filing the application. Moreover, if a notice under Section 248(5) of Companies Act has been issued by the Registrar for initiating action pursuant to Section 248(1), the company shall not be allowed to file an application for the removal of its name.

Increase in the EPF contribution pursuant to the Supreme Court Judgment notified

Pursuant to the judgment dated 4 November 2022 of the Supreme Court in the matter of the *Employees' Provident Fund Organisation and Others* v. *Sunil Kumar B. & Others*, wherein it was held that the requirement of members to contribute at the rate of 1.16 per cent of their salary, to the extent such salary is in excess of INR 15,000 per month, as an additional contribution is *ultra vires* the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the Central Government *vide* Notification No. S.O. 2061 (E) dated 3 May 2023 issued by Ministry of Labour and Employment has notified under the provisions of Code of Social Security, 2020 that for the members who had exercised joint option under the Employees' Pension Scheme, 1995 and are found eligible, the employer's contribution shall be 9.49% of the basic wages, dearness allowance and retaining allowance of each member including the increase of 1.16% from the existing 8.33%. The notification shall be deemed to have come into effect from 1 September 2014.

Modifications in the requirement of filing of offer documents with SEBI by Mutual Funds

The Securities and Exchange Board of India (SEBI) *vide* Circular SEBI/HO/IMD/IMD-RAC-2/P/CIR/2023/60, dated 25 April 2023 notified certain changes with respect to the filing of offer documents by Mutual Funds. Accordingly, the Asset Management Companies (AMCs) are no longer required to file physical copies of their offer documents with the SEBI. Further, such submission of offer documents shall be made at least two working days prior to the launch of the scheme instead of the previous requirements of filing the same at least seven working days prior to the launch of the scheme. These provisions have come into effect from 1 May 2023.

Remittances to International Financial Services Centers (IFSCs) in India under the Liberalized Remittance Scheme (LRS) amended

The Reserve Bank of India (RBI) *vide* A.P. (DIR Series) Circular No. 03 dated 26 April 2023 has amended its direction on the conditions for a Resident Individual to open a Foreign Currency Account (FCA) in International Financial Services Centers (IFSC). Accordingly, RBI has withdrawn the requirement of repatriating to an investor's domestic INR account any funds lying idle in the FCA for a period of up to 15 days from the date of its receipt with immediate effect.

Levy of charges on forex prepaid cards/ store value cards/ travel cards, etc. in INR only

The Reserve Bank of India (RBI) *vide* A.P. (DIR Series) Circular No. 04 dated 9 May 2023 has issued an advisory under Section 10(4) and Section 11(1) of the Foreign Exchange Management Act, 1999 to the Authorised Dealers who are levying certain fees/ charges on International Debit Cards/ Store Value Cards/ Charge Cards/ Smart Cards or other instruments that can be used to create a financial liability as 'currency', that such fees/ charges payable in India should be denominated and settled in Indian Rupees only.

Central Consumer Protection Authority advisory for e-commerce platforms

It was found that certain e-commerce platforms are selling products such as 'seat belt alarm stopper clips' thereby posing a risk to the safety of consumers driving a motor vehicle. In light of the same, Central Consumer Protection Authority (CCPA) has issued certain directions vide Advisory No. CCPA – 19/ 2023 – CCPA dated 10 May 2023 to the e-commerce platforms under Section 20 of the Consumer Protection Act, 2019 (Act) wherein e-commerce platforms have been directed to permanently delist all car seat belt alarm stopper clips and associated motor vehicle components which hamper the safety of consumers. If any person is found to be in violation of said directions, he may be subjected to action in accordance with the Act.

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Ratio Decidendi

- Arbitration cannot be invoked when the arbitration agreement or clause is contained in an unstamped or insufficiently stamped agreement or contract – Supreme Court
- Insolvency – Time Taken to provide certified copy excluded from limitation period for appeal to NCLAT – Supreme Court

Arbitration cannot be invoked when the arbitration agreement or clause is contained in an unstamped or insufficiently stamped agreement or contract

The Constitution Bench of the Hon'ble Supreme Court of India has held that arbitration cannot be invoked when the arbitration agreement, or the arbitration clause in a contract, is contained in an unstamped or insufficiently stamped agreement or contract. The following question was decided by the Court: '*Whether the statutory bar contained in Section 35 of the Stamp Act, 1899 ('**Stamp Act**') applicable to instruments chargeable to stamp duty under Section 3 of Stamp Act read with the Schedule to the Stamp Act, would also render the arbitration agreement contained in such an instrument, which is not chargeable to payment of stamp duty, as being non-existent, unenforceable, or invalid, pending payment of stamp duty on the substantive contract/instrument*'.

Facts:

The Appellant and the Respondent entered into a work order for coal transportation from the washery ('**Work Order**'). Clause 10 of the Work Order, constituting the Sub-Contract, provided for an Arbitration Clause. Series of disputes arose between both the parties and as a result, the Respondent invoked the bank guarantee. The Appellant filed a lawsuit against the encashment of the bank guarantee, consequent to which the Respondent applied for reference of this dispute to Arbitration under Section 8 of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'), which was rejected by the Commercial Court. Aggrieved by the same, the Respondent filed a writ petition before the Bombay High Court to contest the Commercial Court's order rejecting the application made under Section 8 of the Arbitration Act. One of the main contentions raised was that the Arbitration Agreement become unenforceable as the Work Order was unstamped. The High Court allowed this writ. Hence, a special leave petition was preferred by the Appellant before a 3-judge Bench of the Supreme Court.

The Apex Court found that that there was a non-payment or deficiency on the stamping of the Work Order, which was chargeable to payment of stamp duty. The court, however, found that such non-payment or the deficiency on the Work Order did not invalidate the contract, but merely rendered it inadmissible in evidence, until the defect is removed. It was observed that Section 35 of the Stamp Act did not make the unstamped instrument invalid, non-existent or unenforceable in law. The Court found that, that being so, the Arbitration Agreement was a distinct and an independent contract between parties. The Arbitration Agreement is also not included in the Schedule of Stamp Act as an instrument chargeable to stamp duty. On applying the Doctrine of Separability, it was held that the arbitration agreement would thus not be rendered invalid, unenforceable, or non-existing, even if the substantive contract, in which it is contained, was inadmissible in evidence or could not be acted upon, in view of it not being stamped.

The Hon'ble three Judge Bench had overruled the judgments of division bench of SC in *SMS Tea Estates Private Limited* v. *Chandmari Tea Company Private Limited*, (2011) 14 SCC 66 ('***SMS Tea***') and *Garware Wall Ropes Limited* v. *Coastal Marine Constructions & Engineering Limited,* (2019) 9 SCC 209 ('***Garware Ropes***') which held that the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement and render it non-existent in law, and un-enforceable. In the subsequent case of *Vidya Drolia and others* v. *Durga Trading Corporation*, (2021) 2 SCC 1 ('***Vidya Drolia'***), the three-judge Bench had affirmed the judgment of the two-judge bench in *Garware Ropes*. Since multiple 3-judge benches of the Apex Court had taken different stances with respect to the aforementioned question of law, the issue under consideration was referred to the Constitution bench of the SC comprising of 5 judges to settle the matter. Hence the present case.

Submission of the Appellants:

- It was submitted that Section 35 of the Stamp Act bars admission of an unduly stamped instrument in evidence for any purpose in court, and the court cannot act upon such an instrument. Section 35 bars the admission of an unduly stamped 'instrument' in evidence for any purpose and also 'acting upon it' and it was held by this Court in *Government of Andhra Pradesh and Others* v. *P. Laxmi Devi*, that Section 33 and 35 are mandatory provisions as they use the word 'shall' and an unstamped document must be impounded at the threshold.
- It was submitted that the Doctrine of Separability, on whose application the Arbitration Agreement has been treated as being distinct and having a separate existence, has been erroneously understood in the context of Sections 33 and 35 of the Stamp Act. Further, the Doctrine of Separability and the principle of Kompetenz-Kompetenz (the arbitral tribunal itself decides on its own jurisdiction) has no bearing on the issue of enforceability of an arbitration agreement when proper stamp duty is not paid on the instrument containing the arbitration agreement.
- It was contended that the law has been correctly laid down in *SMS Tea* and *Garware Ropes* which was correctly upheld in the case of *Vidya Drolia*. It was submitted that the judgments ought not to have been overruled.
- It was submitted that the amendment made to Section 11 of the Arbitration Act, by inserting sub-section 6A which limits the intervention of the court at the stage of appointment of an arbitral tribunal, does not authorise a court to overlook the dictates of sections 33 and 35 of the Stamp Act.

Submission of the Respondents:

- It was submitted that the Court must adopt a harmonious construction between the Stamp Act and the Arbitration Act. The importance of conforming to Section 5 of the Arbitration Act, which calls for minimum intervention of Courts, has been emphasized upon.

Submission of the Amicus Curiae:

- It was submitted that non-payment of the stamp duty will not invalidate the instrument. It is a curable defect. Non-stamping does not render the agreement null and void. In law and in point of fact, an unstamped instrument bears life. Reliance was placed on *Hindustan Steel Ltd.* v. *Dilip Construction Company*, (1969) 1 SCC 597, to contend that an unstamped document can be acted upon, after payment of duty and penalty.
- It was further submitted that a true reading of Section 11(6A) of the Arbitration Act would establish that the impounding of an unstamped or deficiently stamped instrument is not to be done by the Judge under Section 11 of the Arbitration Act, but by the Arbitrator appointed under thereunder. Section 11(6A) compels the Court to confine its examination to the question of the existence of the Arbitration Agreement and not its validity.

Majority decision:

The Bench upheld the rationale in *SMS Tea* and *Garware Ropes* as upheld in *Vidya Drolia*. By considering the relevant provisions of the Stamp Act, the Registration Act, 1908, and the Indian Contract Act, 1872 ('**Contract Act**'), the Bench reached the following conclusions:

- The Stamp Act is a fiscal enactment, and the courts are duty bound to always interpret in favour of enforcement of the law in question and not its breach. The court after being presented with an unstamped/ insufficiently stamped instrument or contract ought to impound the same in accordance with Section 33 of the stamp act, and the unstamped/ insufficiently stamped instrument would only be enforceable in law within the meaning of Section 2(h) of the Contract Act only after it is validated as per the Stamp Act.
- An instrument which is exigible to stamp duty may contain an Arbitration Clause and since it is not stamped, the arbitration agreement also cannot be said to be a contract which is enforceable by law within the meaning of Section 2(h) of the Contract Act.
- The Court is permitted under Section 11 of the Arbitration Act to act on the basis of the original agreement or on a certified copy. The agreement, original or certified, must clearly indicate the stamp duty as paid as held in *SMS Tea*.
- If there is no such indication on a certified copy, the Court should not act on such an instrument. If the original of the instrument is produced and it is unstamped, the Court, acting under Section 11 of the Arbitration Act, is duty-bound to act under Section 33 of the Stamp Act and impound the same.
- When it does so, the other provisions, which in the case of the payment of the duty and penalty would culminate in the certificate under Section 42(2) of the Stamp Act, would also apply. When such a stage arises, the Court will be free to process the application under Section 11 of the Arbitration Act as per law.

- An Arbitration Agreement, within the meaning of Section 7 of the Act, which attracts stamp duty and which is not stamped or insufficiently stamped, cannot be acted upon, in view of Section 35 of the Stamp Act, unless impounding and payment of the requisite duty is done and the necessary certificate is provided under Section 42 of the Stamp Act.

[*N.N. Global Mercantile Pvt. Ltd.* v. *Indo Unique Flame Ltd.* – Judgment dated 25 April 2023, Civil Appeal No(S). 3802-3803 of 2020, Supreme Court of India]

Insolvency – Time Taken to provide certified copy excluded from limitation period for appeal to NCLAT

The Hon'ble Division Bench of the Supreme Court has held that when the Appellant has shown due diligence and applied for the certified copy of the order of the National Company Law Tribunal ('**NCLT'**) within the limitation period, the time taken by the NCLT to provide the certified copy of the order ought to be excluded when determining the period of limitation under Section 61(2) of the Insolvency and Bankruptcy Code, 2016 ('**IBC**')

Brief Facts:

The Appellant had filed an application under Section 7 of the IBC before the NCLT, which had been dismissed on 26 August 2022. Thereafter, on 2 September 2022, the Appellant had filed an application for obtaining a certified copy of the order, which was received only after ten days, i.e., on 15 September 2022. The Appellant then e-filed an appeal against the NCLT order on 10 October 2022, with an application for condonation of delay. On 9 January 2023, the National Company Law Appellate Tribunal ('**NCLAT**') dismissed the appeal for being barred by limitation, as it was instituted on the 46th day following the order of the NCLT, exceeding the outer limit of 45 days permissible under Section 61 of IBC.

Submissions by the Appellant:

- The Appellant submitted that the appeal had been filed within the period of limitation from the date the order was made available in the public domain i.e., 15 September 2022. However, as a matter of abundant precaution, the appellant had considered 26 August 2022 to be the date from which limitation would commence. The prescribed time period of 30 days for filing the appeal ended on 5 October 2022, after accounting for the exclusion of 10 days (from 5 September 2022 to 15 September 2022 on account of the time taken to provide a certified copy).
- The Appellant submitted that the inadvertent delay of 5 days in filing the appeal had been caused due to the additional time needed to obtain legal advice, collate documents and connect with counsel during the festive season.

Submissions by the Respondent:

- The Respondent submitted that the appeal was filed on 10 October 2022 in the electronic mode. On 3 January 2021, a circular was issued by the NCLAT notifying a

Standard Operating Procedure for e-filing in terms of which physical copies were required to be filed as per the procedure prescribed under the NCLAT Rules 2016 along with the e-filing receipt. On 21 October 2022, a further order was issued by the Registrar of NCLAT clarifying that the period of limitation shall be computed from the date of the presentation of the appeal as per Rule 22 of the NCLAT Rules 2016, the effect of which was that the period of limitation would cease to run only after a physical copy was presented. By an order of 24 December 2022, notified by the Registrar of the NCLAT, the earlier order dated 21 October 2022 was withdrawn and it was notified for the first time that limitation shall be computed with reference to the date of e-filing.

- It was contended that, in light of the above, even the e-filing of the appeal on 10 October 2022 would not result in limitation ceasing to operate and it was only when a hard copy was filed that limitation would stop running.

Judgment:

The Court relied on the judgment in *V Nagarajan* v. *SKS Ispat and Power Limited & Ors,* (2022) 2 SCC 244, where the Court observed that Rule 22(2) of the NCLAT Rules 2016 mandates that an appeal must be filed with a certified copy of the impugned order. Any delay in receipt of a certified copy, once an application has been filed, has been envisaged by the legislature under Article 12 of the Limitation Act, and duly excluded to not cause any prejudice to a litigant's right to appeal.

It was observed that, in the present case, the Appellant had filed an application for certified copy of the order within the limitation period which shows that the Appellant has exercised due diligence. The certified copy was provided to the appellant on 15 September 2022. It was determined that, hence, the period of 10 days between 5 September 2022 and 15 September 2022 taken by the court to provide a certified copy of the order ought to be excluded when determining the period of limitation under Section 61(2) of the IBC.

The court further observed that it was highly incomprehensible why NCLAT should insist on physical filling in addition to e-filling. The Court observed that this imposes unnecessary burden on time and expense of litigants as it leads to duplication of efforts. Accordingly, the Court urged the Union Government to have a fresh look at the rules to encourage e-filing across the tribunals, in order to save paper and carbon footprint. The Bench suggested to constitute a working group to make a comprehensive assessment of the position across tribunals and suggest regulatory changes.

[*Sanket Kumar Agarwal & Anr* v. *APG Logistics Private Limited,* Judgment dated 1 May 2023, Civil Appeal No. 748 of 2023, Supreme Court of India]

News Nuggets

- Insolvency – A decision taken by CoC, when in contravention of the provisions of law, cannot be validated by the principle of commercial wisdom of CoC
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- Arbitration – Courts cannot grant subsequent relief by modifying an award after setting aside the said award
- Arbitration – 2015 amendments not applicable where notice invoking arbitration is issued prior to amendment
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- Use of celebrity names, images for satire, parodies, news, etc. not falls foul to tort of infringement of right of publicity

Insolvency – A decision taken by CoC, when in contravention of the provisions of law, cannot be validated by the principle of commercial wisdom of CoC

The Hon'ble Supreme Court in *M.K. Rajagopalan* v. *Dr. Periasamy Palani Gounder* (Judgment dated 3 May 2023) has held that if the Committee of Creditors ('**CoC**') has erred with respect to a significant provision of law in making a decision to accept a resolution plan, the principle of commercial wisdom of CoC shall not brush aside such shortcomings. In the present case, the resolution applicant, admitted and approved by the CoC and the National Company Law Tribunal (NCLT), was found to be declared ineligible under the Indian Trusts Act, 1882. However, he was still admitted as the Successful Resolution Applicant (SRA) of the corporate debtor. The National Company Law Appellate Tribunal (NCLAT) rejected the resolution plan and remanded it back to the CoC for fresh consideration. Now, in an appeal from such decision of the NCLAT, the Supreme Court while upholding the decision of the NCLAT observed that both the CoC and the NCLT have erred in not considering the provisions of a significant law that bars the resolution applicant in the present case from being the SRA. It was held that, therefore, NCLAT was right in rejecting the resolution plan and also observed that though the SRA submitted the resolution plan in his individual capacity, it would be difficult to entirely separate him from the trust that was ineligible to be the resolution applicant as per the law, thereby barring him from being a SRA of the corporate debtor.

Arbitration – Issue of existence and validity of an arbitration agreement to be conclusively decided upon by the referral court under Section 11 of the Arbitration Act

The Hon'ble Supreme Court has held that if there is an issue with regards to existence and validity of an arbitration agreement, the same shall be decided upon by the court and not by the arbitrator. While deciding an appeal arising out of an order in *Magic Eye Developers Pvt. Ltd.* v. *Green Edge Infrastructure Pvt. Ltd. & Ors.* (Order dated 12 May 2023), the High Court had referred the dispute to arbitration and appointed an arbitrator, and also stated that the matter regarding the dispute with respect to the transaction should be addressed by an Arbitral Tribunal. It was argued by the appellant that it is the court that has to first examine the issue of whether an arbitration agreement exists or not and the same cannot be left to an arbitral tribunal. Subsequently, on appeal, placing reliance on Section 11(6) of the Arbitration and Conciliation Act, 1996 that states that the pre-referral jurisdiction of court consists of two inquiries namely (i) existence and validity of an arbitration agreement and (ii) non-arbitrability of the dispute, it was held by the Supreme Court that that such a dispute with respect to existence and validity must be decided upon conclusively by the court at the pre-referral stage, and that the same cannot be left to an arbitral tribunal, since such issues go to the root of the matter. Thereby, the Supreme court set aside the order of the High Court and remitted the issue back to the referral court.

Arbitration – Courts cannot grant subsequent relief by modifying an award after setting aside the said award

The Hon'ble Supreme Court has held that a court, after setting aside an arbitral award, cannot further grant any relief by way of modifying said award. In *Indian oil Corporation* v. *Satyanarayana Service Station* (Judgment dated 9 May 2023), arbitration proceedings were initiated post termination of a dealership between the parties. Subsequently, an award was passed in favour of the termination challenging which a petition was filed before a District Court, which dismissed the same. An appeal against the same was filed before the High Court, which allowed the appeal thereby setting aside the arbitral award, and further restored the dealership through an order and left it open to the respondent to claim damages. Now, in an appeal to the Supreme Court against such restoration, the Apex Court, while placing reliance on *Project Director, National Highways no. 45E and 220 National Highways Authority of India* v. *M. Hakeem and Another*, has held that the High Court had erred in restoring the dealership and allowing for claim of damages after setting aside the arbitral award. It further observed that the court must leave the parties to work out the remedies. It was held that, therefore, the decision of the High Court to proceed with granting relief after it had set aside the arbitral award was erroneous in nature.

Arbitration – 2015 amendments not applicable where notice invoking arbitration is issued prior to amendment

The Supreme Court has held that, in a case where the notice invoking arbitration is issued prior to the Arbitration and Conciliation (Amendment) Act, 2015 ('**Amendment Act**') and the application under Section 11 for appointment of an arbitrator is made post the Amendment Act, the provisions of pre-Amendment Act, 2015 shall be applicable and not the Amendment Act. In the case *Shree Vishnu Constructions* v. *Engineer in Chief Military Engineering Service* [Judgment dated 9 May 2023], the notice invoking arbitration clause was issued on 26 December 2013, i.e., much prior to the Amendment Act while the application under Section 11(6) of the Arbitration and Conciliation Act, 1996 was preferred/filed on 27 April 2016, i.e., after the amendment Act came into force. The Apex Court observed that the High Court had rightly entered into the question of 'accord and satisfaction', as per which after a breach of contract has been made, the parties may enter into a subsequent contract by which the aggrieved party may accept some substituted obligations other than resorting to legal remedies and which principle was existing under the pre-Amendment, and had rightly dismissed the application under Section 11(6), thus applying the provisions prevailing prior to the Amendment. The Supreme Court in this regard also observed that the decisions of the Court in the cases of *Union*

of India v. *Parmar Constructions Company* and *Union of India* v. *Pardeep Vinod Construction Company* were not *per incuriam* and/or in conflict with the decision of this Court in the case of *Board of Cricket Council of India* v. *Kochi Cricket Board,* which dealt with the constitutionality and applicability of the Amendment Act, in this regard.

Arbitration agreement persists even if choice of arbitrator falls foul of Section 12(5) of the Act

The Bombay High Court has held that the choice of getting the dispute resolved by arbitration is one thing, and the choice of a specific arbitrator is another thing, and both are severable from each other. According to the Court, in case the choice to get the arbitration proceedings decided by specific person/arbitrator falls through for any reasons whatsoever, such as on account of the introduction of Section 12(5) r/w VIIth Schedule of the Arbitration and Conciliation Act, 1996, that by itself would not mean that the intention to arbitrate has been wiped out. The bone of contention before the Court in *Sunil Kumar Jindal* v. *Union of India* [Judgment dated 4 May 2023] was the clause in the contract according to which no person other than the person appointed by the competent authority of CIL/CMD of subsidiary company should act as an arbitrator, and that if for any reason that is not possible, the matter was not to be referred to arbitration at all. It was the contention of the Respondent that the clause falls foul of Section 12(5) read with Schedule VII, and hence there is no possibility of any arbitration. However, this understanding was rejected by the Court.

Use of celebrity names, images for satire, parodies, news, etc. not falls foul to tort of infringement of right of publicity

In an interesting case involving infringement of right of publicity, the Delhi High Court, after relying on number of foreign judgments, held that use of celebrity names, images for the purposes of lampooning, satire, parodies, art, scholarship, music, academics, news and other similar uses would be permissible as facets of the right of freedom of speech and expression under Article 19(1)(a) of the Constitution of India, and would not fall foul to the tort of infringement of the right of publicity. According to the Court, the right of publicity cannot be infringed merely on the basis of a celebrity being identified or the defendant making commercial gain. Dismissing the application for interim injunction, the Court in this respect noted that the violation of the right of publicity in India has to be considered on the touchstone of the common law wrong of passing off.

The High Court in *Digital Collectibles Pte Ltd.* v. *Galactus Funware Technology Private Limited* [Judgment dated 26 April 2023] was hence of the view that the use of the name and/or the image of a celebrity along with data with regard to his on-field performances by the online fantasy sports (OFS) platforms is protected by the right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India, and does not amount to infringement of the common law right of publicity. It also, in this regard, noted that protection under Article 19(1)(a) extends to commercial speech as well. The Court therefore held that even if the defendants are using players'

names, images and statistics for commercial gain, this would be protected under Article 19(1)(a). It also noted that the Defendant, in the instant case, did not use actual photographs of the players but used artwork of the players on its NFT enabled Digital Player Cards, containing creative elements that distinguish them from the actual image of the players in question.

The Court further noted that OFS operators use information of all available players available in public domain for the purposes of identification of the players for playing the game, and that this obviates any possibility of confusion that a particular OFS platform is being endorsed by a particular player or has an association with a particular player. Regarding the availability of information in public domain, the Court also noted that the information which is available in public domain cannot be owned by anybody, including the players themselves, and therefore, such publicly available information cannot be the subject matter of an exclusive license by the player in favour of a third party.

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