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Securities and Exchange Board of India

Relaxation in timelines for compliance with regulatory requirements

The Securities Exchange Board of India (“SEBI”) in exercise of powers conferred under Section 11(1) of the Securities and Exchange Board of India Act, 1992 and Section 19 of the Depositories Act, 1996 to protect the interests of investors in securities and to promote the development of, and to regulate the securities markets issued a *Circular dated December 01, 2020 (“Circular”)* to extend the timelines for complying with various regulatory requirements by the trading members / clearing members / depository participants.

Considering the situation arising due to COVID-19 pandemic and subsequent lockdown being imposed by the Government and the representations received from Stock Exchanges, SEBI had provided relaxations to fulfill the regulatory requirements by issuing various Circulars from time to time, and has once again decided to extend the following timelines:

Sr. No.	Compliance requirements for which timelines are extended	Extended timeline
I	Internal Audit for half year ended on September 30, 2020.	December 31, 2020
II	System Audit for half year ended on September 30, 2020.	
III	Half yearly net worth certificate as on September 30, 2020.	December 31, 2020
IV	Cyber Security and Cyber Resilience Audit for half year ended on September 30, 2020.	January 31, 2021

In view of the request received from the Depositories, SEBI has decided to extend the timelines for compliance with the following regulatory requirements by Depository Participants (“DPS”), as under:



Sr. No.	Compliance requirements for which timelines are extended	Extended timeline / Period of exclusion
I	Submission of half yearly Internal Audit Report by DPs for the half year ended on September 30, 2020.	December 31, 2020.
II	Know Your Client (“KYC”) application form and supporting documents of the clients to be uploaded on system of KYC Registration Agency (“KRA”) within ten (10) working days.	Period of exclusion shall be from March 23, 2020 till December 31, 2020. A fifteen (15) days time period after December 31, 2020 is allowed to Depository / DPs, to clear the back log.
III	Systems audit on annual basis for the financial year ended March 31, 2020.	December 31, 2020.

SEBI has directed the Stock Exchanges / Clearing Corporations and Depositories to bring the provisions of this Circular to the notice of their members and participants respectively and also disseminate the same on their websites.



Securities Exchange Board of India

Operational guidelines for Transfer and Dematerialization of re-lodged physical shares

The Securities Exchange Board of India (“SEBI”) in exercise of powers conferred under Section 11 (1) of the Securities and Exchange Board of India Act, 1992 issued a *Circular dated December 02, 2020* stipulating the operational guidelines for crediting the transferred shares into the demat account of the investors as previously SEBI vide its Circular dated September 07, 2020, has fixed March 31, 2021 as the cut-off date for re-lodgment of transfer requests and had stipulated that such transferred shares will be issued only in demat mode.

The following are the main aspects of the operational guidelines:

- a. Guidelines for crediting the transferred physical shares in demat mode:
 1. Once the re-lodged transfer request has been processed, the Registrar and Share Transfer Agents (“RTAs”) are required to retain the physical shares and to inform the investor (**transferee**) about the execution of the transfer by means of a Letter of Confirmation (“LoC”). Such Letter shall be sent through Registered / Speed Post or through email with digitally signed letter and shall, *inter alia*, contain details of endorsement, shares, folio of investor (required on Demat request form) as available on the physical shares.
 2. Within ninety (90) days of the issuance of the above-mentioned LoC, the investor is required to submit the demat request to the Depository Participant (“DP”) along with the LoC. At the end of the sixty (60) days following the issuance of the LoC, the RTAs are also required to issue a reminder to the investor to submit the demat request as set out above.
 3. The DP will process the letter of confirmation on the basis of the demat request.
- b. In the instance of the investor not receiving a demat request within ninety (90) days of the date of LOC, the shares will be credited to the company's Suspense Escrow Demat Account.
- c. SEBI vide its Circular dated November 06, 2018, specified certain standardized conditions for the physical transfer of shares which required the transfer of shares / securities to be locked in for a period of six (6) months from the date of registration of the transfer and not to be transferred / dematerialized during the said period. In accordance with the Circular, SEBI stated that in the case of such locked-in shares, the RTA will also notify the depository of the lock-in period dur-



d. Depositories shall:

1. make the necessary amendments to the relevant byelaws, rules, and regulations in order to implement the directions referred to above; and
2. bring to the notice of their participants the provisions of the Circular and also disseminate the same on their websites.

Note: The suggested format of LoC is given at Annexure A to the Circular.



Securities Exchange Board of India

Additional Payment Mechanism (i.e. ASBA, etc.) for Payment of Balance Money in Calls for partly paid specified securities issued by the listed entity

The Securities Exchange Board of India ("SEBI") in exercise of the powers conferred upon it under Sections 11 and 11A of the Securities and Exchange Board of India Act, 1992 read with Regulations 88 and 299 of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 issued a Circular dated December 08, 2020 ("Circular") with a view to protect investors interest and reduce investor grievances relating to refund, introduced Application Supported by Blocked Amount ("ASBA") as the sole payment mechanism in the Initial Public Offer ("IPO") and Rights issues.

- 1. As payment through the ASBA mechanism is investor friendly and enables faster completion of the process, SEBI has introduced an additional payment mechanism under ASBA for making subscription and / or payment of calls in respect of partly paid specified securities through self-certified syndicate banks ("SCSBs") and intermediaries such as Trading members / Brokers - having three in one type

Table with 3 columns: Channel I, Channel II, Channel III. Channel I: Online ASBA: Through an online portal of the SCSB. Channel II: Physical ASBA: Physically at the branch of a SCSB. Channel III: Additional Online mode: using the facility of linked online trading, demat and bank account (3-in-1 type accounts), provided by some of the brokers.

- account and Registrar and Transfer agents ("RTA").
- 2. Period of Subscription: The payment period for payment of balance money in Calls shall be kept open for fifteen (15) days.
- 3. The Circular further directed that the said intermediaries including the issuer company and its RTA shall provide necessary guidance to the specified security holders in use of ASBA mechanism while making payment of calls.
- 4. The Circular directed the Stock Exchanges to:
 - a. take necessary steps to put in place systems for implementation of the circular, including necessary amendments to the relevant bye-laws, rules and regulations ;



- b. take necessary action to institute additional payment channels (electronic banking modes only) for making subscription and / or paying call money in respect of partly paid up specified securities; and
- c. bring the provisions of this circular to the notice of the listed companies and their members and also disseminate the same on their websites.

Note: This Circular will be applicable for all Call Money Notice wherein the payment period opens on or after January 1, 2021 .



Ministry of Corporate Affairs

Amendment in Companies (Appointment and Qualification of Directors) Rules, 2014

The Ministry of Corporate Affairs (“MCA”), in exercise of powers conferred under Section 149 read with Section 469 of the Companies Act, 2013 amended the Companies (Appointment and Qualification of Directors) Rules, 2014 vide *Notification dated December 18, 2020* and amended rule 6, in sub-rule (4) of Companies (Appointment and Qualification of Directors) Rules, 2014 (“**Appointment Rules, 2014**”).

1.
 - (1) These rules may be called the Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2020.
 - (2) They shall come into force on the date of their publication in the Official Gazette.
2. In the Appointment Rules, 2014, in *Rule 6*, -
 - (a) in sub-rule (4), -
 - (i) for the words “one year from”, the words “two years from” shall be substituted;
 - (ii) for the first and second proviso, the following provisos will be substituted, namely :-

“Provided that an individual shall not be required to pass the online proficiency self-assessment test when he has served for a total period of not less than three years as on the date of inclusion of his name in the data bank, -

- (A) as a director or a key managerial personnel, as on the date of inclusion of his name in the databank, in one or more of the following, namely:-
 - i. listed public company; or
 - ii. unlisted public company having a paid-up share capital of rupees ten crore or more; or
 - iii. body corporate listed on any recognised stock exchange or in a country which is a member State of the Financial Action Task Force on Money Laundering and the regulator of the securities market in such member State is a member of the International Organization of Securities Commissions; or
 - iv. bodies corporate incorporated outside India having a paid-up share capital of US\$2 million or more; or



(B) in the pay scale of Director or above in the Ministry of Corporate Affairs or the Ministry of Finance or Ministry of Commerce and Industry or the Ministry of Heavy Industries and Public Enterprises and having experience in handling the matters relating to corporate laws or securities laws or economic laws; or

(C) in the pay scale of Chief General Manager or above in the Securities and Exchange Board or the Reserve Bank of India or the Insurance Regulatory and Development Authority of India or the Pension Fund Regulatory and Development Authority and having experience in handling the matters relating to corporate laws or securities laws or economic laws:

Provided further that for the purpose of calculation of the period of three years referred to in the first proviso, any period during which an individual was acting as a director or as key managerial personnel in two or more companies or bodies corporate or statutory corporations at the same time shall be counted only once.”;

(b) in the Explanation, in item (b), for the words “sixty percent”, the words “fifty percent” shall be substituted.



Ministry of Corporate Affairs

Amendment in Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

The Ministry of Corporate Affairs (“MCA”) in exercise of the powers conferred by Sub-Sections (1) and (2) of Section 469 read with Sections 230 to 233 and Sections 235 to 240 of the Companies Act, 2013 (“the Act”), vide its *Notification dated December 17, 2020* has further amended the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (“**Companies Rules, 2016**”).

1.
 - (1) These rules may be called the Companies (Compromises, Arrangements and Amalgamations) Second Amendment Rules, 2020.
 - (2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Companies Rules, 2016, in rule 2, in sub-rule (1), after clause (d), the following clause shall be inserted, namely:-

“(e) “corporate action” means any action taken by the company relating to transfer of shares and all the benefits accruing on such shares namely, bonus shares, split consolidation, fraction shares and right issue to the acquirer.”

3. In Companies Rules, 2016, after rule 26, the following rule shall be inserted namely:-

“26 A. Purchase of minority shareholding held in demat form ---

 - (1) The company shall within two (2) weeks from the date of receipt of the amount equal to the price of shares to be acquired by the acquirer, under Section 236 of the Act, verify the details of the minority shareholders holding shares in dematerialised form.

 - (2) After verification under sub-rule (1), the company shall send notice to such minority shareholders by registered post or by speed post or by courier or by email about a cut-off date, which shall not be earlier than one (1) month after the date of sending of the notice, on which the shares of minority shareholders shall be debited from their account and credited to the designated DEMAT account of the company, unless the shares are credited in the account of the acquirer, as specified in such notice, before the cut-off date.



the registered office of the Company is situated and also be uploaded on the website of the Company, if any.

- (4) The company shall inform the depository immediately after publication of the notice under sub-rule (3) regarding the cut-off date and submit the following declarations stating that: -
 - (a) the corporate action is being effected in pursuance of the provisions of Section 236 of the Act;
 - (b) the minority shareholders whose shares are held in dematerialised form have been informed about the corporate action [a copy of the notice served to such shareholders and published in the newspapers to be attached];
 - (c) the minority shareholders shall be paid by the company immediately after completion of corporate action; and
 - (d) any dispute or complaints arising out of such corporate action shall be the sole responsibility of the company.
- (5) For the purpose of effecting transfer of shares through corporate action, the Board shall authorize the Company Secretary, or in his absence any other person, to inform the depository under sub-rule (4), and to submit the documents as may be required under the said sub-rule.
- (6) Upon receipt of information under sub-rule (4), the depository shall make the transfer of shares of the minority shareholders, who have not, on their own, transferred their shares in favor of the acquirer, into the designated DEMAT account of the company on the cut-off date and intimate the company.
- (7) After receiving the intimation of successful transfer of shares from the depository under sub-rule (6), the company shall immediately disburse the price of the shares so transferred, to each of the minority shareholders after deducting the applicable stamp duty, which shall be paid by the company, on behalf of the minority shareholders, in accordance with the provisions of the Indian Stamp Act, 1899 (2 of 1899).
- (8) Upon successful payment to the minority shareholders under sub-rule (7), the company shall inform the depository to transfer the shares of such shareholders, kept in the designated DEMAT account of acquirer after such disbursement.
- (9) In case, where there is a specific order of Court or Tribunal, or statutory authority restraining any transfer of such shares and payment of dividend, or where such shares are pledged or hypothecated under the provisions of



the Depositories Act, 1996, the depository shall not transfer the shares of the minority shareholders to the designated DEMAT account of the company sub-rule (6).

Explanation – For the purposed of this rule, if “cut-off date” falls on a holiday, the next working day shall be deemed to be the “cut-off date”.



Reserve Bank of India

24x7 Availability of Real Time Gross Settlement (RTGS) System

The Reserve Bank of India (“RBI”), under Section 10(2) read with Section 18 of Payment and Settlement Systems Act, 2007 has issued a directive vide its *Notification dated December 04, 2020*, deciding to make Real Time Gross Settlement (“RTGS”) system available round the clock on all days. The same will come to effect from 00:30 hours on December 14, 2020.

All member banks participating in the RTGS system are advised to comply with the following:

1. RTGS shall be made available for customer and inter-bank transactions round the clock except for the interval between ‘end-of-day’ and ‘start-of-day’ processes.
2. RTGS shall continue to be governed by the RTGS System Regulations, 2013, as amended from time to time.
3. Intra-Day Liquidity (“IDL”) facility shall be made available to facilitate smooth operations. IDL availed, if any, shall be reversed before the ‘end-of-day’ process begins.
4. Member banks are advised to put in place necessary infrastructure to enable round the clock RTGS.
5. RTGS transactions undertaken after normal banking hours are expected to be automated using ‘Straight Through Processing (“STP”) modes.
6. Members are further advised to disseminate information on the extended availability of RTGS to all their customers.



Case Summary

Case Name : ***The State of Jharkhand & Ors. Vs. Brahmaputra Metallica Limited, Ranchi & Anr.- Civil Appeal Nos. 3860-3862 of 2020***

Court Name : The Supreme Court of India

Order Date : December 1, 2020

Sections cited : Article 14 of Constitution of India, Article 226 of Constitution of India, Section 9 of Bihar Electricity Act, 1948 ("**BEA, 1948**")

Facts of the case:

1. The Appeal arises from a judgment dated December 11, 2019 of the Hon'ble High Court of Jharkhand ("**High Court**") whereby the High Court *inter alia* (i) struck down Notification dated January 8, 2015 ("**Notification**") which gave a prospective effect to exemption to be granted on rebate / reduction from electricity duty to Industrial units offered under Jharkhand Industrial Policy 2012 ("**Industrial Policy**"); (ii) the Notification is retrospectively applicable from April 1, 2011; and (iii) the denial of exemption by State Government for FYs 2011 to 2014 was contrary to the doctrine of *promissory estoppel*.
2. Section 9 recognizes the power of State Government to grant exemptions. The Industrial Policy called upon the State Government to issue notifications within one (1) month providing exemption on rebate / reduction from electricity duty, and thus, a notification under Section 9 of BEA, 1948 was necessary. However, the State Government failed to comply with the time schedule.
3. Since an exemption notification was not issued by the State Government under Section 9, a Writ Petition under Article 226 of Constitution of India was instituted by one company named Usha Martin Limited. It was only after such Petition that State Government made the benefit available and that to prospectively. The Respondent would have received the benefit under Industrial Policy for the entire period, that is from the year when Industrial Policy was implemented.
4. The conclusion of the Hon'ble High Court was that the failure of the State to issue an exemption notification within time should not stand in the way of the industrial units getting the benefit which was promised and its denial of such benefit for FYs 2011 to 2014 was contrary to the *doctrine of promissory estoppel*.

Analysis of the Court:

1. The decision delivered by Hon'ble Justice D.Y Chandrachud and Hon'ble Justice Indu Malhotra took the opportunity to expound on the origins and evolution of Doctrine of Promissory Estoppel and Doctrine of Legitimate Expectation.



2. The Appellant had sought to distinguish Kalyanpur case and objected that the Respondent herein had no vested right to claim that a follow-up notification should be issued and that the doctrine of promissory estoppel would not apply to the present case.
3. The State government was evidently inclined to grant the exemption wherein the Government decided to override its representation contrary to implement it *albeit* in fits and starts. Firstly, there was a delay of three (3) years in issuance of the notification and secondly, by making the Notification prospective, depriving the Respondent of the exemption under Industrial Policy.
4. The Hon'ble Supreme Court found it prudent to discuss the origins of doctrine of promissory estoppel and its applicability to present case. It referred to decision of Court of Appeal in ***Crab v. Arun DC [1978] 1 Ch 179 (Court of Appeal)*** and ***Combe v. Combe [1951] 2 K.B. 215*** and an excerpt in ***Chitty on Contracts***.
5. Under English Law, judicial decisions have in the past postulated that the doctrine of promissory estoppel cannot be used as a 'sword' to give rise to a cause of action for the enforcement of a promise lacking any consideration. Its use in those decisions has been limited as a 'shield', where the promisor is estopped from claiming enforcement of its strict legal rights, when a representation by words or conduct has been made to suspend such rights.
6. The doctrine of promissory estoppel has grown parallel to doctrine of legitimate expectation. It comes into play if a public body leads an individual to believe that they will be recipient of a substantive benefit. The doctrine was explained in ***R v. North and East Devon Health Authority, ex p Coughlan [2001] QB 213***.
7. The scope of doctrine of legitimate expectation is wider than doctrine of promissory estoppel because it not only takes into consideration a promise made by a public body. Under the doctrine of promissory estoppel, there may be a requirement to show a detriment suffered by a party due to reliance placed on the promise. Although, typically it is sufficient to show that the promisee has altered its position by placing reliance on the promise, the fact that no prejudice has been caused to the promisee may be relevant to hold that it would be not be 'inequitable' for the promisor to go back on their promise. However, no such requirement is present under the doctrine of legitimate expectation. Reference was made to judgment of Court of Appeal in ***Regina (Bibi) v. Newham London Borough Council [2002] 1 W.L.R. 237***.
8. The basis of doctrine of legitimate expectation in public law is premised on the principles of fairness and non-arbitrariness surrounding the conduct of public authorities. When public authorities fail to adhere to their responsibilities without



providing an adequate reason to the citizens for this failure, it violates the trust reposed by citizens in the State. The generation of a business friendly climate for investment and trade is conditioned by the faith which can be reposed in the fulfillment of the expectations which it generates.

9. Therefore, the Hon'ble Supreme Court expounded on the doctrine of legitimate expectation referring to its judgments in ***National Buildings Construction Corporation v. S. Raghunathan* [(1998) 7 SCC 66]**; ***Monnet Ispat and Energy Ltd. v. Union of India* [(2012) 11 SCC 1]**; ***Union of India v. Lt. Col. P.K. Choudhary* [(2016) 4 SCC 236]**; ***Food Corporation of India v. Kamdhenu Cattle Feed Industries* [(1993) 1 SCC 71]**; and ***NOIDA Entrepreneurs Assn. v. NOIDA* [(2011) 6 SCC 50i8]**.
10. The State must discard the colonial notion that its sovereign handing out doles at its will. It's the policies that gives rise to legitimate expectations and the State acts according to what it puts forth in the public realm. In all its actions, the State is bound to act fairly, in a transparent manner. This is an elementary requirement of the guarantee against the arbitrary state action under Article 14 of Constitution of India adopts. A deprivation of the entitlement of private citizens and private business must be proportional to a requirement grounded in public interest.

Held by the Court:

1. Therefore, it is clear that the State had made a representation to the Respondent and similarly situated industrial units under the Industrial Policy. This representation gave rise to a legitimate expectation on their behalf, that the exemption would be granted within stipulated time. However, due to failure to issue a notification and by the grant of the exemption only prospectively, the expectation and trust in the State stood vitiated.
2. Since, the State has offered no justification for the delay in issuance of the Notification or provided reasons for it being public interest, the Hon'ble Supreme Court held that such a course of action by the State is arbitrary and is violative of Article 14 of the Constitution of India.



Case Summary

Case Name : ***Vidya Drolia & Ors. Vs. Durga Trading Corporation- Civil Appeal No. 2402 of 2019***
Court Name : The Supreme Court of India
Order Date : December 14, 2020
Sections cited : Section 8, Section 11, Section 11 (6-A), Section 16 (1), Section 34 & Section 43 of Arbitration & Conciliation Act, 1996 ("**A&C Act, 1996**"), Section 10 of Indian Contract Act, 1872 ("**Contract Act, 1872**"), Section 111, Section 114, Section 114A of Transfer of Property Act, 1882 ("**TOPA, 1882**"); Arbitration & Conciliation (Amendment) Act, 2015 ("**Amendment Act, 2015**"); Arbitration & Conciliation (Amendment) Act, 2019 ("**Amendment Act, 2019**").

Facts of the case:

1. This judgment decides the reference made to three (3) bench Judges of Hon'ble Supreme Court of India ("**Supreme Court**") in its Order dated February 28, 2019 in Civil Appeal No. 2402 of 2019 ("**Order**") titled *Vidya Drolia & Ors. v. Durga Trading Corporation* expressing its concerns in the legal ratio laid in *Himangni Enterprises v. Kamaljeet Singh Ahluwalia [(2017) 10 SCC 706]* ("**Himangni Enterprises Case**") that landlord-tenant disputes governed by the provisions of the TOPA, 1882 are not arbitrable as this would be contrary to public policy.
2. The Order reveals that two aspects required reference viz., (i) meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration; and (ii) the conundrum- "who decides"- whether the court at the reference stage or the arbitral tribunal in the arbitration proceedings would decide the question of non-arbitrability. The second ambit also includes the scope and ambit of jurisdiction of the court at the referral stage when an objection of non-arbitrability is raised to an application under Section 8 or 11 of A&C Act, 1996.
3. Himangni Enterprises Case relied upon two (2) Hon'ble Supreme Court judgments in *Natraj Studios (P) Ltd. v. Navrang Studios [(1981) 1 SCC 523]* and *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. [(2011) 5 SCC 532]* ("**Booz Allen Case**") holding that in cases of tenancies governed by TOPA, 1882 the dispute would be triable by the civil court and not by the arbitrator.
4. In the course of its judgment, the Hon'ble Supreme Court also touched upon its judgments in *Duro Felguera, S.A v. Gangavaram Port Limited [(2017) 9 SCC 729]*; *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan & Ors. [(1999) 5 SCC 651]*; *Vimal Kishor Shah & Ors. v. Jayesh Dinesh Shah & Ors. [(2016) 8 SCC 788]*; *Dhulabhai Etc. v. State of Madhya Pradesh & Anr. [(1968) 3 SCR 662]* and *Emar MGF Land Limited v. Aftab Singh [(2019) 12 SCC 751]*.



NON-ARBITRABILITY:

1. Non-Arbitrability is basic for arbitration as it relates to the very jurisdiction of the arbitral tribunal. Reference was accorded to Hon'ble Supreme Court's decisions in Booz Allen Case, ***Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya & Anr. [(2003) 5 SCC 531]***; ***SBP & Co. v. Patel Engineering Ltd. & Anr. [(2005) 8 SCC 618]***.
2. While deciding the issue, the Hon'ble Supreme Court touched upon the important provisions of A&C Act, 1996 and Contract Act, 1872.
3. After having perused the landmark decisions and jurisprudence on arbitration law, the Hon'ble Supreme Court propounded a four-fold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable at *paragraph 45* of this judgment:-
 - (a) When cause of action and subject matter of the dispute relates to actions *in rem*, that do not pertain to subordinate rights *in personam* that arise from rights *in rem*;
 - (b) When cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;
 - (c) When cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be enforceable; and
 - (d) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of dispute would be non-arbitrable.

Applying the above principles, they dovetail considered the following cases to determine arbitrability:

(1) Fraud

The Hon'ble Supreme Court has overruled the ratio in ***N. Radhakrishnan v. Maestro Engineers & Ors. [(2010) 1 SCC 72]*** observing that allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability.

(2) Debt Recovery Tribunal

The decision rendered by the Full Bench of the Hon'ble Delhi High Court in



HDFC Bank Ltd. v. Satpal Singh Bakshi [2013 (134) DRJ 566 (FB)] has been overturned by the Hon'ble Supreme Court which had held that the disputes which are to be adjudicated by the Debt Recovery Tribunal under Recovery of Debts due to Banks and Financial Institutions Act, 1993 are arbitrable. The Hon'ble Supreme Court laid down that such disputes are non-arbitrable.

(1) Landlord-Tenant Disputes

The Hon'ble Supreme Court has overruled the ratio in **N. Radhakrishnan v. Maestro Engineers & Ors. [(2010) 1 SCC 72]** observing that allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability.

WHO DECIDES NON-ARBITRABILITY:

1. While determining the second aspect concerning the reference, the issue of non-arbitrability can be raised at three distinct stages:
 - a) Before the court on an application for reference under Section 11 of A&C Act, 1996 or for stay of pending judicial proceedings and reference under Section 8 of A&C Act, 1996;
 - b) Before the arbitral tribunal during the course of the arbitration proceedings (**Arbitration Stage**); or
 - c) Before the court at the stage of the challenge to the award or its enforcement (**Challenge Stage**).
2. A comparative analysis was also made for: (i) Section 8 under A&C Act, 1996 and under Amendment Act, 2015; and (ii) Section 11 under A&C Act, 1996, Amendment Act, 2015 and Amendment Act, 2019 at *paragraph 56*.
3. While adjudicating any application under Section 8 or Section 11 of A&C Act, 1996, a court does not perform a ministerial function, but a judicial one. Acceptance was accorded to the Hon'ble Supreme Court's decisions in **Mayavati Trading Private Limited v. Pradyut Deb Burman [(2019) 8 SCC 714]** which held the dictum laid forth in **SBP & Co. v. Patel Engineering Ltd. [(2005) 8 SCC 618]**.
4. The position adopted in **National Insurance Company Limited v. Boghara Polyfab Private Limited [(2009) 1 SCC 267]** was also accepted with addition of following elements:
 - i. The court clarified that questions of whether or not a cause of action relates to an action *in personam* or *in rem*, whether the subject matter affects third parties, whether it relates to inalienable sovereign and public



- ii. There are questions that the court may determine or defer for the consideration of the arbitral tribunal. These include questions such as whether there is a live and subsisting dispute; and
 - iii. The matters that must necessarily be deferred to the tribunal which includes questions on the arbitrability and merits of a claim.
5. The Hon'ble Supreme Court held that principle of competence-competence (*kompetenz-kompetenz*) requires priority to be given to the arbitral tribunal to decide issue of non-arbitrability at the Arbitration Stage and another look by the courts is still open under Section 34 of A&C Act, 1996 at the Challenge Stage.
6. The conclusions reached by the Hon'ble Supreme Court in determining the question relating to an application under Section 8 or Section 11 of A&C Act, 1996 are as follows:
 - a) Sections 8 and 11 of A&C Act, 1996 have the same ambit with respect to judicial interference;
 - b) Usually, subject matter arbitrability cannot be decided at the stage of Section 8 or Section 11 of A&C Act, 1996, unless it's a clear case of deadwood;
 - c) The court under Section 8 and Section 11 of A&C Act, 1996 has to refer to arbitration or to appoint of an arbitrator, as the case may be, unless a party has established a prima facie case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding;
 - d) The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis as laid down, that is, 'when in doubt, do refer'; and
 - e) The scope of the Court to examine the prima facie validity of an arbitration agreement includes only:
 - i. Arbitration Agreement was in writing;
 - ii. Arbitration Agreement contained exchange of letters, telecommunication, etc.;
 - iii. Core contractual ingredients qua the Arbitration agreement were fulfilled; and
 - iv. On rare occasions, whether the subject-matter of dispute is arbitrable.
7. The Hon'ble Supreme Court while elaborating on the second aspect also afforded reference to its judgments in ***Konkan Railway Corpn. Ltd. & Ors. v. Mehul Construction Co. [(2000) 7 SCC 201]***; ***Konkan Railway Construction Ltd. & Anr. v. Rani Construction Pvt. Ltd. [(2002) 2 SCC 388]***; ***Arasmeta Captive Power Company Private Limited & Anr. v. Lafarge India Private Limited [(2013) 15 SCC 414]***; ***Shin-***



Case Summary

Case Name : **Savla Corporation Vs. Aristo Apparels**
Court Name : The High Court of Bombay
Order Date : December 16, 2020

Facts of the case:

1. Savla Corporation ("**Plaintiff**") is a registered partnership, having a business of manufacturing garments and fashion apparels since 1971 and is also a periodically reconstituted registered firm. It claims to be a popular fashion brand because of the quality of product it offers.
2. The Plaintiff has various trade marks such as "SERO", "FREEZONE", "FUNTONES", and "MARRY ME". These marks are used in India as well as certain overseas jurisdictions.
3. Aristo Apparels ("**Defendant**") is a sole proprietorship concern of one Kanji Patel in the same industry.
4. The Plaintiff claims that the Defendant has adopted the mark "SERON" and has used the under the same class of goods and same type of goods.
5. The Hon'ble Bombay High Court compared the marks of the Plaintiff and the Defendant through a pictorial description.
6. On September 19, 2020, the Plaintiff's marketing team made a trap purchase. On further search, the Plaintiff discovered that the Defendant has applied for the registration of the SERON label mark in Class 25 [*Trademark Class 25 pertains to clothes, footwear, headgear*].
7. Class 25 is the same class in which the Plaintiff is already enjoying prior registration.
8. Hence, the Plaintiff has filed the present suit for trade mark and copyright infringement of the mark "SERO".

Observations of the Court:

The observations of the Hon'ble Court are as follows:

1. The mark used by the Defendant is confusing and deceptively similar to the Plaintiff's mark.
2. The Defendant has merely added a 'N' to the Plaintiff's mark which makes it a definite structural, phonetic and visual similarity between both the marks.



3. The mark in which the Plaintiff enjoys copyright has been lifted and used with only the most minor and irrelevant modifications by the Defendant.

Directions issued by the Court:

The Hon'ble Court issued an ad-interim order which is as follows:

1. The Plaintiff has made out a sufficient prima facie case. Prima facie, it would appear that the Defendant is trading on the Plaintiff's goodwill and reputation;
2. The Defendant is forbidden to use the mark "SERON" or any other mark containing the word "SERO" by itself or in combination with any other word or deceptively similar words which is identical to all the Applicant registered trademarks hearing no. 3614725, 472724 and 868257 till the hearing and final disposal of the present suit.
3. Court Receiver / Commissioner has also been appointed to submit a report by January 23, 2021.

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Warm Regards,

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