LEGALOS

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Monthly Bulletin

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Dear Professional,

The heart and soul of legal profession is an ***inquisitiveness to learn.***

This profession will bring various disputes and litigations and hence, a seasoned lawyer should remain aware and updated all the time and prepare the organisation well in advance to tackle such unforeseen liabilities.

"Legalos" a **Monthly Legal Bulletin – December, 2020**, is **another academic initiative of AMLEGALS** wherein we will try to incorporate the important gist of legal updates in law which need to be known by any organisation such **as Insolvency & Bankruptcy Law, Intellectual Property Right, Arbitration, GST, Contracts, FinTech, Data Privacy, etc..** Hope, this initiative will keep you all well informed at any given point of time.

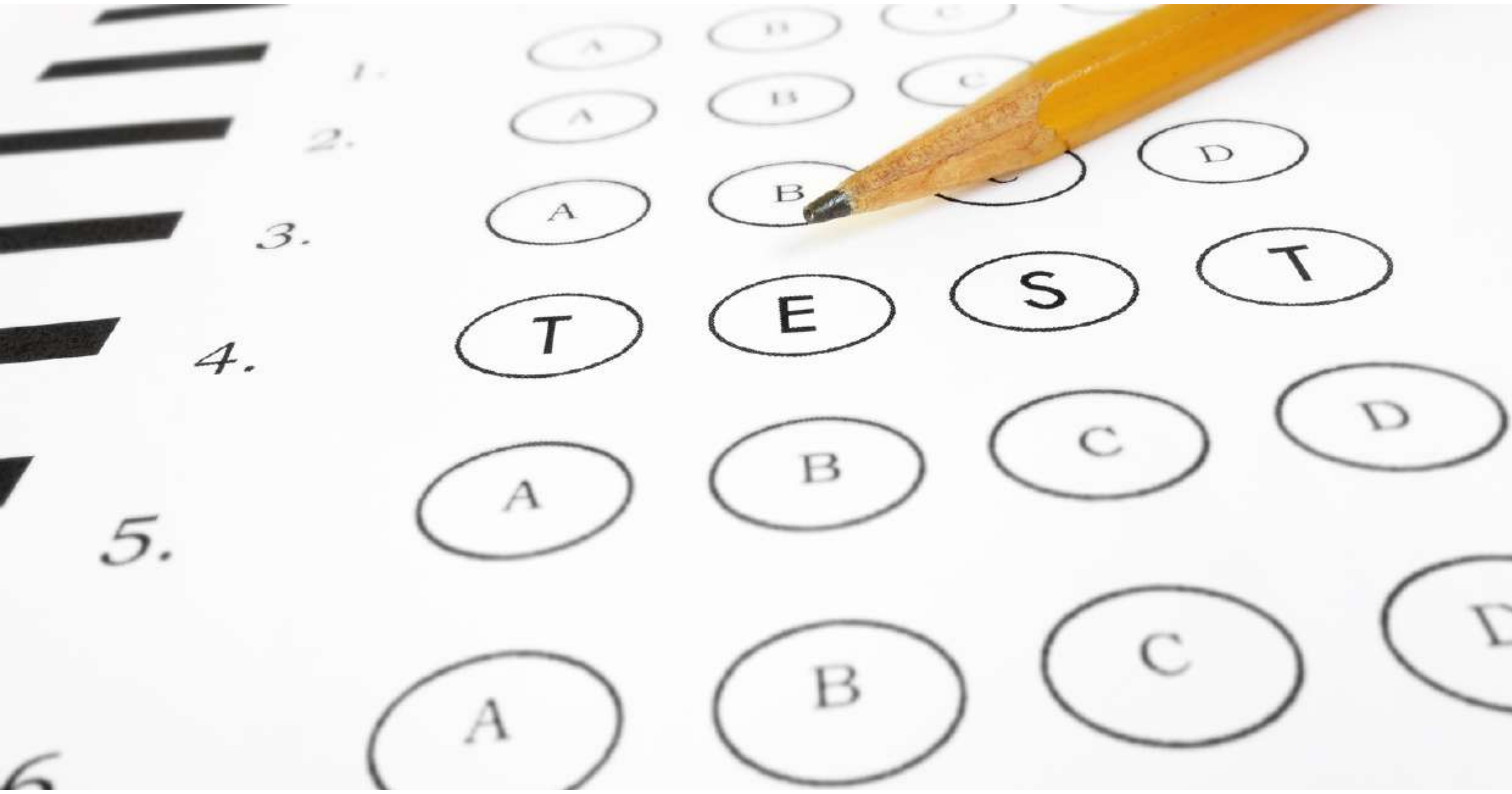
Our **DNA** of working is constant research and deployment of best standards and practices to **make our work better and make our partners' business more dispute proof.**

We hope this will be insightful for all.

Warm Regards

TEAM AMLEGALS

Independence of Resolution Professional: Test of Biasness



State Bank of India

Versus

M/s. Metenere Ltd

[Company Appeal (AT) (Insolvency) No. 76 of 2020] | NCLAT

In the present case the appointed Resolution Professional ("RP"), Shailesh Verma ("SV") was an ex-employee of the Appellant Financial Creditor and was also drawing pension from it. Thus, on objection raised by the Respondent, the Adjudicating Authority directed substitution of the RP, on the ground that he was previously employed with the Appellant and thus will render the process unfair and biased. Aggrieved by this, the Appellant appealed before the Appellant Authority on the ground that SV fulfils the requirement for appointment as Resolution Professional and bears no disqualification.

ISSUE

Whether an ex-employee of the financial creditor having rendered services in the past should not be permitted to act an Interim Resolution Professional at the instance of such financial creditor?

DECISION AND FINDINGS

The Appellant Tribunal held that merely because the RP drew pension does not clothe him with the status of an interested person. Pension is paid for the services rendered to the employer in the past and it is a benefit earned for such past services under the relevant services rules.

Further, it was held that the argument that inclusion of pension within the definition of "salary" under the Income Tax Act was not relevant and did not make the RP an interested person and ineligible to be appointed as the RP..

The Tribunal relied on the Regulation 3(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 wherein complete independence of the RP from the Corporate Debtor is mandatory. The Regulation was not violated in the instant case.

Further, relying on the decision of **State Bank of India vs. Ram Dev International Limited, Company Appeal (AT) (Insolvency) No. 302 of 2018,** the Tribunal held that there was no ground to disqualify him from being appointed as the RP. Nonetheless, regardless of the abovementioned findings, the Tribunal rendered the test for determination of apprehension of bias. To answer this, the Tribunal placed reliance on the decision of the Supreme Court in **Ranjit Thakur v. Union of India and Ors., (1987) 4 SCC 611,** wherein it was held that the *"to test likelihood of bias it is relevant to see whether there is a reasonable apprehension in the mind of the party."*

Thus, the Tribunal held that the determination of apprehension of bias about the RP necessarily rests on the perception of the Corporate Debtor.

In light of the past association of the RP with the Financial Creditor, the Tribunal held that the apprehension of the Corporate Debtor cannot be ruled out.

It was held that the RP acting as an "independent umpire" had to be viewed in the context of the RP being required to discharge his statutory duties in a fair manner, including collating claims.

Although it was acknowledge that per se the RP was not disqualified to act in his personal capacity as an RP as there exists no statutory requirement forbidding an ex-employee from becoming RP.

AMLEGALS REMARKS

The decision of the NCLAT is a positive attempt at highlighting the importance of an independent RP under the Code. The decision is in consonance of the objective of the Code that is to balance the interests of all stakeholders.

Whilst it is a pertinent adjudication for the determination of independence of the RP, the Tribunal through the test has lowered the threshold by not considering specific instances of biased conduct by the RP. It will also invoke further challenges for the appointment of RP on the ground that it is biased from the perspective of the Corporate Debtor. This will further elongate the timeline for completion of the CIRP, as against the objective of the Code.

Nonetheless, the functioning of the RP independent from the Committee of Creditor is imperative and thus calls for a legislative intervention in furtherance of Regulation 3 (1).

Enforcement of Foreign Award granting a put option subject to challenges under FEMA

With industrialization and growth in commercial activities, the need for the development of efficient methods of dispute resolution has also increased. Alternative dispute resolution methods including arbitration are preferred more in international trade as compared to litigation.

One of the reasons for opting for the arbitration is the easier enforceability of an arbitral awards in a foreign country. The Convention on Enforcement of Foreign Arbitral Awards, 1958, or the New York Convention ("New York Convention") is a noteworthy milestone in international commercial arbitration. The New York Convention has globally attempted to standardize the rule for enforcement of awards passed by arbitral tribunals in foreign countries. By being a signatory to the New York Convention, nations have agreed to recognise and enforce arbitral awards passed in other member nations.

However, in India, even after the gradual development of arbitration laws, it is still quite challenging to enforce foreign awards in certain cases, **as regulatory laws are often used as a defence against enforceability of such awards.**

Arbitration awards can be challenged in India if their enforceability results in violation of provisions of the Arbitration and Conciliation Act, 1996 ("the Act"). In recent years, the enforceability of foreign award granting put option has been challenged in Indian Courts taking Indian securities and foreign exchange laws as a defence. Nevertheless, Indian Courts have time and again taken a progressive approach by enforcing the foreign awards despite there being regulatory objections.

This article aims at discussing the objections raised under FEMA on the enforcement of foreign arbitral awards granting a put option and how Indian Courts have responded to such objections.

PUT ON OPTION

A put option is a **type of optional clause** which is included in **the shareholder agreement to give the shareholder a right, not an obligation, to sell his securities, assets, bonds or stocks, to the investee company on occurrence or non-occurrence of certain events.** Thereby, it obliges the investee company to buy such shares.

The price or value of securities may be fixed by the agreement or be left for future determination by an expert. The term 'put' means that the owner of the share has the right or option to **"put his share up for sale".** The put option clause acts as a means to **exit the investment.**

Put options are of three kinds:

- **In the time money (ITM):** A put option is in the time money, if its **strike price is above the current price of the shares.**
- **Out of the time money (OTM):** A put option is in the time money, if its **strike price is above the current price of the shares.**
- **At-the-money (ATM)**: A put option is at the money if its **strike price is the same as the current price of the shares.**

On exercise of a put option by a shareholder, the value or price of the shares is paid back to him. On non-compliance on the part of the investee company, subject to valid exercise, the aggrieved party or the shareholder may seek relief and enforce the performance of such clause.

Foreign investors, often, rely on put options to end their investment in the investee company by obligating the investee company to buy-back their shares. In this way, investors **liquidate their investment and protect the value of their investment** as an initial public offering is not always the most feasible mechanism, while liquidation or voluntary winding-up proceedings may be time consuming. Further, through this, the **investee company's obligation to buy-back their shares** can be fulfilled through strict regulatory measures.

The exercise of the put option clause must be in **compliance with the regulatory procedures and laws of the investee country.** The put options are quite popular in international commercial practice, however, in India, they face several regulatory obstacles under Indian securities and foreign exchange control laws.

However, the enforceability of foreign awards granting put option has been going through a progressive change by amending the regulatory laws and judicial interpretation, as discussed in detail herein below.

RESTRICTIONS ON PUT OPTIONS UNDER FEMA

In India, foreign exchange is regulated by the Foreign Exchange and Management Act, 1999 ("FEMA"). The Reserve Bank of India ("RBI"), being a controlling and enforcement authority under FEMA, it issued the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 ("Regulations 2020") to regulate the transfer or issue of securities by a person residing outside India.

Regulations 2020 provided for a basic framework with respect the kind of Indian companies who could issue securities to a person resident outside India and the mechanism through which shares of the Indian companies could be transferred to or by the non-resident. According, as per Regulations 2020, Indian companies could issue equity shares or preference shares/debentures to only such non-residents as provided under the Foreign Direct Investment Scheme.

Put options were not considered legal under FEMA and even Regulations 2020 did not permit the put option clauses. Thereafter, RBI through its Notification No. FEMA. 294/2013-RB dated 12 November 2013 ("2013 Notification"), provided that –

> *"Further, shares or convertible debentures containing an optionality clause but without any option/right to exit at an assured price shall be reckoned as eligible instruments to be issued to a person resident outside India by an Indian company subject to the terms and conditions as specified in Schedule I ."*

Subsequently, in accordance to **Circular RBI/2013-2014/436 A.P. (DIR Series) Circular No. 86 dated 9 January 2019 ("2014 Circular - I"),** rendered that –

> *"optionality clauses may henceforth be allowed in equity shares and compulsorily and mandatorily convertible preference shares/debentures to be issued to a person resident outside India under the Foreign Direct Investment (FDI) Scheme. The optionality clause will oblige the buy-back of securities from the investor at the price prevailing/value determined at the time of exercise of the optionality so as to enable the investor to exit without any assured return."*

Henceforth, through the 2013 Notification and the 2014 Circular -I amendments were made in Regulations 2020 which **allowed the optionality clause but without any option to exit**. By 2014 Circular - I, optionality clauses were allowed in shares to be issued to a person resident outside India but **such shares would have to oblige the buy-back at the price prevailing or value determined at the time of exercise of the optionality**. Further, the optionality clause including the put option shall be subject to other conditions provided in the circular.

RBI through **Circular RBI/2014-15/129 A. P. (DIR Series) Circular No. 4 dated 15 July 2014 ("2014 Circular – II")**, revised the pricing guidelines applicable to issue and transfer of shares having optionality clauses. Thus, the exercise of a put option would be subject to the revised pricing guidelines.

Subsequently, by the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 ("Regulations 2017") and now by Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("Non-debt Rules") further attempts were made to relax the laws. These amendments have substantially liberalized the enforceability of put options.

Further, even the recent amendments of RBI via Regulations 2017 and Non-debts Rules impose certain pricing and other regulatory restrictions on the enforcement of put options. In accordance to Regulation **10(7) of the Regulations 2017,**

> *"A person resident outside India holding capital instruments of an Indian company containing an optionality clause in accordance with these Regulations and exercising the option/ right, may exit without any assured return, subject to the pricing guidelines prescribed in these Regulations and a minimum lock-in period of one year or minimum lock-in period as prescribed in these Regulations, whichever is higher"*

Similar clause has also been incorporated in the Non-Debt Rules.

The primary obstacles that arise is when a put option is exercised at a **price above or below the fair market value of share** set under FEMA Regulations. If it is the case, then the put option is considered in **violation of the Indian foreign exchange and securities laws and are considered illegal.** Another obligation deployed against put option is that they provide the foreign investors with an **"assured return"** which is prohibited under FEMA.

The 2013 Notification, 2014 Circular – I and II, along with Regulations issued by the RBI and Non-Debt Rules prohibiting exits at assured returns have become the basis for challenge to the enforcement of certain foreign awards.

CHALLENGES TO ENFORCEABILTY OF FOREIGN ARBITRAL AWARDS IN INDIA

International, as well as domestic arbitral awards, are enforced as per the Act. India, being a signatory to the New York Convention, facilitates the enforcement of foreign awards subject to the official recognition and provisions of the Act.

Article V of the New York Convention provides for limited grounds to challenge the enforcement of a foreign award. Article V is incorporated into the Act through Section 48 which replicates the grounds set out in Article V. If a foreign award is found to be in violation the provision, the award would be considered illegal and would be prohibited to be enforced in India.

An arbitral award may be refused to enforce if the aggrieved party proves that -

i. The arbitral agreement is not valid, or
ii. Due process of law has been violated, or
iii. The arbitrator exceeded his authority, or there is an irregularity in the composition of Arbitral Tribunal or proceedings, or a
iv. Award was set aside in the country where it was made, or
v. **Award is contrary to the public policy of India.** In such cases, the Courts have to check whether the enforcement of arbitral awards is in contravention with provisions of Indian law or public policy of India.

However, the ground of public policy can only be taken if,

a. The making of the award was induced by fraud or corruption or was in violation of **Section 75** or **Section 81** of the Act; or
b. The award is in contravention with the fundamental policy of Indian law; orIt is in conflict with the most basic notions of morality or justice.
c. It is in conflict with the most basic notions of morality or justice.

As mentioned above, one of the grounds to refuse enforcement of foreign awards is when the foreign award is found to be **contrary to the public policy of India which includes the violation of any Indian laws. This ground is used as a defence against the enforcement of put option when it is in violation of provisions of FEMA or SEBI.**

With the aim to minimise the interference with the enforceability of a foreign award, amendments were made to Section 48 in 2015, which deleted the ground **“contrary to the interest of India”.**

More so, even the India Courts have clarified that the power to refuse the enforceability of a foreign award is discretionary, and Courts may allow an award even if it is contrary to the provisions of Section 48 of the Act.

JUDICIAL TREND

The Indian Courts have followed the principle of **“least interference”** in several cases while determining the enforceability of the foreign arbitral awards under **Section 48** of Act.

The Supreme Court in the case of **Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644**, had categorically held that,

> *“provisions of the New York Convention do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being to the public policy of the country in which the award is set to be enforced”.*

Thereafter, in **Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, AIR 2019 SC 5041,** the Supreme Court limited the scope for intervention in the enforcement of arbitral awards and noted that interpretation of the term 'public policy has been narrowed down by the 2015 Amendment.

The Supreme Court, in **Shri Lal Mahal Ltd. v Progetto Grano Spa (2014) 2 SCC 433**, laid down that any interference on the merits of the decision of the foreign arbitral tribunal is untenable as it is not permitted under the New York Convention, and the **expression 'public policy of India' should be construed narrowly.**

Following is a judicial trend of cases pertaining to the issue of enforcement of the foreign arbitral awards granting put option despite the violation of Indian laws:

1. **Shakti Nath and Others v. Alpha Tiger Cyprus Investment Ltd.& Others (2017 (5) ARBLR 112)**

In this case, dispute arose pertaining to the foreign investors right, under the shareholder agreement, to require the Indian promoters to acquire their shares in case of failure to comply with certain conditions. An award was passed in favour of the foreign investors.

The award was challenged by the Indian promoters on the ground that the award was an attempt by the foreign investors to enforce their put option rights under the agreement which was in violation of Notification and Circulars issued by the RBI that explicitly prohibited foreign investors from receiving an assured exit price on the sale of their shares.

With regard to the allegation on enforcement of put option rights through arbitral award, the High Court of Delhi observed that

> *"The Arbitral Tribunal examined the Respondents' claim as one for damages. The directions issued by the Arbitral Tribunal did not touch on the aspect of exercise of put option by the Respondents. With the Respondents not exercising the option of the "put option" but claiming damages for breach of the contract under Section 73 of the ICA, the question of any violation of RBI Circular No. 4 of 2014 in relation to exercise of "put option" did not arise. There is, therefore, no merit in the contention of the Petitioner that the impugned Award, if implemented, would lead to violation of FEMA/ RBI guidelines or any of the circulars thereunder."*

Thus, the Court held that award awarding damages for breach of a put option does not violate foreign exchange or RBI guidelines.

2. **Cruz City 1 Mauritius Holdings v. Unitech Ltd. (2017) 239 DLT 649**

In this case, the dispute pertained to the exercise of a put option by the petitioner due to delay in commencement of construction of a real estate project. An arbitral award was passed in favour of the petitioners which was challenged by the respondents. Respondents contended that the award is contrary to the public policy of India as it contravenes the provisions of FEMA.

The High Court of Delhi, while enforcing the award held that the defense of public policy is to be balanced while enforcing the foreign awards and it shall be exercised only when it offends the core values of national policy which cannot be compromised.

Further the Court laid down that,

> *"The expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental and substantial legislative policy and not a provision of any enactment."*

Ultimately, the Court referred to various Indian and foreign decisions to conclude that the **width of the public policy defense to resist enforcement of a foreign award is extremely narrow.** The Court held that the **ground of violation of the provisions of FEMA would not warrant declining enforcement of a foreign award**. Importantly, however, the Court clarified that the remittance of foreign exchange in favour of a foreign party pursuant to the enforcement of such award would still be subject to receipt of the requisite permission, if any, from the RBI under FEMA.

The Court also refused that the exercise of the put option clause, in this case, amounted to an assured return and held that Cruz City had no assurance of exit at a pre-determined return.

3. **NTT Docomo Inc. v. Tata Sons Limited, (2017 (4) ARBLR 127 (Delhi))**

In this case, the RBI challenged the enforcement of the foreign award on the ground that the award is in contravention of the provisions of FEMA. The Award stated that there were modes of performance of the put option obligation that would not require any special permission from the RBI.

The High Court of Delhi rejected the RBI's contentions and held that there is no provision in the law that permits the RBI to intervene in a petition seeking enforcement of an arbitral award to which the RBI is not a party.

Further, the Court **allowed the enforcement of award as it contemplated payment for damages instead of enforcing the put option hence was not violating any provision of FEMA.**

4. **Vijay Karia v. Prysmian Cavi E Sistemi SRL & Others (2020 SCC SC 177)**

In this case, the Supreme Court affirmed the earlier decisions of the High Court of Delhi and allowed the enforcement of a foreign award transferring securities from an Indian resident to a non-resident of India at a price below the fair market value.

The challenge was on the ground that the foreign exchange regulations require the transfer of securities be made at fair market value, not at the lessor value, thus, the objections were raised that the award was in contravention of FEMA and against the public policy of India. It was pointed out that FEMA aims at managing foreign exchange, unlike FERA which focused on policing.

The Supreme Court observed that the violation of FEMA can be rectified by seeking ex post facto permission from the RBI to condone the violation, thus, these awards cannot be held to be illegal or void.

The Court while commenting on violation of the fundamental policy of Indian law held that a **breach under FEMA can never be held to be a violation of the fundamental policy of Indian law.**

The Court further held that -

> *"the important point to be considered is that the **foreign award must be read as a whole, fairly, and without nit-picking.** If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counter-claims of the parties, enforcement must follow"*.

5. **Banyan Tree Growth Capital LLC v. Axiom Cordages Ltd, Commercial Arbitration Petition No. 476 of 2019.**

Recently, the High Court of Bombay relied on the decision of Cruz City and Vijay Karia and observed that put options providing exit to foreign investors do not violate the provision of FEMA. **It held that unlike its predecessor, it aims at managing the foreign exchange transaction.**

It was further held that a put option providing exit to a foreign investor which is triggered in the event that the promoters of the investee company are unable to conduct an IPO or merger of the investee company, would not amount to an assured exit.

Thus, the Court held **no objections under FEMA can become a ground for holding the put option agreement unenforceable and definitely will not be violation of public policy of India so as to render the enforcement foreign award granting put option void.**

AMLEGALS REMARKS

For a long time, it has been a challenging task for foreign investors to prove the validity of put option and to enforce arbitral awards allowing put option in India. However, post 2013 amendments made in FEMA and recent judicial pronouncements, there has been a **progressive change in foreign exchange laws and their interpretation,** which has made the enforcement of such clauses possible India in several cases.

Judiciary had adopted the **narrow approach of public policy** in furtherance of the pro-enforcement and pro-arbitration regime. The position is also in accordance with **Article 51 of the Constitution of India that bestows a duty to encourage compliance of international law and treaty obligation, thereby need to encourage settlement of international disputes by arbitration.**

Thus, it is settled that enforcement of arbitral awards cannot be restricted based on the objections raised under foreign exchange law. Nonetheless, RBI retains its regulatory powers and can step in to regulate remittance of monies pursuant to enforcement of a foreign award.

This approach of Indian Courts has resulted in **substantial relief for foreign investors and it may attract more foreign investments in future.**

Central Goods & Service Tax Act, 2017 - SEZ Units Entitled to claim refund of untilized IGST credits

M/s Britannia Industries Ltd.

Vs.

Union of India

C/SCA/15473 of 2019 | 11.03.2020 | Gujarat HC

In the present case, The Petitioner, having a unit situated in Special Economic Zone (for short "SEZ"), filed an application for refund in Form GST RFD-01A with regard to the credit of Integrated Goods and Services Tax (for short "IGST") distributed by Input Service Distributor (for short "ISD") for services related to the SEZ unit, amounting to Rs.99,05,156/- for the year 2018-2019.

The Petitioner was making zero rated supplies under the GST and was not able to utilize the credit of Input Tax Credit of IGST from its ISD, which was lying unutilized in the Petitioner's electronic credit ledger. Thus, the Petitioner made an application to claim such refund.

The Deputy Commissioner, Central GST Mundra Division, Gandhidham (hereinafter referred to as "Respondent") issued a Show Cause Notice dated 02.07.2019 with a proposal to reject the claim of refund on the grounds that the Petitioner, being situated in SEZ unit, received zero rated supply of goods and services and there is no provision under Section 54 of the the Central Goods and Services Act, 2017 (hereinafter referred to as "CGST Act").

The notice also contended that there is no circular, notification or guidelines issued ever by the Board to process GST refund claim application of SEZ units.

The Petitioner filed the written submissions in personal hearing dated 23.07.2019, however an order dated 01.08.2019 was passed by the Respondent rejecting the refund.

Aggrieved by the order of the Respondent dated 01.08.2019, the Petitioner approached the High Court under Article 226 of the Constitution of India to issue a writ of mandamus to direct the Respondent to grant the said refund, set aside the order of rejection of refund.

ISSUE

Whether the Petitioner, being an SEZ unit, can claim refund of unutilized IGST credit lying in Electronic Credit Ledger under section 54 of the CGST Act, 2017?

DISCUSSION AND FINDINGS

The High Court observed that as per the definition of ISD under **Section 2(61)** of the CGST Act and the facts of the present case, **it is not possible for a supplier of goods and services to file a refund application to claim refund of input tax credit distributed by the ISD.**

Therefore, the Court held that:

> *"the stance of the department that the petitioner is not entitled to seek the refund of the ITC paid in connection with goods or services supplied to SEZ unit is not tenable."*

The Court placed reliance on **Notification No. 28/2012**, dated 20.06.2012 which clarified the procedure for distribution of Input Tax Credit by ISD. As per the notification, the service tax attributable to services in use in more than one unit shall be distributed on a pro-rata basis of the turnover during the relevant period of the unit in question to the sum total turnover of all the units.

In view of the facts of the present case, the Court observed that the ISD has distributed credit of service tax to all units, thereby making the Petitioner's claim of refund valid.

The Court observed that:

> *"22. ...in facts of the present case also, credit of service tax is distributed to all the units by the ISD and therefore, the claim of refund made by the SEZ unit of the petitioner is required to be granted."*

The Court heavily relied on the decision of **M/s Amit Cotton Industries v. Principal Commissioner of Customs, SCA No.20126/2018** and referred the aspects of refund therein, wherein the Petitioner's claim for refund of IGST concerning an export unit was allowed. However, Court held that in the present case **Rule 89** of the Rules will be applicable unlike that Amit supra wherein **Rule 96** was applicable.

Relying on the aforesaid judgment, the Court further concluded that **a specific supplier does not exist who is entitled to claim refund on the input tax credit as per the provisions under CGST Act and Rules, owing to the fact that the input tax is distributed by the ISD and hence, the petitioner itself is entitled to claim the said refund.**

Thus, the Court held as under:

> *"23. We are of the opinion that in view of the aforesaid decision in case of M/s. Amit Cotton Industries (supra), the petitioner is entitled to claim refund of the IGST lying in the Electronic Credit Ledger as there is no specific supplier who can claim the refund under the provisions of the CGST Act and the CGST Rules as input tax credit is distributed by the input service distributor."*

Therefore, the High Court allowed the writ petition and quashed the impugned order passed by the Respondent. Further, the Court ordered the Respondents to process the Petitioner's claim within 3 months, for refund of unutilized IGST credit lying in Electronic Credit Ledger under Section 54 of the CGST Act.

AMLEGALS REMARKS

The Court has appreciated the concept of ISD under **Section 2(61)** of the Act at the first place. It further went on to deal with **Section 16** of IGST Act, Rule 89 of CGST Rules and **Section 54** of the Act per se.

The Court also appreciated that if Section 54 is not applicable to such a situation then it will become redundant as was originally argued by Mr. Anandaday Mishra, Founder & Managing Partner, AMLEGALS, who represented the Petitioner in the High Court.

The High Court also went on to discard the plea of Respondent on alternative remedy as the writ was directly filed against an O.I.O passed by learned Deputy Commissioner.

This will bring a big relief as this order will clear the backlog of refunds filed by SEZ in entire India in as much as the GST tax regime is new and such issues need to be cleared at an early stage otherwise the entire trade will face the hardship

TRADEMARK INFRINGEMENT -Degrading the Goodwill of E-commerce Companies by Rogue Websites

Snapdeal Private Ltd

Vs.

Snapdeallucky-draws.org.in & Ors

CS (COMM) No.264/2020 | 20.07.2020 | Delhi HC

In the present case, Snapdeal Pvt. Ltd. (hereinafter referred to as "the Plaintiff") incorporated in 2008 as Jasper Infotech Private Limited was later renamed to Snapdeal Pvt. Ltd. The company had launched a website namely; www.snapdeal.com (hereinafter referred to as "the Plaintiff's website") in February 2010 being an online marketplace for sellers and buyers to conduct business in the virtual sphere.

Certain rogue websites (hereinafter referred to as "the Defendants") have identical names with the Plaintiff's website which tend to portray that they either arise out of or are connected incidentally, with the Plaintiff. Such websites offer fraudulent prize schemes, lotteries and lucky draws which inter alia degraded the Plaintiff's goodwill continued to Infringe the Plaintiff's registered trademark.

The Plaintiff contended that the Defendants have damaged the commercial and statutory interest of the Plaintiff and have also defrauded gullible customers, by making them falsely believe that the Defendants are associated with the Plaintiff.

The Plaintiff further instituted John Doe suit against all the Defendants whose particulars are not known yet but carry the illegal activity mentioned hereinabove. Additionally, the Plaintiff arrayed the domain registrars of the Defendants (hereinafter referred to as **"the Domain Registrars")** along with the Department of Telecommunications, Ministry of Electronics and Information Technology and National Internet Exchange of India (hereinafter referred to as **"the Authorities")** so as to enable the Court to pass orders efficaciously.

ISSUE

Whether the Defendants, through their rogue websites, were infringing the registered trademark of the Plaintiff and harming the Plaintiff's goodwill?

OBSERVATIONS AND FINDINGS

The High Court noted that the Plaintiff had approached the Court in similar circumstances, where the Court had issued an interim order dated 01.11.2018, in **Jasper Infotech Private Limited vs. Aadi Sins & Ors. CS (COMM) 1214/2018.**

In the above case, **the Plaintiff had instituted a suit for ex-parte ad-interim injunction to be granted against various third-party websites/domains bearing the infringing trademark of Snapdeal and offering lucky draw/lottery schemes**.

The Court on being satisfied with the contentions of the Plaintiff **passed an order of injunction restraining the Defendants infringing the Plaintiff's trademark and passing off their activities and business as that of the Plaintiff. The Court had further ordered domain registrars to suspend the domains infringing Plaintiff's trademark.**

The Court observed that prima facie the current case was in favour of the Plaintiff and that the balance of convenience also favoured the Plaintiff. Also, the public at large would be defrauded by such rogue websites as they mislead into believing that the fraudulent activities of prize schemes, lotteries and lucky draws are connected directly or incidentally to that of the Plaintiff.

The Court in Para 9 of the judgment observed that:

> *"According to me, the plaintiff has, no doubt, been able to set up a prima facie case in its favour. The balance of convenience is also in favour of the plaintiff inasmuch as continuation of such fraudulent prize schemes, lotteries and lucky draws have the ability to affect a large number of persons who would be deluded into believing that the fraudulent prize schemes, lotteries and lucky draws either emanate from the plaintiff or the plaintiff is, in some way, connected with them."*

Further, the Court observed that furtherance of such activities by the Defendants would jeopardise the Plaintiff's interest along with that of the public at large.

DECISION

The Court passed an order of injunction against the Defendants to carry on activities either under the Plaintiff's trademark or any other trademark having deceptive similarity to the Plaintiff's trademark.

Further, the Court ordered the **Domain Registrars to suspend or block the Defendant's domain names registered with them.** The Court also ordered different Domain Registrars to block respective domains registered under them.

Additionally, the Court ordered the Authorities to issue appropriate notifications to the concerned Internet Service Providers to block access to the Defendant's websites.

The Court also granted leave to the Plaintiff to array rogue websites as Defendants as when they receive notice about them carrying on similar illegal activities, without requiring to file a fresh action for infringement.

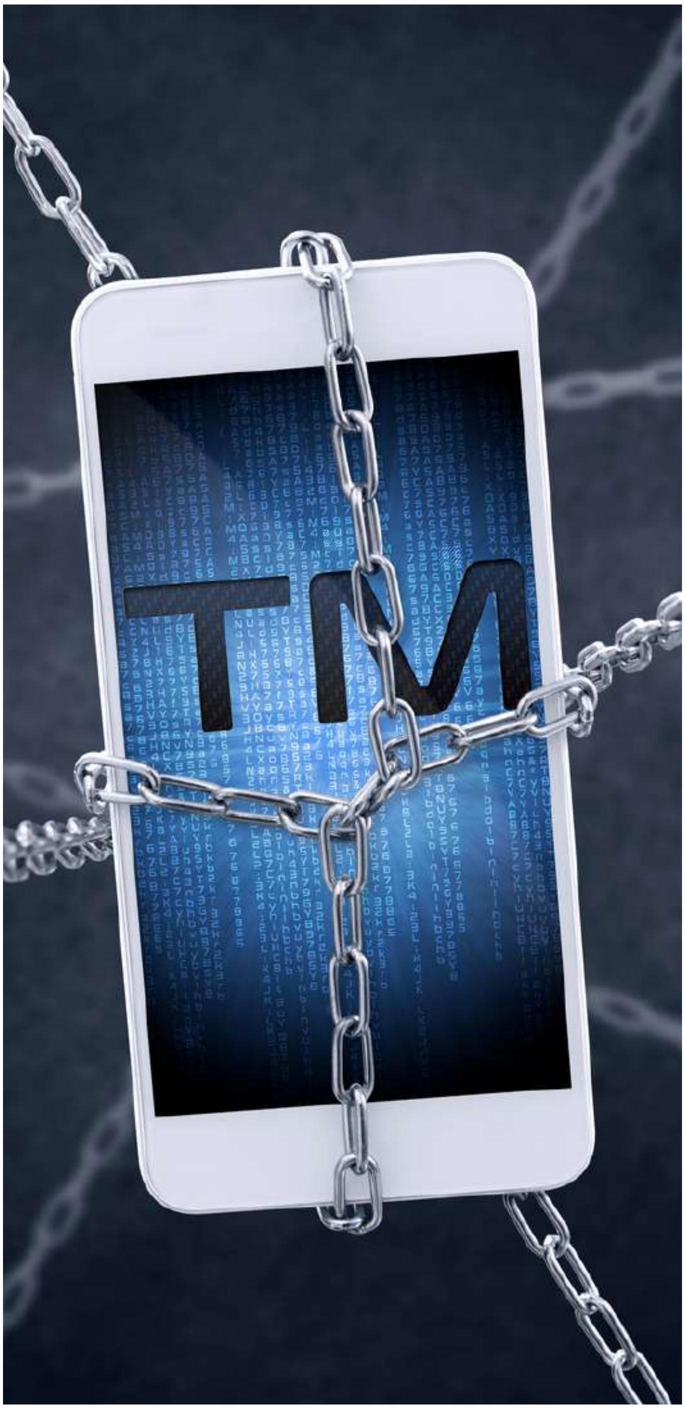
AMLEGALS REMARKS

Through this Order, the Court has reiterated a well settled position of law regarding infringement of registered intellectual property. Accordingly, the Court granted interim injunction to restrict the Defendants from infringing the registered trademark of the Plaintiff.

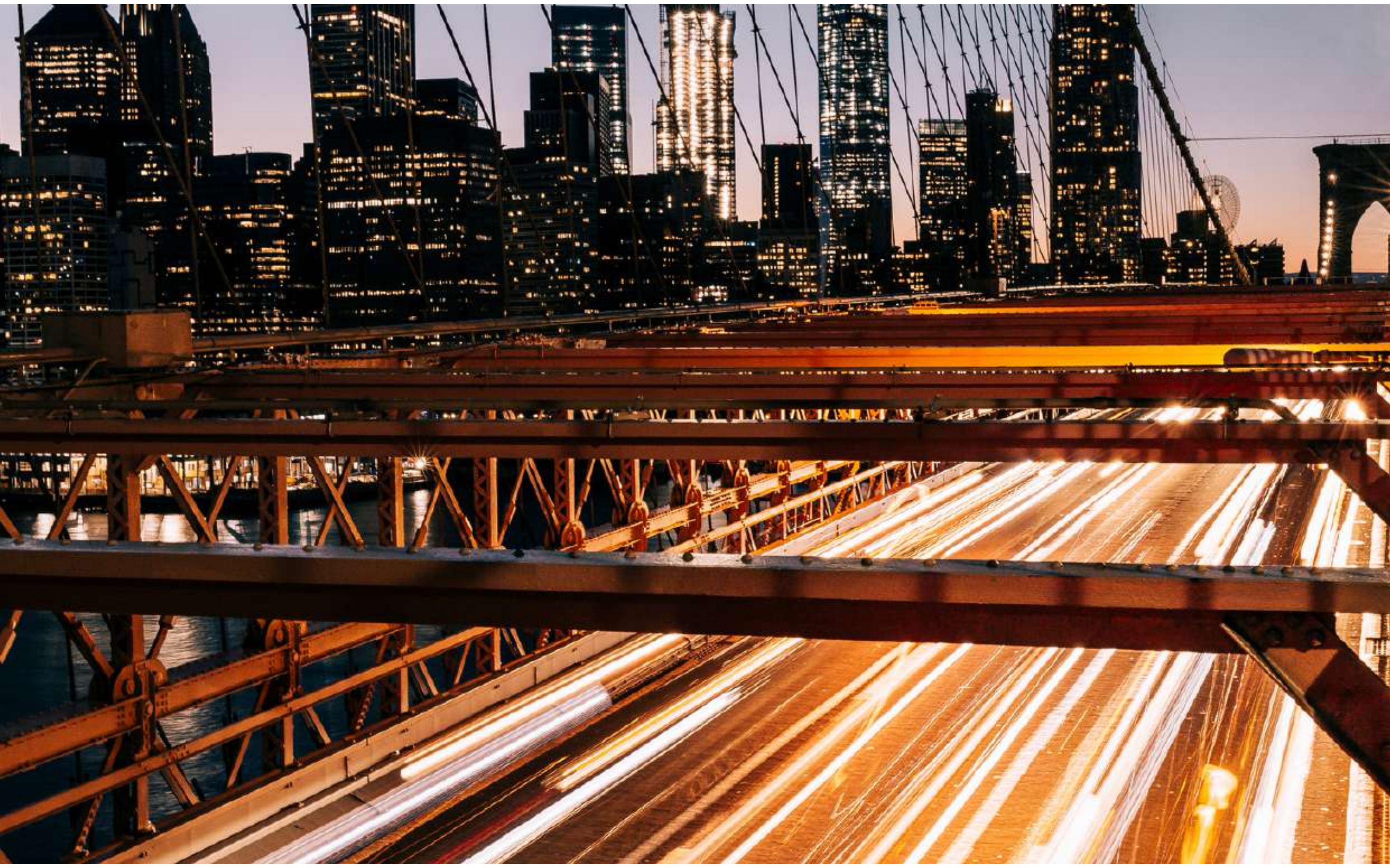
Apart from the infringement of Plaintiff's registered trademark, the action of the Defendants also damaged the reputation and goodwill of the Plaintiff. The activities carried on by the Defendants were fraudulent in nature, based on deceiving the public by passing of as the Plaintiff or as connected to the Plaintiff. The Defendants took undue advantage of the Plaintiff's goodwill with mala fide intentions to make wrongful gains.

The High Court took note of the above illegal activities of the Plaintiff and noted that the prima facie case was in the Plaintiff's favour, with the balance of convenience tilted towards the Plaintiff.

In order to prevent further harm to the reputation and goodwill of the Plaintiff and to preserve the trademark rights of the Plaintiff, the Court rightly granted an order of injunction against the Defendants, directed the Domain Registrars to revoke the domain registrations by the Defendants and further notified the Internet Service Providers to block access to such rogue websites.



MSME - Legal Safeguards & Provisions



The Micro, Small and Medium Enterprises ("MSMEs") Sector plays an essential role in strengthening the Indian economy. In last five decades, MSMEs have contributed immensely in economic and social development of the country by generating employment opportunities, mobilization of resources and by industrializing the rural and backward areas. The equitable distribution of national income and wealth would be assured only when the small and medium enterprises are strengthened.

With the aim to develop the MSMEs, the **Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act")** was enacted by the legislature. The Act aims at facilitating the promotion and development of MSMEs as well seeks to enhance their competitiveness.

It is the first legislation which gave legislative recognition to the term "enterprise" in India. **Section 7** of MSMED Act classifies **'enterprises'** in two categories; the Manufacturing Enterprises and Service Enterprise, and further categories them in three categories; namely, Micro, Small and Medium Enterprises.

1. **Manufacturing Enterprises**

Section 7 of the MSMED Act provides that the manufacturing enterprises are those enterprises which are engaged in manufacturing or production of goods pertaining to any industry specified in the First Schedule of the Industries (Development and Regulation) Act, 1951. These enterprises are defined as per the terms of Investment in Plant & Machinery.

- A manufacturing enterprise is called **"Micro Enterprise"** when its investment in plant and machinery does not exceed Twenty-Five Lakh Rupees.
- A manufacturing enterprise is called **"Small Enterprise"** when its investment in plant and machinery is more than twenty-five lakh rupees but does not exceed Five Crore Rupees.
- A manufacturing enterprise Is called **"Medium Enterprise"** when Its investment in plant and machinery Is more than five crores but does not exceed Ten Crore Rupees.

2. **Service Enterprise**

Section 7 of the MSMED Act provides that service enterprises are those enterprises which are engaged in providing or rendering of services. These enterprises are defined as per the terms of investment in equipment.

- A service enterprise is called **"Micro Enterprise"** when its investment in equipment does not exceed Ten Lakh Rupees.
- A service enterprise is called **"Small Enterprise"** when its investment in equipment is more than Ten Lakh Rupees but does not exceed Two Crore Rupees.
- A service enterprise is called **"Medium Enterprise"** when its investment in equipment is more than Two Crore Rupees but does not exceed Five Crore Rupees.

The **"financial liquidity"** plays a vital role in the development, growth and sustenance of MSME Sector. However, one of the major challenges faced by the MSMEs is the recovery of payments.

PROVISION FOR RECOVERY OF PAYMENTS

MSMEs are considered as the backbone of Indian economy due to their immense contribution to the overall production and export of good or services, in domestic as well as global market. Nevertheless, MSME Sector has been facing the issue of delayed realisation of payments which led to liquidity and financial constraints in the growth of the enterprises. Due to financial hardships, the risk of them turning into non-performing assets only increases which hits the sustainability of the enterprises.

Considering the rising concerns over the liquidity issues of MSMEs, the Indian Legislature has introduced certain provisions in MSMED Act to mitigate the problem of delayed payments to the suppliers. MSMED Act provides a framework to resolve the issue of liquidity and delayed payment to the MSMEs.

Section 15 to 24 of the MSMED Act deal with the issue of delayed payments and provides a framework for the recovery of such payments.

Section 15 puts a liability on buyer and obligates him to make payment to the supplier when the goods are supplied, or services are rendered to him, on or before the date agreed by them. The Section reads as under:

> *"Where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day"*

The proviso to the Section provides that such payment must be made within the period of forty-five days from the day of acceptance or deemed acceptance.

Penalty:

Further, **Section 16** provides that if the buyer fails to make the payment to the supplier, as provided under **Section 15**, he will be liable pay a compound interest on the principal amount at three times of the bank rate notified by the Reserve Bank of India on the monthly basis. The Section reads as under:

> *"Where any buyer fails to make payment of the amount to the supplier, as required under section 15, **the buyer shall**, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, **be liable to pay compound interest with monthly rests to the supplier** on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, **at three times of the bank rate notified by the Reserve Bank."***

Moreover, **Section 17** expressly provides that the supplier can recovery any amount due under Section 16 from the buyer for any goods supplied or services rendered. The Section reads as under:

> *"For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16."*

Even then, if any dispute arises, the concerned party can make a reference to the Micro and Small Enterprises Facilitation Council for resolution of their dispute and recovery of dues thereof.

MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL

Section 20 of MSMED Act mandates the State Governments to establish one or more Micro and Small Enterprises Councils ("MSEFCs") for the settlement of disputes pertaining to delayed payments. The State Governments shall also notify the place where such Councils shall be established by notification. **Section 21** of MSMED Act provides that MSEFCs shall consist of not less than three but not more than five members. The members of MSEFCs must include:

- Director of Industries of the State Government having administrative control of the small scale industries;
- One or more representatives of associations of micro or small industry or enterprise;
- One or more representatives of banks and financial institutions which provides the loans to micro or small enterprises;
- One or more persons having special knowledge in the field of industry, finance, law, trade or commerce.

Further, the Director of Industries appointed under this Section shall be known as the Chairperson of the Micro and Small Enterprises Facilitation Council. Thus, MSEFCs are authorised by the State Governments to resolves the disputes with regard to realisation of principal and interest. Under **Section 30**, the State Government are empowered to make rules to carry out the provisions of the MSMED Act.

PROCEDURE TO FILE A COMPLAINT BEFORE MSEFC

A complaint may be filed or reference of a dispute may be made to the MSEFCs by any party to dispute under Section 18 of MSMED Act. **Section 18** lists the steps to be taken to refer a matter before MSEFCs and provides as under:.

- **Reference to the Council**

Firstly, a reference of dispute with regard to an amount due under **Section 17** should be made to the Micro and Small Enterprises Facilitation Council by the disputing party.

- **Initiation of Conciliation Proceeding**

On the receipt of a reference, the MSEFC must conduct a proceeding to resolve the dispute in two ways; either by conducting a conciliation proceeding on its own or by seeking the assistance from any institution or centre providing alternative dispute resolution services by making a reference to such institution or centre, for conducting conciliation. The provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall be applied for resolving the dispute as if the conciliation was initiated under Part III of the Act.

- **Reference of Matter to Arbitration on non-settlement**

Section 18 provides that if dispute is not settled between the parties by conciliation and conciliation proceeding stands terminated without reaching any settlement, the matter shall be taken up for the arbitration proceeding; either by the MSEFC itself or MSEFC may refer it to any institution providing alternative dispute resolution services for conduction of such arbitration. Section 18, further, mandates that the provisions of the Arbitration and Conciliation Act, 1996 shall apply to resolve the dispute by arbitration as if the arbitration was in pursuance of an arbitration agreement as provided under Section 7 of Arbitration and Conciliation Act.

- **Jurisdiction of the MSEFC**

Under **Section 18**, the Micro and Small Enterprises Facilitation Council or Centre providing alternative dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator to resolve a dispute between the supplier and the buyer, where the supplier must be located within MSEFC's jurisdiction and buyer may be located anywhere in India. also observed that the burden of establishing the existence of a Novation deed is on the party invoking it.

- **Time frame for resolving a dispute**

Clause 5 of Section 18 expressly provides that every reference under Section 18 must be decided **within a period of ninety days** from the date of making such reference.

- **Application before the Court to set aside the decree, award or order**

Section 19 of the MSMED Act provides that an application for setting aside any decree, award or order made, either by the Council itself or by the Institution or Centre to which matter was referred under Section 18 to provide alternative dispute resolution services, shall be entertained by any Court unless the appellant, not being the supplier, deposits to the Court seventy-five percent of the amount in terms of the decree, award or, any other order made by the Court thereunder.

Further, **proviso to Section 19** empowers the Court to order, during the pendency of disposal of the application filed under Section 19, to make the payment to the supplier of the amount deposited in such percentage as it considers reasonable under the circumstances of the case subject to such conditions as it deems fit. Thus, the above procedure must be followed for resolving any dispute pertaining to recovery of dues.

SAMADHAN PORTAL

The aforesaid procedure was introduced to deter the buyers who fail to make the payments on time and to mitigate the cases of delayed payment. In order to strengthen the prevalent mechanism for recovery of payment, the Ministry of MSME launched an online portal, namely, **"Samadhan Portal"**. This Portal was launched to enable the suppliers to file an online application against the buyers for the recovery of their dues. The said application will be reviewed by the MSEFCs, and would also be viewed by the Central Ministries, State Governments and Central Public Sector Enterprises ("CPSEs") for pro-active actions.

The portal facilitates the entrepreneurs or micro and small enterprises:

- To file an online application for delayed payments using the portal. For filing an application, the applicant is required to have Udyog Aadhaar Number which is validated with Aadhaar for filing the application.
- To check status of their application filed for recovery of delayed payments.
- By providing information regarding the pending payment of micro and small enterprises with CPSEs, or Central Ministries, or State Government etc.

Under the Insolvency and Bankruptcy Code, 2016 ("IBC") an MSME can be considered as operational creditors, as well as corporate debtor depending upon the fact whether the MSME owed a debt to a creditor or a debt, was owed to the MSME. Accordingly, the IBC has different provisions and framework which deals with the operational creditor and the corporate debtor.

For Operational Creditor

As per the scheme of the IBC, creditors are classified as operational creditor and financial creditor. This distinction is based on the nature of debt owed to them.

As far as MSMEs are concerned, they are categorised as Operational Creditor under **Section 9**. As per **Section 5 (20)** of the IBC an operational creditor means *"a person to whom an operational debt is owned."* It follows that when an MSME has to make a recovery of debt, it will be treated as operational creditor under the IBC.

A comparison between financial creditor and operational creditor under the IBC suggests that the former is given priority over the latter in many provisions.

For instance, under **Section 21** of the IBC, the operational creditors are not allowed to be a part of the committee of creditors and has no right to vote on the resolution.

Under **Section 53** of the IBC, which deals with the waterfall mechanism, the operational creditors are given less priority.

Also, in case, where a debt is disputed by the Corporate Debtor before the filing of the application under **Section 9** of the IBC, the same could be rejected by the Adjudicating Authority. However, the condition does not remain the same when an application is filed by the financial creditor.

Therefore, MSMEs being an operational creditor is at a disadvantageous position as compared to the financial creditor.

For MSMEs, there are other alternatives available for recovery of dues under the MSMED Act, 2006. As per **Section 15** of the Act, 45 days' time period is fixed for the recovery of dues by the supplier from the buyer and in cases where the buyer fails to make the amount to the supplier in 45 days, then he becomes liable to pay compound interest to the supplier at three times the bank rate notifies by RBI. The Act also gives an option to approach the MSME Facilitation Council. The Council on the application may himself conduct the conciliation process or may seek help from any other institution to conduct conciliation under **Section 65 to 81 as per the Arbitration and Conciliations Act, 1996.**

Therefore, the provisions of the MSMED act facilitates the recovery of dues more convenient and faster as compared to the provisions of IBC, 2016.

For Corporate Debtor

As per **Section 2(8)** of the IBC, *"Corporate Debtor means a corporate person who owes a debt to any person."* Accordingly, in the case where dues are to be recovered from the MSME and an application can be moved under applicable provisions of IBC. MSMEs is considered as corporate debtor under IBC. Accordingly, Corporate Insolvency Resolution Process ("CIRP") can be initiated against MSMEs under IBC just like against any other corporate debtor. This increases the chances of the MSME going into liquidation.

IBC (Second Amendment) Act, 2018

Therefore, assessing the condition an amendment was made wherein **Section 240A** was added in IBC. As a result of amendment, **Clauses (c) and (h) of Section 29A** became inapplicable to resolution applicant in respect of CIRP of any MSME. It is pertinent to note that Section 29A provides for the list of persons who are not eligible to submit a resolution plan. Accordingly, as per Clause (c) and (h) of Section 29(A) the promoters of entities having nonperforming assets and guarantors were not allowed to submit a resolution plan.

Sub-Sections (1) and (2) of Section 240(A) of the IBC are as under:

> *"240A. (1) Notwithstanding anything to the contrary contained in this Code, the provisions of clauses (c) and (h) of Section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process of any micro, small and medium enterprises.*
>
> *(2) Subject to sub-Section (1), the Central Government may, in the public interest, by notification, direct that any of the provisions of this Code shall—*
>
> *(a) not apply to micro, small and medium enterprises; or*
>
> *(b) apply to micro, small and medium enterprises, with such modifications as may be specified in the notification."*

Clauses (c) and (h) of Section 29(A) of the IBC are as under: -

> *"(c) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:*
>
> *Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;"*
>
> *"(h) has executed an enforceable guarantee in favor of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code;"*

Accordingly, the promoters after the amendment became eligible to submit the resolution plan. As per the **Insolvency Law Committee Report, 2018** the objective behind the insertion of Section 240A was that under the IBC, a default of above Rs. 1 lakh and above gives the right to creditors to initiate proceedings which can lead to liquidation as well. Further, the Committee highlighted the importance of the MSME and observed that liquidation of MSME can hit the economy very badly as these enterprises are a source of income and livelihood to many employees and workers. Therefore, allowing promoters to bid for them will help their revival because a person apart from promoter might not be interested in reviving it

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The relevant excerpt of the Committee Report is as under: -

> *"27.4 Regarding the first issue, the Code is clear that default of INR one lakh or above triggers the right of a financial creditor or an operational creditor to file for insolvency. Thus, the financial creditor or operational creditors of MSMEs may take it to insolvency under the Code. However, given that MSMEs are the bedrock of the Indian economy, and the intent is not to push them into liquidation and affect the livelihood of employees and workers of MSMEs, the Committee sought it fit to explicitly grant exemptions to corporate debtors which are MSMEs by permitting a promoter who is not a willful defaulter, to bid for the MSME in insolvency. The rationale for this relaxation is that a business of an MSME attracts interest primarily from a promoter of an MSME and may not be of interest to other resolution applicants."*

The reasoning given by the Committee behind the amendment was affirmed by a landmark Supreme Court judgement in **Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India, Writ Petition (Civil) No. 99 OF 2018.**

The observation of the Court was that:-

> *"the rationale for excluding such industries from the eligibility criteria aid down in Section 29A(c) and 29A(h) is because qua such industries, other resolution applicants may not be forthcoming, which then will inevitably lead not to resolution, but to liquidation."*

In another judgement of the Appellant Authority in **Sarvana Holdings Pvt Ltd. V. Bafna Pharmaceutical Pvt. Ltd Company Appeal (AT) (Insolvency) No. 203 of 2019,** it was held that that in cases where the corporate debtor is an MSME, the promoter is not required to compete with the other resolution applicant while regaining the control of the corporate debtor. The Adjudicating Authority can do away with the process give under the **Section 12A** of IBC, if the promoter offers a plan which is feasible enough to maximize the value of assets.

Recent Amendments

Due to COVID-19 outbreak, the Indian economy suddenly came to a halt. As a result of which business enterprises have to suffered losses amounting to crores. Assessing that defaults in such a scenario can be on the rise, the Ministry of Corporate Affairs ("MCA") vide its notification dated 24th March 2020, changed the default limit under Section 4 of the IBC from Rs. 1 lakh to Rs.1Crore. The main objective behind the change was to safeguard the small-scale industries from going into liquidation.

The Government keeping in mind the difficulties which the business enterprises faced due to lockdown restrictions and impact of the pandemic on the economy as a whole brought another amendment in the form of the IBC (Amendment) Ordinance, 2020 wherein Section 7,9 and 10 of the IBC were suspended. Further Section 10(A) was inserted which provided that no application for CIRP shall be filed after 25th March for a period of at least six months, which was further extended for three months on 25th September 2020.

Analyzing the effect of the amendments on the MSME sector

Both the amendments brought by the Government was much required for the MSME sector. In absence of these amendments thousands of proceedings against the MSME would have initiated and that could have made the matter worse for the MSME.

On the one hand, the amendment was beneficial to the MSMEs who are corporate debtor as it provided them protection from the creditors. However, it was non-beneficial to the MSMEs who are operational creditor as firstly, the threshold limit for limit went up to Rs. 1 Crore and further the suspension of the relevant provisions of the IBC also made it impossible for them to recover the dues. Here, looking at the business structure of MSMEs where the continuous supply of money is essential for working operation, non-recovery of dues becomes a critical issue.

Since the default value has increased and the relevant portions have been suspended, some enterprises may deliberately stop the payment to the MSMEs and in that condition, they have no recourse available in the IBC till the time suspension continues. Therefore, this recourse of recovering dues under the IBC is not available for the time being it becomes important that MSMEs should opt for alternative methods like MSMED act, to recover their dues. As already discussed, the MSMED Act, at this juncture could prove to be of great relief to MSME for speedier recovery of their dues.

Special Insolvency Resolution Framework

Recently IBBI Chief M. S. Sahoo announced that a Special Insolvency Resolution Process will be introduced under **Section 240-A** of the IBC especially for MSME's. In wake of the ongoing pandemic and stressed MSMEs, Government will soon notify a cheaper, faster and efficient Special Insolvency Resolution framework for MSME, which will allow MSME's to get waiver from Insolvency resolution process up to one year. The special framework will speed up the process of cases under IBC by having provision for the pre-packed plan in which the company and creditor will agree upon a resolution plan well in advance.

Impact of the proposed framework

Shorter Time Frame

The proposed framework will reduce the mandatory time-frame for submitting a resolution plan for such businesses to just 90 days from the current 270 days for all companies, to cut delays along with cost-effective and easier procedures where the debtor continues to manage the business while negotiating with creditors. The promoters, who are not wilful defaulters, will also be allowed to bid for their stressed assets.

Further, the proposed framework has adopted a new definition of MSMEs which Include firms with an annual turnover of up to Rs 250 crore each or investments of up to Rs 50 crore. Further, it would provide a 'debtor in possession' model for MSMEs that would enable them to negotiate the resolution with creditors and incentivise them to continue running the business after insolvency resolution.

Waiver From Suspension of Proceeding

Insolvency proceedings are suspended against fresh defaults from 25 March 2020 after the induced lockdown. However, MSMEs will likely be allowed to approach the adjudicating authority even during this period to declare themselves as insolvent if they wish to pursue a resolution of their stressed assets. However, they can approach NCLT only when they take approval from their unrelated financial creditors accounting for at least 25% of the total outstanding financial claims.

However, creditor cannot drag MSMEs to the National Company Law Tribunal ("NCLT") during this period of suspension because of the rise in threshold to Rupees 1 crore from just Rupees 1 lakh in order to insulate small businesses from being dragged to the NCLT.

AMLEGALS REMARKS

The MSMEs are one of the strongest pillars of economic growth in India. The progress and development of MSMEs directly or indirectly plays a prominent role and immensely contributes in the development of the country. Considering this, the steps were taken by the Government to strengthen the legislative framework of regulation of MSME Sector. As discussed, delay in payments is the major challenge faced by the enterprises. The MSMED Act was aimed at reducing the issues pertaining to liquidity and financial constraints by regulating the timely payments of dues to the supplier. The phrasing of **Section 17** expressly provides for the "recovery of amount due" along with the payment of interest thereon

Further, the proposed framework has adopted a new definition of MSMEs which Include firms with an annual turnover of up to Rs 250 crore each or investments of up to Rs 50 crore. Further, it would provide a 'debtor in possession' model for MSMEs that would enable them to negotiate the resolution with creditors and incentivise them to continue running the business after insolvency resolution. The MSMED Act and its legal framework has come out as a big relief to the suppliers and enterprises. Further, in order to strengthen the sector and to fill the loopholes in the recovery proceedings before the MSEFCs, the Ministry of MSME introduced the online portal for efficient dispute resolution known as Samadhan Portal. The Portal is also another step to strengthen the MSMEs or we can say that to strengthen the backbone of Indian economy.

As far as the IBC remedy is concerned for the MSMEs, the analysis was divided into two parts. The first one from the perspective of the operational creditor and the second was from the perspective of the corporate debtor. Classification of MSMEs as an operational creditor does not provide them with many advantages for the speedy recovery of dues. Further, operational creditor is always given less priority as compared to the financial creditor under the IBC.

MSMEs has always been the guiding force for the growth process in the country considering the contribution to the GDP and employment generation and the same was highlighted behind the insertion of **Section 240(A)** in the IBC. However, relaxations only from **Clause (c) and (d) of Section 29(A)** of IBC is not enough as limitations in the other clauses continues. The concrete policy is required to ensure that the revival of MSMEs takes place and the enterprise does not go into liquidation.

The faster resolution framework for MSME is aimed at complementing the Centre's latest measures under the Atmanibhar Bharat Abhiyan Scheme in ensuring that MSMEs get adequate credit to resume operations. This proposed Framework of Special Insolvency Resolution will be faster, cheaper and efficient, as it will cover those firms who has annual turnover of Rupees 250 Crore or investment cap of Rupees 50 Crore only. Further, it will allow MSME's to approach NCLT to initiate Insolvency Proceeding even during the period, when NCLT has suspended other Companies from approaching NCLT due to adverse effect of Covid-19. Further, it will allow promoter of the MSME's who are not wilful defaulters under **Section 29-A** of IBC to participate in the resolution process and bid for their assets. Further, it will speed up the process of resolution process as the Special Framework for MSME will reduce the time period of Resolution Process from 270 days to 90 days only.

ABOUT US

AMLEGALS is a multi-specialised firm. We would like to hear your views, queries, feedback and comments on anand@amlegals.com or rohit.lalwani@amlegals.com or siddharth.kakka@amlegals.com

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