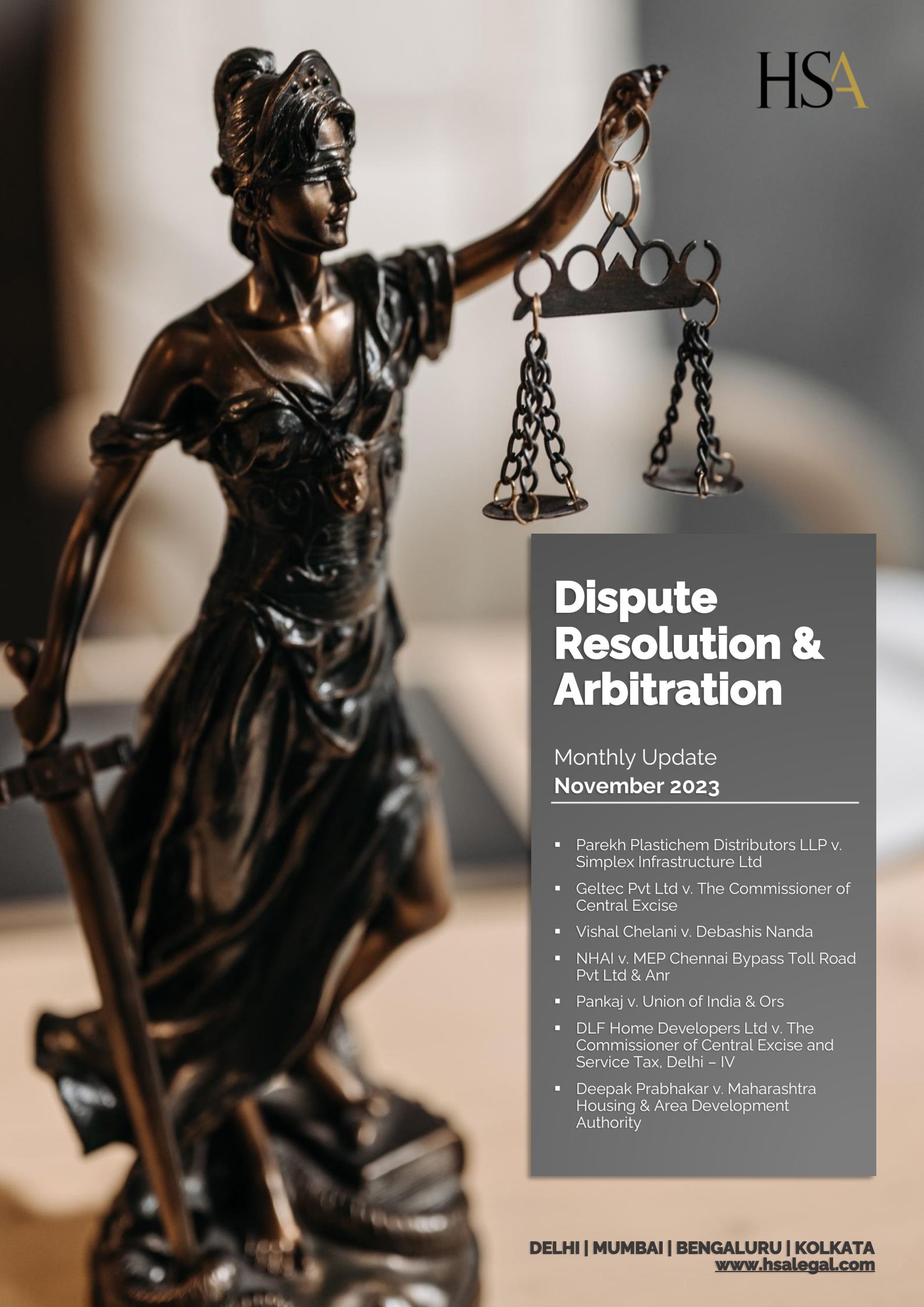

HSA

Dispute Resolution & Arbitration

Monthly Update

November 2023

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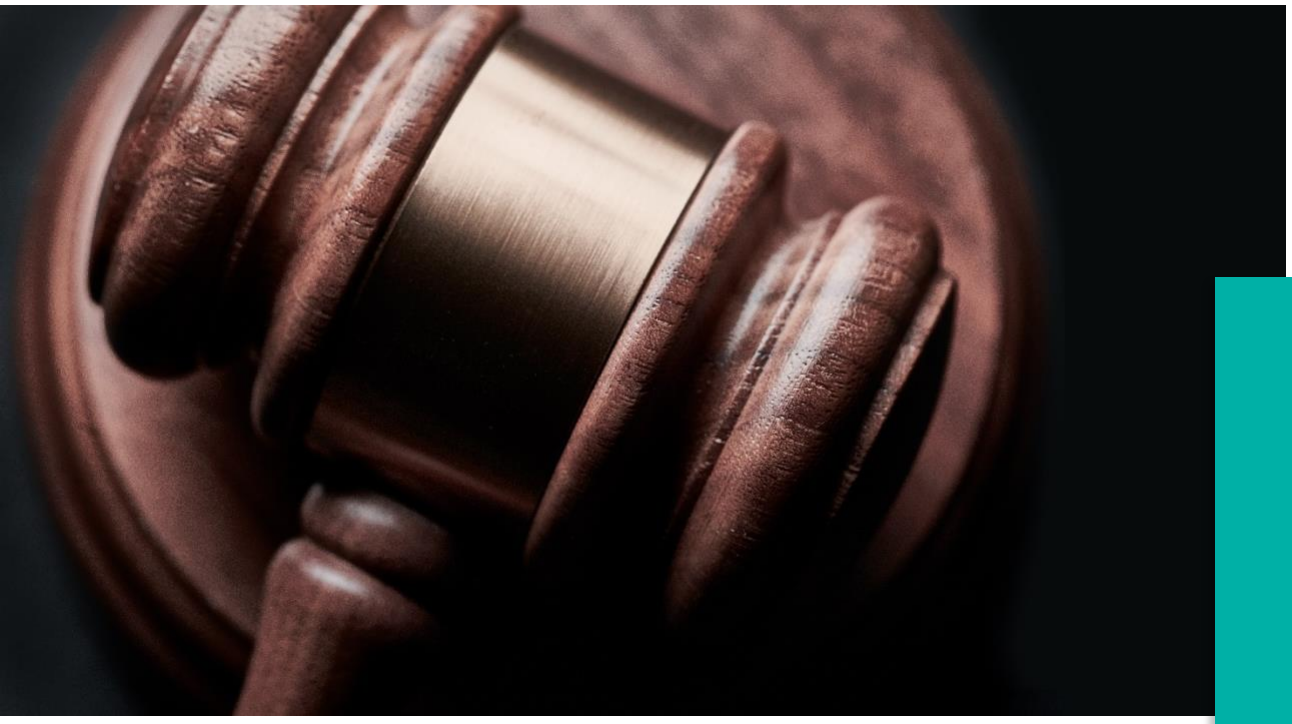
DISPUTE RESOLUTION AND ARBITRATION UPDATE



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Parekh Plastichem Distributors LLP v. Simplex Infrastructure Ltd

Bombay High Court | Arbitration Application No. 250 of 2021

Background facts

- Parekh Plastichem Distributors LLP (**Parekh**) supplied micro silica to Simplex Infrastructure Ltd (**Simplex**) pursuant to various purchase orders issued by Simplex. The purchase orders included the terms and conditions governing the relationship between both the parties and contained an arbitration clause which provided that the venue of arbitration would be Kolkata.
- Upon successful deliveries of micro silica, Parekh raised invoices, some of which were paid by Simplex; however, an amount of INR 21,78,910 remained due. The invoices issued by Parekh also contained an arbitration clause which provided that the venue of arbitration would be Mumbai.
- Thereafter, Parekh sent various reminders to Simplex for payment of the outstanding sum, but Simplex failed to make payment. In light of this, the advocates for Parekh issued a notice dated July 15, 2021 to Simplex invoking the arbitration clause contained in the invoices issued by Parekh (which provided that the venue of arbitration would be Mumbai). However, Simplex did not issue any response to this notice.
- Parekh filed an Application under Section 11 of the Arbitration and Conciliation Act, 1996 (**Act**) before the Bombay High Court (**HC**) to seek appointment of an arbitrator in terms of the arbitration clause contained in the invoices issued by it to Simplex. However, Simplex contended that the HC did not have jurisdiction to entertain the application since the purchase orders contained an arbitration clause which provided that the venue of the arbitration would be Kolkata.

Issue at hand?

- Whether the parties intended to be bound by the arbitration clause in the purchase orders issued by Simplex or the arbitration clause in the invoices raised by Parekh?

Decision of the Court

- The HC observed that the purchase orders issued by Simplex constituted the main agreement between the parties which contained the terms and conditions for supply of goods, and it cannot be disputed that the arbitration clause contained therein was agreed to by the parties.

- The HC noted that the intention of the parties is paramount in order to consider whether there is any arbitration agreement between the parties and the terms of such arbitration agreement. Upon analyzing the facts of the case, HC noted that the parties intended to be bound by the arbitration clause in the purchase orders and not the arbitration clause contained in the invoices.
- The HC opined that the act of Simplex in accepting the supplies made by Parekh and making payment towards the supply would not have the effect of the arbitration clause in the invoices superseding the arbitration clause in the purchase orders. There was no express agreement between the parties to override or supersede the arbitration clause contained in the purchase orders with the arbitration clause contained in the invoices.
- While arriving at its decision, the HC relied upon Supreme Court's decision in ***Balasore Alloys Limited v. Medima LLC***[1], wherein it was held that there was consensus ad idem between the parties to an arbitration clause contained in the comprehensive and all-encompassing agreement to the exclusion of the arbitration clause contained in an ancillary agreement.
- The HC held that the ratio of the Balasore decision would apply to the facts of this case since the purchase orders were comprehensive and contained all the terms of engagement between the parties. The arbitration clause in the purchase orders would govern the parties and not the arbitration clause contained in the invoices issued by Parekh.
- In view of the above, the HC dismissed the Section 11 Application filed by Parekh.

HSA
Viewpoint

By way of this judgment, the confusion regarding the arbitration clause contained in purchase orders and invoices has now been well settled by the HC providing a rationale based on the consent and intention of the parties. This decision will facilitate and guide the conscious contracts and legal responsibilities between the contractual parties. It'll surely hold a significant value for cases wherein parties have standard form purchase orders containing an arbitration clause and subsequent documents which contain a conflicting arbitration clause. The HC has clarified that in such cases, the Court will look at the contents of the documents under reference and the intention of the parties.

Geltec Pvt Ltd v. The Commissioner of Central Excise

Customs Excise & Service Tax Appellate Tribunal, Bangalore I Central Excise Appeal No. 2249 of 2010

Background facts

- Geltec Pvt Ltd (**Appellant**) is engaged in the manufacturing of soft gel capsules, which fall under Chapter 29 and 30 of the Central Excise Tariff Act, 1985 (**Act**).
- During the process of manufacturing soft gel capsules, a product known as Gelatin Mass Waste emerges. The Appellant destroys the Gelatin Mass Waste in its own factory, in compliance with the provisions of Drugs and Cosmetics Act and the Rules made therein, since Gelatin Mass Waste is a bio-hazardous product.
- During the period from 2004 to 2007, the Appellant applied for remission of duty, considering the by-product as excisable goods under Rule 21 of the Central Excise Rules, 2002 (**Rules**).
- However, during the period from September 2007 to March 2008, the Appellant destroyed the said by-product within their factory without seeking permission from the respective department in terms of the proviso to Rule 21 of the Rules.
- In view of the same, show cause notices were issued to the Appellant, with a proposal for reversal of the Central Value Added Tax (**CENVAT**) credit of INR. 45,74,204 used in the manufacture of the by-product along with interest and penalty. On adjudication, the said demand was confirmed along with interest and penalty.
- Aggrieved by the said Order, the Appellant filed an appeal before the Commissioner of Central Excise (Appeals), Bangalore who in turn rejected their appeal, vide an Order dated April 25, 2010.

Issue at hand?

- Whether the CENVAT inputs relevant to generation of 'Gelatin Mass Waste', being a waste product generated during the course of manufacture of finished goods, are required to be reversed?

Decision of the Tribunal

- At the outset, the Tribunal relied on its own decision considering the Circular issued by the Central Board of Indirect Taxes & Customs observed that the demand for reversal of CENVAT credit on the waste product is unsustainable in law. The said view was later upheld by the Karnataka High Court as reported in ***2012 (81) ELT 170 (Kar)***, where the High Court remarked that the waste product was destroyed within the factory and, therefore, the liability to pay duty thereon does not arise.
- In view of the aforesaid principle of law settled by the High Court and later upheld by the Supreme Court reported as ***2014 (304) ELT A85 (SC)*** by dismissing the appeal filed by the Revenue, the Tribunal did not find any merit in the Order dated April 25, 2010.
- Hence, the Tribunal set aside the Order dated April 25, 2010 and allowed the appeal.

HSA
Viewpoint

This decision reaffirms that certain waste products generated during manufacturing processes do not qualify as excisable goods. Consequently, the demand for the reversal of CENVAT credit related to such waste products is unsustainable in law. This decision provides clarity to manufacturers regarding their liabilities with respect to waste by-products that emerge during the manufacturing of the final products.

[1] (2020) 9 SCC 136

Vishal Chelani v. Debashis Nanda

Supreme Court of India I 2023 INSC 913

Background facts

- This case was an amalgamation of two different statutes: The Real Estate Regulatory Act (**RERA, 2016**) and the Insolvency and Bankruptcy Code (**IBC, 2016**).
- Bulland Buildtech Private Limited, a real estate company, had began one of its projects in the state of Uttar Pradesh. The project, however, was subjected to an inordinate delay and the allottees of the project filed an application with the Uttar Pradesh Real Estate Regulatory Authority (**UP RERA**).
- The UP RERA passed an order which allowed the allottees to get refund on the amount they had deposited for this project along with interest thereon. Meanwhile, while this order was passed, the Company went into Insolvency Process. This Insolvency Process is governed by IBC, 2016.
- Insolvency and bankruptcy, though used interchangeably, have two very distinct and different meanings. While insolvency refers to the state of a person unable to pay their debts due or as they become due, bankruptcy refers to the formal adjudgment of a person by the Adjudicating Authority. Within the IBC, the 180-day resolution Process has the following main provisions:
  - Once a Company is admitted into the Insolvency Process by the National Company Law Tribunal (the **NCLT**, also known as the Adjudicating Authority) a Committee of Creditors (**CoC**) is formed.
  - The COC consists of all financial creditors of the Company. If there are no financial creditors, then 18 biggest operational creditors, 1 representative of workmen and 1 representative of employees together will form this COC.
  - The COC then approves the Resolution Plan which the Resolution Professional will come up with. The Committee of Creditors will also choose another Resolution Professional once it is constituted or will re-affirm the original Resolution Professional once it is constituted.
  - Another important thing to note about IBC is the two definitions of Financial and Operational Creditors as it is mostly the Financial Creditors who form the COC.
  - A Financial Creditor is a person or an entity to whom a company owes a financial debt like money whereas an Operational Creditor is a person or an entity to whom a company owes operational debt like goods, services, etc. Also, important to note is a Resolution Professional, who is the person who resolves the Insolvency (the state where a person or an entity is unable to pay its debts) of inter alia, a company.
  - In 2018, the definition of financial debt was amended and subsequently, homebuyers came to be included in the class of Financial Creditors.
- In this case, Bulland Buildtech Private Limited became a part of the Insolvency Resolution Process and a Committee of Creditors was formed. However, what became a major factor leading to this case was the Resolution Plan submitted to the Committee of Creditors and subsequently, to the NCLT (National Company Law Tribunal), Delhi.
- The said Resolution Plan proposed to differentiate between the Financial Creditors under the category of 'homebuyers' meaning that the plan proposed a differentiation between the home buyers who had sought relief under RERA and had got their refund and the home buyers who hadn't sought any relief and therefore were still to receive any money. The Home buyers who had not approached RERA or gotten any decree were given 50% more favorable terms.
- Aggrieved the Plaintiffs approached the NCLT. However, the National Company Law Tribunal rejected the numerous applications of the current plaintiffs against this Resolution Plan. Further, their appeals against this Resolution Plan were also subsequently rejected.
- Thereafter the Plaintiffs approached the Supreme Court to appeal the Resolution Plan passed.

Issues at hand?

- Whether it was legally sound to make a differentiation between the same class of homebuyers or if the differentiation would align with differentiation under Article 14 of the Constitution of India?
- Whether the Insolvency and Bankruptcy Code will operate even when relief for the same cause of action for another act is sought?

Decision of the Court

- **Whether it was legally sound to make a differentiation between the same class of homebuyers or if the differentiation would align with differentia under Article 14 of Constitution of India?**
  - In order to understand and resolve this issue, the Court looked into the basis of the differentiation adopted by the Resolution Professional in the Resolution Plan.

- The argument adopted by the Resolution Professional was that it was not possible for one entity, or a person to claim two different reliefs for the same cause of action. The homebuyers, who had already sought reliefs from the UP RERA in terms of refund of deposit, would therefore not be entitled to benefits more than the home buyers who had not sought any refund or relief from the UP Real Estate Regulatory Authority.
- The Counsel for the homebuyers cited the case of ***Mr. Natwar Agrawal (HUF) v. Ms. Ssakash Developers & Builders Pvt Ltd.*** Here it was held by the Bombay NCLT that a homebuyer obtains a decree under RERA as an allottee of a Real Estate Project. And such an allotee is included in the category of a Financial Creditor as per the amended definition under the Insolvency and Bankruptcy Code.
- The Supreme Court examined the arguments of both the parties and came to the conclusion that RERA remedies can only be sought by home buyers and no other group of people, in the capacity of them being homebuyers. Further, the amendment in the IBC, 2016 which has added home buyers did not differentiate between any category of homebuyers who sought to seek relief from the Real Estate Regulatory Authority (**RERA**) and those who did not.
- Homebuyers, as a whole, were made to be a part of the class of Financial Creditors since a Financial Debt was owed to them.
- Thus, in light of all the points of view and the provisions of law mentioned above, the Supreme Court of India held that what the Resolution Plan had done amounted to hyper-classification' and this hyper classification, without any reasonable or intelligible difference was in direct contravention to Article 14 of the Constitution of India - Right to Equality.
- Thus, it was not legally sound to make a differentiation between the same class of homebuyers.

- **If the IBC will operate even when relief for the same cause of action is sought via another Act?**
  - The Insolvency and Bankruptcy Code, 2016 contains the provision of Section 238 which contains a non-obstante clause (often referred to a 'notwithstanding clause').
  - Section 238 says 'the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law'. Thus, the Court came to the conclusion that IBC has paramountcy over all other provisions of law when it comes to insolvency and bankruptcy. Thus, even if relief is sought under one provision in one capacity of the plaintiff, it cannot be a bar from the provisions of insolvency and bankruptcy operating on the defendant.
  - The Court therefore set the impugned Order of the National Company Law Tribunal, Delhi, aside. All homebuyers would be treated as Financial Creditors under the amended IBC and therefore no discrimination would be made between different categories of homebuyers. They would be included in the Resolution Plan and a decision regarding the Resolution Plan would be subsequently taken by the NCLT at Delhi.

HSA
Viewpoint

This judgement of the Supreme Court is indeed a major relief to the homebuyers. While natural justice is one the primary principles of law, another equally important principle is equality, which is enshrined in the Constitution itself. The Court in this case upheld this right, and interpreted the provisions of IBC along with the provisions of RERA to point out to a solution not violating Article 14 of the Constitution of India.

NHAI v. MEP Chennai Bypass Toll Road Pvt Ltd & Anr

High Court of Delhi | OMP(T) (COMM.) 48/2022, IAs 6739/2022, 6740/2022, 6741/2022 and 6742/2022

Background facts

- The Petitioner National Highway Authority of India (**Petitioner/NHAI**) and the Respondent MEP Chennai Bypass Toll Road Pvt. Ltd. (**Respondent**) entered into a Concession Agreement dated January 14, 2013. After a dispute arose between the parties, an Arbitral Tribunal was constituted, and the dispute was referred for arbitration.
- The Arbitral Tribunal passed an order that it was not bound by ICADR Rules and thus determined the arbitral fees for the claims and the counterclaims separately. The Arbitral Tribunal passed an order suspending the claims and counterclaims of the respective parties on the ground that the parties had failed to clear arrears of arbitral fee.
- Thereafter, the Respondent paid arbitral fee and based on the same, the Tribunal restored the counterclaims. The Arbitral Tribunal, however, reiterated that NHAI's claims would remain suspended on account of its failure to clear the outstanding arbitral fee.
- NHAI filed an application before the Arbitral Tribunal to revise the arbitral fee in accordance with the Fourth Schedule of the Arbitration and Conciliation Act, 1996 (**Act**). The Arbitral Tribunal dismissed the application holding that it was not bound by the Fourth Schedule of the Act and that the arbitral fee was determined separately for the claims and the counterclaims keeping in mind the facts and complexity of the dispute between the parties. The Arbitral Tribunal held that the

counterclaim(s) should be treated separately from the claims in view of Order 8 Rule 6A of the Code of Civil Procedure, 1908.

- Against the order passed by the Arbitral Tribunal, the Petitioner filed a petition under Section 14 and Section 15(2) of the Act to seek termination of the mandate of the Arbitral Tribunal on the ground that the Arbitral Tribunal had become de jure and de facto unable to perform its functions.
- **Submissions of the Petitioners:**
  - The Arbitral Tribunal had fixed the arbitral fee contrary to the terms of the agreement between the parties.
  - As per the agreement entered into between the parties, the arbitral fee was payable to the Arbitral Tribunal as per the ICADR Rules. Thus the arbitral fee was payable on the dispute, i.e., the claim and the counter-claim, cumulatively and not separately.
  - The Tribunal could not charge fees separately on claims and counterclaims or charge a fee higher than what was agreed upon between the parties, in light of the interpretations given by the Court to the expression 'amount in dispute'- as found in the Fourth Schedule of the Act, which is *pari materia* to Schedule I of the ICADR Rules.
  - The Arbitral Tribunal by charging a higher fee than what was agreed between the parties, had not accepted the mandate, and was therefore de jure unable to perform its functions.
- **Submissions of the Respondent:**
  - The entire petition is misconceived as the Arbitral tribunal is free to decide its own fees and it is clear that the Tribunal had agreed to charge fee on claims and counter claims separately and not commutatively at time of appointment of tribunal vide order dated May 14, 2019.

Issue at hand?

- Whether or not the Arbitral Tribunal is permitted to fix its fee, if its appointment is made by way of an *ad hoc* agreement between the parties?

Decision of the Court

- The Court held that it is too late in the day for the Petitioner to now question the appointment of the Tribunal and argue that such appointment is contrary to the terms of the Agreement. Continuation of arbitral proceedings and periodical payments made by Petitioner, without any protest or reservation, signified that the Petitioner had agreed and accepted the fee decided to be charged by the Arbitral Tribunal. The Court ruled that the Arbitral Tribunal's observations that the arbitral fee was to be determined in terms of Fourth Schedule of the Act, does not mean that the fee has to be charged cumulatively on the claims and counterclaims.
- The Court held that continuation of the arbitral proceedings since 2019 indicated that Petitioner had explicitly accepted the terms of appointment of the Arbitral Tribunal and as there was substantial delay in approaching the Court, this was a good ground to refuse interference by the Court.
- The Court has ruled that the Arbitral Tribunal was permitted to fix its fee, since its appointment was made by way of an ad hoc agreement between the parties.

HSA
Viewpoint

The Court has clarified the applicability of the Fourth Schedule on proceedings arising out of arbitration agreement providing for appointment of ad hoc Arbitrators where the Arbitral Tribunal has accepted its appointment outside the mandate of the institutional arbitration rules such as the International Centre for Alternative Dispute Resolution Rules (**ICADR Rules**) and its entitlement to determine its fee out of the scope of the ICADR Rules. Moreover, the legal position on the aspect of cumulative fee on claims and counterclaims in an arbitration proceeding has also been clarified. Further, the conduct of the party raising an objection on the mandate of an Arbitral Tribunal, being a factual facet, has also been clarified.

Pankaj v. Union of India & Ors

Supreme Court of India | Criminal Appeal No. 3051-3052 of 2023

Background facts

- On October 03, 2023, Supreme Court in its judgement granted leave in matter of challenges in the Criminal Appeal Nos. 3051-3052 of 2023 filed by Mr. Pankaj Bansal and CWP No. 14539 of 2023 filed by his father i.e. Basant Bansal.
- By the order dated July 20, 2023, the Division Bench opined that as the constitutional validity of Section 19 of the Prevention of Money Laundering Act, 2002 (**Act**) had been held by the Supreme Court, the challenge to the same by the writ petitioners could not be considered only because of the fact that a review petition was pending before the Supreme Court.
- It had come to light that prior to the present FIR, between the years 2018 and 2020, 13 FIRs were registered by allottees of two residential projects of the IREO Group, alleging illegalities on the part of its management. On the strength of these FIRs, the ED recorded Enforcement Case Information Report dated June 15, 2021 in connection with the money laundering offences allegedly committed by the IREO Group and Lalit Goyal, its Vice-Chairman and Managing Director.
- Further that the number of FIRs had also increased from 13 to 30, as per this complaint. This case was numbered as COMA/01/2022, titled 'Directorate of Enforcement vs. Lalit Goyal and others' and was pending in the Court of Sudhir Parmar. After receiving information at this stage regarding

Mr. Sudhir Parmar showing favoritism to Lalit Goyal, the owner of IREO Group and also towards Roop Bansal and his brother, Basant Bansal who are the owners of M3M Group. This led to the registration of another FIR No. 0006 dated April 17, 2023. Then on May 12, 2023, the ED issued summons to M3M India Pvt Ltd, calling upon it to provide information and documents pertaining to transactions with certain companies. Thereafter upon the order, the ED raided the properties of M3M Group and effected seizures of assets and bank accounts on June 01, 2023. Roop Bansal was arrested by the ED on June 08, 2023 apropos the first ECIR.

- After the first ECIR, Pankaj Bansal and Basant Bansal secured interim protection from Delhi High Court in Bail Application Nos. 2030 and 2031 of 2023. By separate orders dated June 09, 2023 passed therein, the Delhi High Court noted that Pankaj Bansal and Basant Bansal had not been named in the first ECIR and that the ED had not yet been able to implicate them in any of the scheduled offences under the Act of 2002.
- It came to light, that Pankaj Bansal had not even been summoned by the ED in that case. The High Court accordingly granted them interim protection by way of anticipatory bail, subject to conditions, till the next date of hearing i.e. July 05, 2023.
- There were many lacunas in ED investigation and many other violations and abuse of process of law by the ED which has been challenged in the present matters.

Issues at hand?

- Whether the provisions of section 19 of the Prevention of Money Laundering Act 2002 was properly followed by ED?
- Whether the Arrest made by ED were bad in law?
- Whether ED has followed proper due process of law in the present case.

Decision of the Court

- SC held that it would be essential for the arrested person to be aware of the grounds on which the authorized officer arrested him/her under Section 19 and the basis for the officer's 'reason to believe' that he/she is guilty of an offence punishable under the Act of 2002. It is only if the arrested person has knowledge of these facts that he/she would be in a position to plead and prove before the Special Court that there are grounds to believe that he/she is not guilty of such offence, so as to avail the relief of bail. Therefore, communication of the grounds of arrest, as mandated by Article 22(1) of the Constitution and Section 19 of the Act of 2002, is meant to serve this higher purpose and must be given due importance.
- Further SC held that Rule 6 of the Prevention of Money Laundering (The Forms and the Manner of Forwarding a Copy of Order of Arrest of a Person along with the Material to the Adjudicating Authority and its Period of Retention) Rules, 2005, titled 'Forms of records', provides to the effect that the arresting officer while exercising powers under Section 19(1) of the Act of 2002, shall sign the Arrest Order in Form III appended to those Rules. Form III, being the prescribed format of the Arrest Order, which was not followed by ED in the present case.
- The SC also observed that in the event their grounds of arrest were equally voluminous, it would be well-nigh impossible for Pankaj Bansal or Basant Bansal to record and remember all that they had read or heard being read out for future recall so as to avail legal remedies. More so, as a person who has just been arrested would not be in a calm and collected frame of mind and may be utterly incapable of remembering the grounds of arrest read by or read out to him/her.
- The very purpose of this constitutional and statutory protection would be rendered nugatory by permitting the authorities concerned to merely read out or permit reading of the grounds of arrest, irrespective of their length and detail, and claim due compliance with the constitutional requirement under Article 22(1) and the statutory mandate under Section 19(1) of the Act of 2002.
- On the above analysis, to give true meaning and purpose to the constitutional and the statutory mandate of Section 19(1) of the Act of 2002 of informing the arrested person of the grounds of arrest, we hold that it would be necessary, henceforth, that a copy of such written grounds of arrest is furnished to the arrested person a matter of course and without exception.
- In the case on hand, the admitted position is that the ED's Investigating Officer merely read out or permitted reading of the grounds of arrest of the appellants and left it at that, which is also disputed by the appellants. As this form of communication is not found to be adequate to fulfil compliance with the mandate of Article 22(1) of the Constitution and Section 19(1) of the Act of 2002, we have no hesitation in holding that their arrest was not in keeping with the provisions of Section 19(1) of the Act of 2002.Further, as already noted above, the clandestine conduct of the ED in proceeding against the appellants, by recording the second ECIR immediately after they secured interim protection in relation to the first ECIR, does not commend acceptance as it reeks of arbitrary exercise of power. In effect, the arrest of the appellants and, in consequence, their remand to the custody of the ED and, thereafter, to judicial custody, cannot be sustained.

HSA
Viewpoint

- It is only if the arrested person has knowledge of the facts that he/she would be able to plead and prove before the Special Court that there are grounds to believe that he/she is not guilty of such offence, so as to avail the relief of bail. Therefore, communication of the grounds of arrest, as mandated by Article 22(1) of the Constitution and Section 19 of the Act of 2002, is meant to serve this higher purpose, and must be given due importance. It is a constitutional right of a person to obtain necessary reliefs under the relevant laws and this can only be done if the person is properly informed the reason for being arrested. This judgment clearly helps in proper interpretation of section 19 of Prevention of Money Laundering Act 2002 and have also clearly specified the procedure of Arrest in such cases and this will refrain the Authorities to violate the provision of laws laid down and not to misuse their powers.

- In light of the above the Criminal Appeals No 3051-3052 of 2023 were allowed by setting aside the impugned orders passed by the Division Bench of the Punjab & Haryana High Court as well as the impugned arrest orders and arrest memos along with the orders of remand passed by the learned Vacation Judge/Additional Sessions Judge, Panchkula and all orders consequential thereto.

DLF Home Developers Ltd v. The Commissioner of Central Excise and Service Tax, Delhi - IV

Customs Excise & Service Tax Appellate Tribunal, Chandigarh I Service Tax Appeal No. 60751 of 2017

Background facts

- DLF Home Developers (**Appellant**) provide business auxiliary service, business support service, construction of complex service and renting of immovable property and have registered themselves for the same.
- During an audit conducted by the Revenue Department, it came to light that the Appellant had received consideration from golf course activities, which they had reported as income, but had not paid the corresponding Service Tax. Additionally, it was observed that the Appellant had not appropriated Service Tax on construction of complex service, renting of immovable property service, preferential location service, and banking and other financial services.
- In view of the above, two show-cause notices dated October 20, 2015, and April 18, 2016 were issued to the Appellant demanding Service Tax under different heads.
- The said show-cause notices were adjudicated vide Order in Original (**OIO**) dated June 9, 2017, whereby certain demands were confirmed, and certain demands were dropped.
- Being aggrieved by the said OIO dated June 9, 2017, the Appellant filed the present appeal before the Customs Excise & Service Tax Appellate Tribunal, Chandigarh (**CESTAT**).

Issues at hand?

- Whether the Revenue Department was correct in issuing show-cause notice and imposing penalty on the Appellant in respect of Preferential Location services wherein the Appellant had already paid the applicable Service Tax before the issuance of show-cause notice?
- Whether Appellant is required to pay Service Tax under the head of 'Banking and Other Financial Services' for providing bank guarantees to their group companies?

Decision of the Tribunal

- At the outset, with specific regards to issue no. 1, the Tribunal stated that as per Section 73(3) of the Service Tax Act, 1994 (Act) the Central Excise Officer shall not issue any notice under Sub-section 1 of Section 73 where the assessee pays the Service Tax and the only exception for non-issuance of such notice is provided under Section 73(4) of the Act, which is attracted when the elements like fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the Rules made there under with intent to evade payment of Service Tax are present.
- The Tribunal held that in the instant case the Revenue department has failed to establish any of these critical conditions, except for the claim that the Appellant concealed material facts. The Tribunal further relied on the rulings of various Tribunals and Courts whereby it was held that mere noncompliance with registration, non-payment of service tax, and failure to file ST-3 Returns are insufficient grounds to allege suppression or any similar offense. To assert suppression, there must be concrete evidence of a deliberate act on the part of the assessee with the intent to evade tax payments.
- In view of the above as well as the facts and circumstances of the instant case, the Tribunal held that the extended period cannot be invoked, and as a result, penalty cannot be imposed on the Service Tax that was paid before the issuance of the show-cause notice.
- With regards to the second issue, the Tribunal held that the Revenue department failed to present any evidence demonstrating that the Appellant has received any form of consideration in providing bank guarantees.
- The Tribunal further relied on its own decision in the matter of the Appellant's group company i.e. Final Order No. 60890/2019 dated October 21, 2019, whereby it was held that appellant therein had neither received any consideration from either the financial institutions or from their associates for providing corporate guarantee nor had Revenue department provided any evidence that the associates of the appellant therein had received loan facilities from financial institution. In view of the same, it was held the appellant therein was not liable to pay service tax.

HSA
Viewpoint

This decision reaffirms that mere non-compliance with registration, non-payment of Service Tax, and failure to file ST-3 Returns cannot be a reason to allege suppression, fraud, etc. The significance of the judgment is that it makes it clear that only when certain conditions as provided under Section 73(4) of the Act are met, can the officer issue notice even if the assessee has paid the service tax. This decision also makes it clear that no Service Tax has to be paid on bank guarantees provided to group companies, if no consideration has been received by the parent company for providing such bank guarantees.

- The Tribunal further relied on the decision of the CESTAT, Mumbai Bench in the case of Commissioner of CGST Vs Edelweiss Financial Services Ltd (A/85986/2022) wherein it was held that there is no consideration insofar as 'corporate guarantee' issued by respondent on behalf of their subsidiary companies is concerned.
- In view of the above, the Tribunal allowed the Appeal.

Deepak Prabhakar v. Maharashtra Housing & Area Development Authority

Bombay High Court | 2023: BHC-OS:11851-DB

Background facts

- The Petitioners in this case were third-party purchasers of the free sale component of the Chembur Shivsmruti Cooperative Housing Society which, as evident by the use of the words 'free sale component', had entered into a Development Agreement. Therefore, the Petitioners had signed the Agreement for Sale (**AFS**) with the Developer- G. A Builders Pvt Ltd.
- When a Society goes through the process of redevelopment, after holding meetings with its General Body and deciding upon a Developer, it signs a Development Agreement with the Developer. The Developer will then redevelop the building, generally with a decided number of extra flats than the ones already existing in the building. These extra flats, which the Developer and not the society will sell to the buyers on the open market is what is known as the 'free sale component'. The agreement for such sale is executed by the Developer and the third-party future owners of these flats, now referred to as third-party purchasers. In the present case, the Petitioners were these buyers of the free sale component.
- Now, the Development Agreement was terminated between the Society and the Developer. The question remained as to what would happen to these buyers who had already signed the AFS with the Developer.
- It seems from the judgment that the Society later engaged another Developer for redevelopment and had even gotten an Intimation of Approval (**IOA**) to carry this development forward. This IOA was given by the Maharashtra Housing and Area Development Authority (**MHADA**), a requirement for redevelopment under the Development Control and Promotion Regulations.
- The Petitioners, who now found themselves to be in a limbo, approached the Bombay High Court in order to file this petition, asking the Court to help them enforce their rights against the Society. There was no mention of enforcing their rights against the Developer, the party with whom they had signed the AFS. The prayers of the Petitioners, in brief, were:
  - For the Court to issue the Writ of Certiorari or any other order for the IOA to be set aside or alternatively, quashed.
  - For the Court to restrain the demolishment of the building of the Society which was to take place as per the IOA.
- Various proofs were furnished which included an Undertaking by the Chairman of the Society to MHADA in order to prove to the Court that third-party rights can be enforced against the Society.

Issue at hand?

- Whether third party-rights of the Petitioners are enforceable against the Society with whom the Petitioners had no contract or agreement signed?

Decision of the Court

- In order to understand the scope of this single issue, the Court looked at various judgments to determine whether there was any provision of any Act whereby the Society could bear any amount of liability towards third-party buyers.
- **If the Society will bear any liability toward third-party purchasers under the provisions of any Act governing this matter (statutory issue/question of law):**
  - The Maharashtra Ownership of Flats Act (**MOFA**) came into being in the year 1963. While MOFA is a State Act and Real Estate (Regulation & Development) Act, 2016 (**RERA**) is a Central Act, the provisions of MOFA do apply in certain cases and also in cases where RERA remains silent vis a vis some provisions which are expressly mentioned in MOFA.
  - Section 2(c) of MOFA defines a Promoter as an entity who either sells or leads to the selling of certain flats or apartments to people, company and other classes as mentioned in this section.
  - In order to decide this issue, the Court referred to the judgement of the Bombay High Court in ***Vaidehi Akash Housing Pvt Ltd v. New DN Nagar Cooperative Housing Society Union Ltd***

& Ors[2]. In this case, under an almost similar set of facts, the same issue was decided. The Court, while affirming the judgement of Vaidehi, also cited the relevant paragraphs.

- Therefore, as per Vaidehi, while it is true that a Society does enter into a development agreement and causes to construct certain flats which are subsequently sold, the Society is still not considered to be a Promoter within a definition of MOFA. The Developer causes the flats to be sold in his own right as an independent contractor. Any other interpretation of the MOFA will lead to an anomalous and absurd interpretation.
- Further, the Court referred to the judgement, again of the Bombay High Court, in ***Goregaon Pearl CHSL v. Dr Seema Mahadev Paryekar & Ors***[3]. In the Goregoan Pearl CHSL case, where the Court had decided that since the definition of Promoter is similarly defined in RERA, a Society would not fall into the definition of a Promoter in RERA or in MOFA. Therefore, the submission of the Petitioners in the present case that after the RERA has come into being, the rights of the third-party purchasers are also protected is an issue that is already decided upon.
- Thus, the Society would have no liability to the third-party buyers under any statutory provisions- be it RERA or MOFA.

- **If the third-party purchasers would have any rights enforceable against the Society (merits/question of fact):**
  - This question can be thought to be on merits as well as on the provisions of law with respect to contracts.
  - In order to understand this question, the Court again looked at the Vaidehi judgement. In Vaidehi, it was held that when a Developer sells the free sale component, he does not do so as an agent of the Society, but rather as an independent contractor, in his own right. The Contract between the Developer and the Society is on a principal-to-principal basis, and is neither a partnership, nor a joint venture. Therefore, since the Developer is not an agent of the Society, there is no privity of contract between the Society or the third-party purchaser.
  - Thus, no third-party purchaser can claim a specific performance for the enforcement of their agreement which they signed through the Developer. Their rights stand so long as the rights of the Developer stand. The agreement with the third-party purchasers is based on the Development Agreement, and a lawful termination of this would never enable the third-party purchasers to lay a claim against the Society.
  - Therefore, in this case too, the Court affirmed the Vaidehi judgement and held that even from a contractual standpoint, the third-party purchasers would have no claim against the Society. While all these purchasers do possess a right to sue the Developer independently depending upon their case, the Court can entertain no Writ Petition against the Society.
  - Thus, the Court held that there was no right present with the third-party purchasers to enforce any claim against the Society, from the contractual point of view or from the statutory point of view.
  - If the third-party purchasers still felt that their rights were impaired, it was open for them to sue the Developer - G.A Builders Private Limited, depending upon the fact and circumstances of each individual case. However, there was no mention of enforcement of rights against the Developer in the present petition, rather it was only the Society against whom the third-party purchasers wanted their rights enforced. The Society was neither obligated to enforce their rights, nor was there any privity of contract present between the third-party purchasers and the Society and thus in the opinion of the Hon'ble Bombay High Court, this petition, was highly misconceived from the very beginning.
- **The question of indemnity:**
  - The Court held that the indemnity given to MHADA whereby the Secretary of the Society claimed to be responsible for liabilities of the Developer, the Court held that this was just an indemnity. At best the third-party purchasers could enforce their claim against the Developer and the Developer could claim to be indemnified by the Society but that was a different issue altogether.

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Viewpoint

This judgement comes as a major relief to societies. In a bid to push for redevelopment, the Government has also introduced various measures and concessions for the same. While free sale component is a major part of the redevelopment process, if the Developer breaches the Development Agreement or some issues are present between the Society and the Developer, it is the legal right of the Society to terminate the Development Agreement. This does not mean that any third-party purchasers who had signed contract with the Developer can enforce their claim against the Society or even impede the redevelopment process, as was evident in this case. This case again reiterated the commitment of the judiciary toward ensuring justice for the people.

[2] 2014 SCC OnLine Bom 5068: (2015) 3 AIR Bom R 270
[3] 2019 SCC OnLine Bom 3274

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