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It gives us immense pleasure to circulate the December 2023 edition of the Luthra and Luthra Law Offices India's Dispute Resolution Newsletter. In this edition, we have primarily focused on the recent legal developments in the field of Arbitration, Insolvency Law, Criminal Law and Consumer Law. Accordingly, we have covered key judgments passed by the Hon'ble Supreme Court and High Court(s) for the period of November-December 2023. We hope you enjoy reading our newsletter.

SUPREME COURT

NN GLOBAL OVERTURNED: ARBITRATION CLAUSE IN UNSTAMPED AGREEMENTS ARE ENFORCEABLE[1]

A seven-judge bench of the Hon'ble Supreme Court led by Chief Justice DY Chandrachud has held that the insufficiency of stamping does not make the agreement void or unenforceable, but it only makes the same inadmissible in evidence. Thus, arbitration clause in unstamped or inadequately stamped agreements are enforceable.

The seven-judge bench was hearing a Curative Petition filed against the judgment rendered by the five-judge bench of the Apex Court in *NN Global Mercantile (P) Ltd.* v. *Indo Unique Flame Ltd.*[2] in the month of April, 2023, wherein it was held that unstamped arbitration agreement are not valid in law.

The seven-judge bench after discussing the conundrum between the Contract Act, 1872, Indian Stamp Act, 1899 and the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") as well as various judgment *inter alia* held as follows:

- *Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered void or void ab initio or unenforceable.*
- *Non-stamping or inadequate stamping is a curable defect.*
- *An objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The Court concerned must examine whether the arbitration agreement prima facie exists.*
- *Any objections in relation to the stamping of the agreement fall*

[1] *In Re Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*, 2023 SCC OnLine SC 1666.

[2] 2023 SCC OnLine SC 495.

within the ambit of the arbitral tribunal.

APPLICABILITY OF THE GROUP OF COMPANIES DOCTRINE IN ARBITRATION PROCEEDINGS UPHELD BY THE SUPREME COURT

The Hon'ble Supreme Court in a landmark judgment titled *Cox and Kings Ltd. v. SAP India Pvt. Ltd.*[3], has reaffirmed the necessity of retaining the 'Group of Companies Doctrine' ("**Doctrine**") in the Indian Arbitration landscape.

The Doctrine provides that an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of the parties to bind both signatories and non-signatories

The question of applicability of the Doctrine in Indian Arbitration landscape was referred by a three-Judges Bench of the Supreme Court to a larger bench, while considering an application under Section 11(6) of the Arbitration.

The five-judge bench of the Supreme Court, while adjudicating on the issue emphasized the fundamental principles of party autonomy and mutual consent are the basis for any arbitration. The Court noted that a signature is the clearest way to express consent, however, the absence of a signature does not necessarily indicate a lack of consent, particularly in cases involving multiple parties. In such situations, it becomes crucial to assess whether non-signatory have consented to be bound as a 'party' by interpreting the express language employed by the parties in the record of agreement, coupled with surrounding circumstances of the formation, performance, and discharge of the contract.

The Court held that Doctrine can be subsumed within Section 7(4)(b) to enable a court or arbitral tribunal to determine the true intention and consent of the non-signatory parties to refer the matter to arbitration. Moreover, the Court noted that the expression "claiming through or under" in Sections 8 and 45 is intended to provide a derivative right, and it does not enable a non-signatory to become a party to the arbitration agreement. The decision in *Chloro Controls* [4] tracing the Group of Companies doctrine through the phrase "claiming through or under" in Sections 8 and
45 is erroneous. The expression 'party' in Section 2(1)(h) and Section 7 is distinct

[3] 2023 SCC OnLine SC 1634.

[4] Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.

from "persons claiming through or under them". Thus, the Supreme Court traced the legal existence of the Doctrine to Section 2(1)(h) and Section 7 of the Arbitration Act and held that the definition of "party" under the same, would include signatories as well as non-signatories.

SUPREME COURT UPHOLDS CONSTITUTIONALITY OF THE PROVISIONS [SECTION 95-100 OF IBC] RELATING TO INSOLVENCY RESOLUTION PROCESS FOR INDIVIDUALS AND PARTNERSHIP FIRMS[5]

The Hon'ble Supreme Court through the Bench comprising of the Hon'ble Chief Justice DY Chandrachud, Justice JB Pardiwala and Justice Manoj Mishra, while disposing off a batch of 384 Petitions upheld the Constitutional validity of Section 95 -100 of Insolvency and Bankruptcy Code, 2016 ("**IBC**"), which pertains to insolvency resolution process of individuals and partnership firms.

The challenge to the aforesaid Sections was based on the ground that they lacked the provision for a hearing opportunity for debtor in insolvency petitions before admission and the imposition of a moratorium. The core contention centred on the violation of the principles of natural justice, given the adjudicatory role assumed by the Resolution Professional ("**RP")** in the resolution process and the absence of safeguards against proceedings initiated under these sections. Moreover, the Petitioners also raised concerns that under the scheme of the aforesaid section(s), the RP is empowered to direct debtor, personal guarantor and third parties to disclose sensitive personal information without a prior hearing.

After a detailed discussion on the contention raised by the parties, the Hon'ble Supreme Court held Sections 95 to 100 of the IBC to be constitutionally valid and devoid of any arbitrariness. The Court noted that, at the stage of Section 97 the Adjudicating Authority (NCLT) is merely conferred with power to appoint the RP. Further, the role of Resolution Professional, at this stage, it limited to ascertaining the details of debt to prepare a report based on the information gathered [see Section 99 of IBC]. Thus, in such circumstances, the role of RP is merely administrative and the adjudicatory function of NCLT only commences at the stage of Section 100 of the IBC.

Further, the Court was of the opinion that the opportunity to raise jurisdictional issues including ones relating to the

[5] Dilip B. Jiwrajka v. Union of India, 2023 SCC OnLine SC 1530.

existence of the debt, at a stage prior to Section 100 would disrupt the timelines contemplated under IBC. Moreover, the Court also noted that reading in a personal hearing at a prior stage would render Sections 99 and 100 of the Code otiose.

With regard to the information sought by the RP while ascertaining the details of debt, the Court clarified that the information sought from parties, especially third parties, must have a nexus with the application filed under Section 94 or Section 95 of the Code. As contemplated by the Parliament, it must be an inquiry with regard to the application and cannot be a fishing and roving inquiry.

The findings of the Court summarized can be as follows:

a. No judicial adjudication is involved at the stages envisaged in Sections 95 to Section 99 of the IBC.
b. The role of RP appointed under Section 97 of IBC is facilitative and the report prepared by the RP to NCLT is recommendatory in nature.
c. To read the requirement of hearing to be conducted by NCLT at the Stage of Section 97(5) of IBC, wound mean rewriting the statute which is impermissible.
d. There is no violation of natural justice under Section 95-100 of IBC, as debtor is not deprived of an opportunity to participate in the process of examination of application by RP.
e. No judicial determination takes place until the NCLT decides under Section 100 of IBC whether to accept or reject the application. Further, principles of natural justice are to be followed by NCLT while exercising jurisdiction under Section 100 of IBC.
f. The purpose of interim-moratorium under Section 96 is to protect debtor from further legal proceedings.

SECTION 120B OF IPC CAN ONLY BE CONSIDERED AS 'SCHEDULED OFFENCE' IF ALLEGED CONSPIRACY IS DIRECTED TOWARDS COMMITTING AN OFFENCE SPECIFICALLY INCLUDED IN SCHEDULE OF PMLA[6]

The Hon'ble Supreme Court in an important judgment has noted that the offence of criminal conspiracy as provided under Section 120B of the Indian Penal Code, 1860 ("**IPC**") can be considered a scheduled offence under the Prevention of Money Laundering Act, 2002 ("**PMLA**")

[6] Pavana Dibbur v. Directorate of Enforcement, 2023 SCC OnLine SC 1586.

only if the alleged conspiracy is directed towards committing an offence specifically included in the Schedule of the PMLA.

The Supreme Court was hearing an appeal from the judgment passed by the Karnataka High Court, whereby the High Court refused to quash the proceedings in the case pending against the Appellant. The allegation against the Appellant in the complaint filed under Section 44-45 of PMLA was that the Appellant had entered into conspiracy with other accused by getting executed nominal sale deeds in respect of two properties in her name for the benefit of other accused. Moreover, Appellant allowed other accused to use her account to siphon the funds.

The case of the Appellant before the Supreme Court was that she was neither named in the FIR not in the chargesheet and was only arraigned as an accused for the first time in the Complaint filed under Section 44-45 of PMLA. Moreover, it was also submitted that Section 120B of the IPC cannot stand alone, emphasizing the need for a conspiracy to commit an illegal act mentioned in the scheduled offences under PMLA. The Respondent opposed the case on the ground that PMLA is an independent Code and a person who has not been named in the FIR can be arraigned as an accused. Moreover, a person can be held guilty of the commission of money laundering offence under Section 3 of PMLA even though they are not shown as accused in the predicate offence.

The Supreme Court after considering the submissions advanced by the parties and the legislative intent behind the inclusion of offences under IPC as 'scheduled offences' observed that merely because there is conspiracy to commit and offence, the same does not become and aggravated offence and the object of the Section 120B of IPC is to punish those involved in conspiracy to commit a crime, through they may not have committed any overt act which constituted the offence. Thus, the Court was of the opinion that offence under Section 120B of IPC, though included in Schedule under PMLA, will only become a 'scheduled offence' if the criminal conspiracy is to commit an offence already included under the schedule. The Court also observed that an offence under Section 3 of PMLA can be committed after a 'scheduled offence is committed'. The Court explained that a person who is unconnected with the 'scheduled offence', knowingly assists the concealment of the proceeds of crime or knowingly assists the use of proceeds of crime, can be held guilty of committing an offence under Section 3 of the PMLA.

COURTS WHILE CONSIDERING AN APPLICATION FOR APPOINTMENT OF ARBITRATOR CAN EXAMINE THE CONSTITUTIONAL VALIDITY OF THE ARBITRATION CLAUSE

The Hon'ble Supreme Court in the case of *Lombardi Engineering Ltd vs. Uttarakhand Jal Vidyut Nigam Limited*[7], ruled that the Courts while considering an application to appoint an arbitrator have the authority to assess the constitutionality of arbitration clauses. The Apex Court observed that if the arbitration agreement is found to be inconsistent with the Constitution, the same cannot be enforced.

Lombardi Engineering Ltd., a Swiss company, filed an application under Section 11(6) of the Arbitration Act seeking the appointment of an arbitrator in a dispute with the State of Uttarakhand. The company filed the Application while objecting to two clauses, which provided for a condition of pre-deposit of 7% of the total claim to invoke the arbitration clause and the discretion vested with the Principal Secretary/Secretary (Irrigation) to appoint the sole Arbitrator.

In response, the State of Uttrakhand argued that only a writ court, in a petition under Article 226 of the Constitution, can determine whether a specific condition in the arbitration clause is arbitrary. The primary issues which came before the Apex Court was whether Court could examine if the arbitration clause is arbitrary while considering an application to appoint an arbitrator.

The Apex Court answered in the affirmative, stating that the Constitution is the paramount source of law in the country. It rejected the argument that the Court cannot examine the constitutionality of the clause in and application under Section 11(6) of the Arbitration Act. The Court emphasized that, for any arbitration clause to be legally binding, it must align with the "operation of law," which includes the grundnorm, i.e., the Constitution. Moreover, the Court observed that an Arbitration Agreement has to comply with the requirements of the following and cannot fall foul of: (i) Section 7 of the Arbitration Act; (ii) any other provisions of the Arbitration Act & Central/State Law; (iii) Constitution of India, 1950.

The Court dismissed the contention that the petitioner, by consenting to the pre-deposit clause during the agreement's execution, cannot challenge its arbitrariness in a Section 11(6) Application. The Court affirmed that there can be no

[7] 2023 SCC OnLine SC 1422.

consent against the law and no waiver of fundamental rights.

THE SUPREME COURT AFFIRMS THAT AIRLINE CAN BE HELD RESPONSIBLE FOR THE PROMISE MADE BY ITS AGENT[8]

The Supreme Court has ruled that an entity is obligated by the commitments made by its agent as per the Indian Contract Act. The dictum form the Apex Court came in the context of a consumer dispute involving Kuwait Airways and its agent, Dagga Air Agents, who had specified a 7-day delivery schedule for certain goods. The Court held Kuwait Airways responsible for compensating the complainant for the delayed delivery of consignment.

The Supreme Court, in the case at hand, was dealing with an appeal against Order passed by National Consumer Disputes Redressal Commission (NCDRC), which held that there was a delay in delivering the complainant's consignment and granted airline was directed to pay compensation to the Complainant for failing deliver the goods in time.

The Court cited Section(s) 186 and 188 of the Contract Act, to emphasize that an agent's authority can be expressed or implied, and an agent with authority to do an act has the authority to do all lawful things necessary to fulfill that act. The Court held the Airways accountable for compensation under Section 19 and 13(3) of the Carriage by Air Act 1972 due to the damage inflicted on the appellant by the delay.

HIGH COURT

NO SEPARATE APPLICATION UNDER SECTION 8 OF ARBITRATION ACT IS REQUIRED IF OBJECTION REGARDING EXISTENCE OF ARBITRATION AGREEMENT WAS TAKEN AT FIRST INSTANCE[9]

The Delhi High Court in a recent case delved into the procedural aspects of invoking arbitration under Section 8 of the Arbitration Act. The Court held that once a party has taken objection to the jurisdiction of the Court to entertain the suit due to presence of the arbitration clause in the Written Statement, that would be sufficient compliance of Section 8 of the Arbitration Act and there is no requirement for a separate application.

[8] M/s. Rajasthan Art Emporium v. Kuwait Airways & Anr., 2023 SCC OnLine SC 1461.

[9] Madhu Sundan Sharma & Ors. v. Omaxe Ltd., 2023 SCC OnLine Del 7136

In the case at hand, the parties had entered into a Memorandum of Understanding (MOU) for land acquisition, incorporating an arbitration clause. Disputes arose between the parties leading the Respondent to file a summary suit under Order XXXVII of Code against the Appellant. The Appellants in response filed an application under Order XXXVII Rule 3(5) seeking leave to defend and took and objection regarding the maintainability of the suit due to presence of arbitration agreement. An appeal was preferred by the Appellants being aggrieved by the fact that suit was decreed in favour of Respondent.

The High Court, in the given facts, clarified that raising objection to jurisdiction, citing an arbitration agreement in an application for leave to defend the suit (which comes prior to the stage of filing written statement), is not belated under Section 8 of the Arbitration Act. Furthermore, the court emphasized that persisting with contesting a suit after raising objections to its maintainability based on an arbitration agreement does not amount to a waiver of the right to arbitration.

Finally, the Court set aside the Judgment passed by the trial court and directed the parties to initiate arbitral proceedings. Further, the Court held that once the arbitration clause had been extracted/presented before the trial court, it would be too hyper-technical to hold that, for want of a separate request to refer the dispute between the parties to arbitration, there was no compliance with Section 8(1) of the Arbitration Act.

This newsletter is only for general informational purposes, and nothing in this newsletter could possibly constitute legal advice (which can only be given after being formally engaged and familiarizing ourselves with all the relevant facts). However, should you have any queries, require any assistance, or clarifications with regard to anything contained in this newsletter (or Dispute Resolution in general), please feel free to contact the Dispute Resolution team at any of the contacts listed below.

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