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Articles

Agreement in Restraint of Legal Proceedings – Is your Bank Guarantee valid?

By **Sudish Sharma & Nikhil Singal**

The original text of Section 28 of the Indian Contract Act, 1872, which voids agreements made (or containing clauses) in restraint of legal proceedings, has been subject to many amendments over the years. In fact, in 1997, the original Section 28 was replaced with a new one, after taking into consideration the recommendations given in the 97th Report of the Law Commission of India. The changes brought by the 1997 amendment caused much displeasure amongst the banking and financial institutions, as the amendment restricted them from including clauses, for example in a bank guarantee (or similar agreement), which extinguish the rights of a party to bring a claim against them.

An attempt to resolve this was made in 2013, when, by the Banking Laws (Amendment) Act, 2012, Exception 3 to Section 28, was introduced as a saving clause for a guarantee agreement of a bank or a financial institution. But a relook at this 2013 amendment, though aimed at protecting banks and financial institutions, shows that instead of resolving the issues, it may add conditions which many banks and financial institutions should be worried about. This article aims to examine such issues and conditions in greater detail.

Rules of Limitation and Prescription

As per Section 28, agreements by which a party is restricted absolutely from enforcing his rights under or in respect of a contract [Section 28(a)], or which extinguish the rights of a party from any liability in respect of a contract [Section 28(b)], are void to that extent.

Prior to the 1997 amendment, Section 28 only contained a provision holding those agreements void which restrict the *rules of limitation* [Section 28 (a)]. However, in 1997, the Section was amended to hold those agreements void which allowed parties to invent their own *rules of prescription* [Section 28 (b)]. Not only did this amendment seek to nullify the effect of various High Court and Supreme Court decisions (in which prescriptive clauses were held to be valid), the amendment also caused undue hardship to banking and financial institutions, which made prescriptive terms in contracts like bank guarantees, where the rights of a party to make a claim against the bank would extinguish at the end of a prescribed period.

Exception 3 to Section 28 was, therefore, introduced to safeguard banks and financial institutions. This Exception provided that:

> *"This Section shall not render illegal a contract in writing by which any bank or financial institution stipulate a term in a guarantee or any agreement making a provision for guarantee for extinguishment of the rights or discharge of any party thereto from any liability under or in respect of such guarantee or agreement on the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment*

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or discharge of such party from the said liability.

Thus, in effect, this Exception not only allowed banks and financial institutions to invent their own rules of prescription, but also allowed the banks from keeping their guarantee instruments open and valid till the expiry of period of limitation under the Indian Limitation Act, 1963. Thus, legally, banks and financial institutions could include prescriptive clauses in their guarantee instruments where the rights of a party to make a claim against the bank would be extinguished at the expiry of a time period, irrespective of the fact that such extinguishment of right was before the period prescribed in the Limitation Act.

The conundrum of minimum period

In the press release issued by the Press Information Bureau after the 2013 amendment, the Government justified the amendment as being brought pursuant to the recommendations of the Indian Banks' Association ("IBA"), Reserve Bank of India and Industry Associations and *"to bring finality to redemption of such guarantees"*.

Howsoever noble the intention of the amendment may have been, it seems to have caused an unintended problem. A close reading of the Exception shows that though it allows the extinguishment of rights of a party to make a claim under a bank guarantee at the end of a specified period, it also states that such specified period *should not be less than one year from the date of occurring or non-occurring of a specified event.*

A plain reading of this would imply that every bank guarantee would have to be kept open for at least a year from when it is executed, and where the "specified event" (let us suppose such "specified event" is the breach of an agreement under which such bank guarantee has been given) occurs on the date on which the bank guarantee is made. Commercially, this seems unviable and impractical!

This time limit of one year was included in the 2013 amendment after considering recommendations made by the Andhyarujina Committee Report of 1999. The Indian Banks' Association also endorsed this in the statement released by them in the *"Review of the activities of the Association during 2004-05"*. Surprisingly, the IBA as well as the framers of the amendment failed to envisage a situation where bank guarantees are to be given for a period of less than one year. In such a case, would such bank guarantee be void?

In practice, there may be contracts where the term of the contact is, for example, six months and a Performance Bank Guarantee is given for this period. Ideally, a party would not want to bear bank charges for keeping the bank guarantee alive for a period of one year where the contract itself has been performed in six months. In such a case, would extinguishment of rights of a party to make a claim against the bank after a period of six months be invalid as per Section 28?

Moreover, this period of one year is to be calculated *"from the date of occurring or non-occurring of a specified event"*. In case breach of the main contract is the "specified event", and the breach happens on the last

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day of validity of the bank guarantee, in such a case, would the bank guarantee have to be kept alive for another one year? Exception 28, and its circuitous interpretation, seems to suggest so!

Need for another amendment?

The intent of Section 28 is to ensure that the *rights* and the *remedies* available to a party cannot be barred or extinguished by an agreement. However, despite its tumultuous amendment history, the impracticality of time limit created by Exception 3 may force the Government to re-think and bring another amendment to Section 28. If this is not done, an action brought against a bank for extinguishing rights of a party under a bank guarantee before a period of one year may allow the Courts to term such bank guarantees as void.

In the meantime, however, banks and financial institutions should protect themselves and ensure that their bank guarantees are so worded that they do not directly extinguish the right of a party, at least not before one year of a "specified event". To an extent, the "notwithstanding clause" template released by the IBA in response to the 1997 amendment could be used by banks. This notwithstanding clause provided that the right of a party to make a claim on the bank would arise only if the claim is served on the bank within a certain period.

A liberal interpretation of this clause would show that it is neither prescriptive nor extinguishing any rights. This does not, however, provide a blanket safeguard to banks and financial institutions and the bank guarantees issued by them are always open to judicial scrutiny. Ideally, what is required is another legislative amendment to clarify Section 28 and make it more commercially viable. We just hope the legislature, in all its wisdom, brings such an amendment at the earliest!

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Corporate Insolvency Procedure – A Comment

By **Anup Koushik Karavadi**

Background and need

From the Justice Eradi Committee report of 1999 to the Department of Financial Services' indicator of October 2015, the pendency of winding-up cases in India has been piling up to reach an alarmingly high level of backlog[1]. The World Bank has ranked India on the 130th position among 189 economies as it takes more than four years on an average to resolve insolvency in India[2].

The Finance Minister had announced the development of an effective bankruptcy code for the facilitation of a stress-free and time-bound disclosure of business in his budget speech of 2014-15, following which the

[1] *Report of the High level Committee on Law relating to insolvency and winding up of companies, 2000,* Accessible at reports.mca.gov.in, last viewed on 15th July, 2016.

[2] *Doing Business Report, 2016: Measuring Regulatory Quality and Efficiency,* 13th Edition. Can be accessed at www.doing business.org, last viewed on 15th July, 2016.

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Viswanathan Committee[3] was set up on 22nd August, 2014. The Committee, in November 2015, came up with a comprehensive report on Insolvency and Bankruptcy which has undergone a number of changes since then. The Committee has taken care of certain unaddressed issues in the code that was introduced in the Parliament. It seeks to cut down the time of proceedings to less than a year and ultimately improve India's global image in this scenario.

Objective of the Code

Some of the primary objectives with which the Code has been conceptualized for are:

A. to consolidate the laws relating to reorganization and insolvency resolution of all persons, including companies, individuals, partnership firms and Limited Liability Partnerships (LLPs) under one statutory umbrella and amending relevant laws;

B. time bound resolution of defaults and seamless implementation of liquidation/ bankruptcy and maximizing asset value;

Authorities Involved:

- The Code seeks to constitute *Insolvency Professional*[4] who will be the licensed quasi-administrator to carry out the insolvency resolution process. Such Insolvency Professionals will be the members of *Insolvency Professional Agency*[5] which shall in turn prepare model code of conduct for Professionals and also for redressal of customer grievances against the Professionals.
- The Code also envisages formulation of *Information Utilities*[6] for collection, classification, storage and distribution of all the relevant data pertaining to the debtors.
- There shall be an Insolvency and Bankruptcy Board of India (Insolvency Regulator)[7] which will function as the regulator for all matters pertaining to insolvency and bankruptcy and oversee the regulation of the Insolvency Regulator, Insolvency Professional Agencies and Information Utilities.
- The Code specifies that National Company Law Tribunal[8] (NCLT/ Adjudicating Authority) to be the Adjudicating Authority to entertain the insolvency process for the companies/ LLPs. Further, the Debt Recovery Tribunal shall be the Adjudicating Authority in case of individuals and partnership firms.

Corporate Insolvency Resolution Process

The following persons could initiate the corporate insolvency resolution process, on the commission of a default by the corporate

[3] *The Report of the Bankruptcy Law Reforms Committee*, November 2015. Accessible at finmin.nic.in, last viewed on 15th July.

[4] Section 3(19) of the Code.

[5] Section 3(20) of the Code

[6] Section 3(21) of the Code.

[7] Section 3(1) of the Code.

[8] Section 5(1) of the Code.

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debtor[9]:

1. A financial creditor (by itself or jointly with other financial creditors)
2. An operational creditor or
3. The corporate debtor itself

Given the fact that the insolvency proceedings could be initiated in the event of default, it becomes relevant to understand the said term in detail. The term 'Default' herein refers to the financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor[10].

The Code distinguishes between a Financial Creditor and Operational Creditor and lays down different procedure for initiating the proceedings by each of them. Further, a Financial Creditor[11] is a creditor to whom a financial debt is owed and includes anyone to whom such debt is assigned or transferred whereas, an Operational Creditor[12] is the one to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

It is noted from the Code that the Financial Creditor will have to move an application before the Adjudicating Authority showing them the proof of default and praying for an interim Insolvency Professional[13] to be appointed. Upon receipt of such application, the NCLT is obligated to ascertain the existence of default from the records as maintained by the Information Utilities or on the basis of the other evidence furnished by the creditor.

It is relevant to note that if an Operational Creditor wishes to initiate the insolvency proceedings, then, such Operational Creditor will have to first serve a demand notice along with the proof of default, giving the debtor ten days to respond to dispute the claim. If the claim remains undisputed, then the Operational Creditor can file an application before the Adjudicating Authority[14].

Time bound insolvency resolution process - Explained

a) The Insolvency resolution process could be initiated by filing an application upon commission of a default by the corporate debtor;

b) Within fourteen days of filing of such application, the Adjudication Authority shall accept or reject the application.

c) In case of acceptance of the application, the corporate insolvency process shall be commenced from the date of admission of the application. However, if rejected, then the applicant will have seven days to rectify the error[15] as pointed out by the Adjudicating Authority.

d) Within 14 days from the date of commencement of the insolvency

[9] Section 6 of the Code
[10] Section 3(19) of the Code.
[11] Section 5(7) of the Code
[12] Section 5(20) of the Code
[13] Section 7 of the Code
[14] Section 8, 9 of the Code
[15] Section 7(5) of the Code

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procedure, the Adjudicating Authority is obligated to appoint an Interim Resolution Professional (IRP) whose term shall not exceed 30 days from the date of appointment[16].

e) Immediately after the admission of the Application for insolvency, the Adjudicating Authority is obligated to order public announcement[17] of the initiation of corporate insolvency proceedings stating information as required under Section 15 of the Code.

f) In the meantime, after admission of the application, the Adjudicating Authority shall declare a moratorium[18] which is one of the most significant features of the Code. It is relevant to note that through moratorium, the Adjudicating Authority could stall and prohibit many activities as mentioned in Section 14 of the Code. It is relevant to note that moratorium can be ordered on the basis of the recommendations of the IRP.

g) The IRP is required to collate the details of all the claims against the corporate debtor and determine its financial position. The IRP is also required to constitute a Committee of Creditors (COC)[19].

h) It is noted that the first meeting of the COC is to be held within 7 days after constitution of the COC[20]. In the first meeting, the COC need to decide by majority voting of 75% to replace the IRP with another Resolution Professional or to make the IRP their (final) Resolution Professional.

i) The Resolution Professional so appointed by COC shall conduct the corporate insolvency process.[21] For the meetings conducted, Resolution Professional shall give notice to the members of COC, Operational creditor or their representative, members of Board of Directors, of which the directors, partners, representatives of the operational creditor shall not vote[22].

j) The Resolution Professional is required to formulate an Information Memorandum containing all relevant information as specified by the Boards for formulating the resolution plan[23]. The Applicant of the Insolvency proceedings may submit a resolution plan to the Resolution Professional prepared on the basis of the information memorandum which

[16] Section 16 of the Code.

[17] Section 13(1)(b) of the Code.

[18] Section 13(1)(a) of the Code

[19] Section 18 of the Code

[20] Section 22(1) of the Code.

[21] Section 23(1) of the Code.

[22] Section 24(4) of the Code.

[23] Section 5(26): "Resolution plan" means a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern in accordance with Part II.

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shall be scrutinised by the Resolution Professional.

k) With respect to the Resolution Plan, the COC can either reject or accept with 75% majority of the financial creditor. The Resolution Professional shall, in case of acceptance, send the approved plan to the Adjudicating Authority[24].

l) If Adjudicating authority is satisfied that the resolution plan accepted by the COC meets the requirements under section 30(2), then it shall approve the plan which will be binding on corporate debtor and its employees, creditors, members, guarantors and other stakeholders. On the other hand, if the adjudicating authority is satisfied that the plan does not confirm to the requirements, then it may reject it.[25]

m) This entire process of Insolvency resolution is required to be completed within a period of 180 days from the date of admission of Application for insolvency[26]. In cases where the Adjudicating Authority is satisfied that the subject matter cannot be completed in 180 days, then it can order extension of time for a period not more than 90 days[27] beyond the stipulated 180 days.

Liquidation Process[28]

Where the Adjudicating Authority rejects the resolution plan or the Creditors' committee fails to agree on a workable resolution plan within the Insolvency resolution period (i.e. 180 days + 90 days) or the aforesaid Committee decides to liquidate the company or the corporate debtor contravenes provisions of the resolution plan, then, the Adjudicating Authority shall pass an order requiring liquidation of the corporate debtor and also required to make a public announcement of the same.

The Insolvency Professional acting as the resolution professional shall, upon commencement of liquidation shall be appointed as the liquidator for the process, unless replaced by Adjudicating Authority.[29]

Stumbling Blocks for Implementation:

With regard to specific provisions, the following are the issues which require an immediate review:

a) The Code envisages setting up of various new entities. It is yet to set out the manner in which some of these entities would be set up. The Code's success in achieving its objectives is heavily dependent upon the smooth establishment and functioning of these entities.

b) It is noted that the term "Insolvency Resolution Process" is used exhaustively but is not really defined under the code. Such use of an undefined term clearly

24 Section 30(6) of the Code
25 Section 31 of the Code
26 Section 12(1) of the Code
27 Section 12(3) of the Code.
28 Section 33 of the Code
29 Section 34(1) of the Code

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leave uncertainty and tremendous scope for interpretations.

c) As per Section 17 of the Code, the Interim Insolvency Professional appointed by the Adjudicating Authority will replace the management of the Company immediately upon his appointment. It sounds absolutely against the interest of a company as the management is replaced by a stranger just by an order overnight.

d) The Code is silent about the rights of the management of the Corporate Debtor after the appointment of the insolvency Professional. More so, it is relevant to note that the Corporate Debtor is not put on notice even before an application requesting the Insolvency process to be initiated is accepted.

e) Code does not contemplate as to whether the corporate debtor will have a chance to represent its case before the Adjudicating Authority during the insolvency process.

f) It is pertinent to note that the Adjudicating Authority does not have an option but to order for liquidation of the corporate debtor immediately after the Resolution Plan is either rejected or that COC fails to arrive at a resolution plan.

g) On an average a winding up petition which is filed before the Hon'ble High Court as on date requires 2 to 3 years for finalisation. Such timeline is proposed to be reduced approximately into days through the Code. Therefore, only implementation will have to through light as to how effective the Code could operate.

h) The proceeds from the sale of the liquidation assets are to be disbursed in the following priority:

   i. IRP costs and liquidation costs in full
   ii. Workmen's dues for the preceding 24 months and secured creditors
   iii. Workmen's dues and employee dues
   iv. Unsecured Creditors
   v. Government dues
   vi. Equity owners

It remains to be seen as to why the cost of the Insolvency Professional is given priority over any other liability of a corporate debtor. More so, the fact that the unsecured creditors are given preference over the Government Dues may cause loss to government exchequer.

Concluding Remark:

The Code as a whole, is definitely a move towards establishing effective regulatory framework to deal with insolvency and bankruptcy. However, it needs to cross various practical and logistical hurdles and set up the required infrastructure to serve its objective. More so, the Code as on date sounds as a deterrent to the Companies from taking loans instead of being a protective measure for the Creditors.

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Notifications & Circulars

Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2016: The Ministry of Corporate Affairs has amended the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014. As per the amendment dated 30-6-2016, there is now no need of filing return of appointment in form MR-1 for appointment of Chief Executive Officer, Chief Financial Officer and Company Secretary. Further, a listed company is not required to disclose the following in its board's report now:

- Explanation on the relationship between the average increase in remuneration and Company performance;
- Comparison of remuneration of Key Managerial Personnel ("KMP") against company's performance;
- Variations in market capitalization, price earnings ratio at the ending and beginning of financial year;
- Key parameters of any variable component of remuneration availed by the directors;
- Ratio of remuneration of highest paid director to that of KMP;

Also, details of top ten employees in terms of the remuneration drawn are required to be disclosed in the boards' report. Additionally, names of employees receiving remuneration in excess of Rupees One Crore and two lakh per year and Rupees Eight Lakh and Fifty Thousand per month are required to be disclosed in the boards' report as against the erstwhile limit of Rupees Sixty Lakhs per year and Rupees Five Lakh per month, respectively.

Companies (Acceptance of Deposits) Amendment Rules, 2016: MCA has amended the Companies (Acceptance of Deposits) Rules, 2014. As per the amendment dated 29-6-2016, the following shall not be considered as deposits:

- Any amount raised by a company by the issue of bonds or debentures convertible into shares of the Company within ten years shall not be considered as deposits (Earlier, the limit for conversion into equity shares was five years);
- Non-convertible debentures not constituting a charge on the assets of the Company and listed on recognized stock exchange as per the applicable regulation framed in this regard;
- Only non-interest bearing amount which are held in trust shall not be considered as deposits now;
- Any advance received as consideration for providing future services under a warranty or maintenance contract as per the written agreement for a period of less than five years or a period prevailing under common business practice (whichever is less);
- Advance received with the permission of sectoral regulator or in accordance with the directions of Central Government;

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- Advance received as subscription towards publication to be adjusted against receipt of such publications;
- Any amount received by way of subscription in respect of chit under Chit Fund Act, 1982;
- Any amount received under Collective Investment Scheme in compliance with applicable regulations framed by SEBI;
- Amount of Rupees twenty five lakh or more received by a startup Company, by way of a convertible note (convertible into equity shares within 5 years from the date of issue) in a single tranche;
- Any amount received from Alternate Investment Funds, Domestic Venture Capital Funds, Mutual Funds registered with SEBI in accordance with the regulations framed in that regard.

Further, Companies which already have deposits are now allowed to accept or renew deposits from its members, upto an amount equivalent to thirty percent of aggregate paid up share capital and free reserves of the Company against the erstwhile limit of twenty five percent. Also, Private Companies have been allowed to accept deposit from its members upto 100% of paid up share capital, free reserves and securities premium account and details relating to such deposits shall be filed with the ROC. The credit rating obtained for deposits shall not be below the minimum investment grade or other specified credit rating for fixed deposits from any of the approved CRA under NBFC Acceptance of Public Deposits (Reserve Bank) Directions, 1998 issued by RBI. The newspaper circulation at the time of issuance of deposits shall also be required to be placed on the website of the Company and Public Companies have to disclose the money received from its directors while private Companies have to disclose the monies received from directors or their relatives.

SEBI - Simplification of Account Opening Kit: The Market Intermediaries Regulation and Supervision Department (MIRSD) of SEBI, has issued a Circular No. CIR/MIRSD/64/2016, dated July 12th, 2016 on the simplification of the account opening kit. According to the Circular, stock broker/ depository participant shall make available the standard documents to the clients, either in electronic or physical form, depending upon the preference of the client, as part of account opening kit. In case the documents are made available in electronic form, stock broker/ depository participant shall maintain logs of the same. The copies of the following standard documents is required to be provided to the clients owing to various previous circulars of SEBI -

- Rights & Obligations of stock broker, sub-broker and client for trading on exchanges (including additional rights & obligations in case of internet/ wireless technology based trading);
- Rights and Obligations of beneficial owner and depository participant as prescribed by SEBI and depositories;
- Uniform Risk Disclosure Documents (for all segments/ exchanges); and
- Guidance Note detailing Do's and Don'ts for trading on stock exchanges

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Ratio Decidendi

Proceedings under Companies Act must give way to proceedings under SICA: Supreme Court of India has held that whenever a reference is made to the BIFR under Sections 15 and 16 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), the provisions of the SICA would come into play and they would prevail over the provisions of the Companies Act. It was held that proceedings under the Companies Act must give way to proceedings under the SICA. The Court in this regard rejected the appeal against the judgment and order of the Division Bench of the High Court of Allahabad wherein the High Court had stayed further proceedings before the Company Court, consequent upon a winding up order passed against the respondent, till a final decision was taken on the reference made before the Board of Industrial and Financial Reconstruction (BIFR).

The bone of contention was whether the BIFR should entertain a reference made by a sick company in terms of Section 15 of SICA after the company had already been directed to be wound up by a Company Judge in a matter which was pending before the Company Court for 2 years. Relying on earlier decision in the case of *Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd.*, [(2000) 5 SCC 515], wherein the Apex Court had opined that the reference in terms of Section 15 of SICA can be made even after passing of the winding up order, the Court here agreed with the High Court in concluding that the winding up proceedings before the Company Court cannot continue after a reference has been registered by the BIFR and an enquiry has been initiated under Section 16 of SICA. [*Madura Coats Limited* v. *Modi Rubber Ltd.*, Civil Appeal No. 1475 of 2006, decided on 29-6-2016, Supreme Court]

Proceedings for insolvency cannot be maintained under Presidency Towns Insolvency Act in presence of a Compromise deed stipulating terms of agreement: The Madras High Court has held that the proceedings for insolvency could not be maintained on the basis of the quantified debt when the parties had mutually agreed on the settlement of price along with the consequences of non-payment and that the same had to be in tune with the agreement. The controversy arose from the investments made by the appellants in certain shares and it was alleged that the amounts have been siphoned off by the respondent due to which it was prayed to the Company Law Board (CLB), Chennai to conduct a Special Audit by an independent Chartered Accountant and formulate a scheme for the exit of the 3 appellants as per a price to be fixed by the CLB.

However, the parties settled their disputes mutually by a Compromise Deed, which they then sought to file before the CLB. Owing to the different nature of the compromise, the CLB merely recorded that the mutually agreed out of Court settlement was taken on record to form a part of the order and disposed of the

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petition. The compromise deed envisaged the instalments to be paid by the respondents and the consequences of a possible breach that was the termination of the agreement and right to pursue the Company Petition. On occurrence of the breach in payment, the appellants filed an application under Section 9(5) of the Presidency Towns Insolvency Act, III of 1909, the maintainability of which was challenged by the respondents. [*Ventur East Proactive Fund* v. *C.Mohan Ram* - O.S.A. No.139 of 2016, decided on 24-6-2016, Madras High Court]

Term 'Other proceedings' under Section 69(3) of Partnership Act does not include Arbitral Proceedings: The Supreme Court of India has held that Arbitral Proceedings do not come under the expression 'other proceedings' of Section 69(3) of the Partnership Act, 1932 and hence the ban imposed under the said section can have no application to Arbitral proceedings as well as on the Arbitration Award. The Court in this regard noted the difference between the Arbitration Act, 1940 and that of 1996, and distinguished the judgement pronounced by the Court in the case of *Jagdish Chander*. Interpretation under Section 14 of the Limitation Act, to treat arbitral proceedings on par with civil proceedings, was also held to be not applicable. It was also held that based on deeming provisions specifically meant for enforcement and execution of an award (Section 35 and 36 of the Arbitration Act, 1996), Arbitration Award cannot be equated to a Civil Proceeding. [*Umesh Goel* v. *Himachal Pradesh Cooperative Group Housing Society Ltd.*, 2016 SCC OnLine SC 624]

Competition law – Presence of number of players and absence of dominance: Competition Commission of India has stated that the underlying principle in assessment of dominant position of an enterprise is linked to its market power which allows the enterprise to act independently of competitive constraints and affords an enterprise with the capacity to affect the relevant market in its favour and to the economic detriment of its competitors and consumer. Earlier, after noting that the requirement, scope and prospect of a residential plot are different from that of a residential apartment and that geographic region of Lucknow exhibits homogenous and distinct market conditions as compared with those prevailing in adjacent areas, CCI found the relevant market to be 'provision of services for development and sale of residential plots in Lucknow'.

In the present case, the opposite party had only one project regarding residential plots in Lucknow and in the presence of many other real estate developers in the city offering similar kind of services in Lucknow, it was observed that the opposite party did not appear to enjoy a dominant position, due to which the question of abuse of dominance did not arise at all. [*Vinay Kala* v. *DLF Ltd.* - Case No. 13 of 2016, decided on 5-7-2016, Competition Commission of India]

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