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Contents

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Article

Termination of employment in India

By **Kumar Panda**

The article in this issue of Corporate Amicus discusses laws relating to termination of employees and workmen in India. It summarises various requirements under the Industrial Disputes Act, 1947 and the Industrial Employment (Standing Orders) Act, 1946, and notes that the notice and payment of service compensation as provided under the state-specific shops and establishment acts (which differ from State to State) must also be complied with by the employers for terminating employees. The article also elaborates on the requirements in case of termination of an employee on account of misconduct. The author recommends that to avoid prolonged litigation one must have robust HR policies and appropriate documentation, in case of termination for misconduct. He also suggests obtaining an acknowledgement recording full settlement of dues, and execution of a separation agreement which also includes no-disparaging provisions.

Termination of employment in India

By Kumar Panda

In India, workforce is technically categorised as 'workmen' and 'non-workmen/employees'. Workmen are typically those who work on the shopfloor in a manufacturing set-up and do not involve someone who are undertaking supervisory or managerial function. With a view to avoid exploitation of workmen, certain statutory protections under the Indian labour laws have been provided concerning termination and conditions of work of workmen. The conditions for employment of non-workmen/ employees are generally governed by the employment contract and the policies adopted by the employer.

Termination of employees/ workmen is of two types:

(i) termination simpliciter or termination for convenience.

(ii) termination as a punitive action on account of misconduct.

A person qualifying as a workman can be terminated for convenience only in accordance with the procedure laid down under the Industrial Disputes Act, 1947 ('**ID Act**').

The ID Act specifies the notice requirement of at least a month or pay in lieu thereof to terminate a workman who has completed a service of at least one year (i.e., 240 days) of service along with payment of retrenchment compensation which is 15 days' pay for every completed year of service.

Further, the employer is required to provide notice to appropriate labour authorities about the termination of workmen. Based on the size of the establishment, an employer employing such number of workmen is required to give a notice period of 90 days instead of 30 days and additionally obtain a prior approval from the appropriate Government.[1,2]

ID Act also mandates compliance with the rule 'Last-come First-go' while terminating workmen which can be deviated only in case of agreement between the employer and workman or due to extraordinary reasons which must be recorded in writing.

In addition to the ID Act, where the establishment has adopted standing orders as per the Industrial Employment (Standing Orders) Act, 1946 ('**IESO Act**'), the procedure

[1] This requirement is applicable to establishments deploying 100 or more workmen in most states and certain states have revised applicability threshold to 300 workmen.

[2] Private establishments and state public sector undertakings have state governments as the appropriate government while entities like central public sector undertakings, ports, airports, mines, etc., have central government as the appropriate government.

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specified therein must be complied with for termination of workmen. IESO Act is generally applicable to manufacturing entities with 100 or more workmen and few States like Haryana have made it applicable to commercial establishments.

While so, conditions of service of non-workmen/ employees are governed as per the contract and the policies of the employer. Additionally, the notice and payment of service compensation as provided under the state-specific shops and establishment acts must also be complied with by the employers for terminating employees. The applicability of state-specific shops and establishment acts to managerial employees differs from State to State and is to be examined based on the facts.

Termination as a punitive action must be undertaken after a domestic inquiry by issuance of notice to the employee, framing charges, and providing the employee a reasonable opportunity to present his case. Further, the action proposed must be based on the nature of the offence.

The state-specific shops and establishment acts like the Andhra Pradesh Shops and Establishments Act, 1988 (as applicable in the states of Andhra Pradesh and Telangana) provide the procedure to be followed for the termination of employees on account of misconduct. However, inquiry for misconduct may not always be necessary when the offence is apparent. For example, an employee can be terminated without a domestic inquiry upon conviction of an employee under a criminal charge. An employee may not be entitled to receive severance compensation if the termination is on account of misconduct.

Employers sometimes resort to termination simpliciter to avoid the obligation of conducting a domestic inquiry as it can be time-consuming. Courts have often held such colourable exercise as invalid and provided relief to employees in the form of reinstatement and payment of back wages.

Workmen can approach labour courts in case of a claim of wrongful termination as per the ID Act. While non-workmen/employees can approach authorities as specified under state-specific shops and establishment acts if the enactment is applicable or to the jurisdiction civil courts if state-specific shops and establishment acts are not applicable. It is worth noting that Indian courts often lean in favour of employees.

To ensure no prolonged litigation, it is, therefore, recommended to ensure appropriate documentation in case of termination on account of misconduct. As a matter of good governance, internal HR policies must be made robust in dealing with instances that can be considered as misconduct. Even if the employer chooses to resort to termination simpliciter to avoid domestic inquiry, it is a general practice that the notice to the concerned employee should not refer to the misconduct.

It is recommended to obtain relevant acknowledgement from the terminated workman / non-workman recording full settlement of all dues at the time of separation. Based on the

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designation of the person, a separation agreement can also be executed. In recent times there has been a growing trend of including no-disparaging provisions in such separation documents so that the employees don't disparage or defame the employer after separation.

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Notifications & Circulars

- IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2023 notified
- IBBI (Insolvency Professionals) (Second Amendment) Regulations, 2023 notified
- Listing of non-convertible debt securities by listed entities – SEBI (Listing Obligations and Disclosure Requirements) (Fourth Amendment) Regulations, 2023 notified
- Redressal of investor grievances through SEBI Complaint Redressal (SCORES) Platform and linking it to Online Dispute Resolution platform – SEBI Circular
- Holding of AGM, EGM through video conference clarified by MCA
- Limited Liability Partnership (Second Amendment) Rules, 2023 notified
- Regulatory reporting by Alternative Investment funds – SEBI Circular
- Insolvency Professional Entities acting as Insolvency Professionals to submit CIRP forms on IBBI platform

IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2023 notified

The Insolvency and Bankruptcy Board of India ('**IBBI**') *vide* Notification No. IBBI/2023-24/GN/REG106, dated 18 September 2023 notified significant developments in the Insolvency Resolution Process for Corporate Persons Regulation 2016 ('**Principal Regulation**'). Following are the significant developments:

a) Regulation 2D has been inserted for providing details of debt, limitation, and default in respect of application filed under Section 7 or 9 of Insolvency & Bankruptcy Code ('**IBC**');

b) Regulation 3A has been inserted to provide for assistance and cooperation by the personnel of the corporate debtor by way of providing records of information relating to assets, finances, operations and records;

c) Regulation 12(1) has been substituted to provide for mandatory submission of claim with proof by the creditor on or before the last date mentioned in the public announcement;

d) Regulation 13(1A), (1B) and (1C) has been inserted *vide* which the RP or IRP shall verify all such claims and categorise them as acceptable or non-acceptable for collation and other certain ancillary requirements;

e) Regulations 16(3A), (3B), and (3C) have been inserted to provide that the class of financial creditors with voting rights not less than 10% may request the IRP or RP and seek for replacement of authorised representative; revisions in the fees of such authorised representative, per meeting; and various roles for them have also been notified;

f) Further, Regulation 30B has been inserted for providing audit of corporate debtor; and Regulations 40A and 40B have also been substituted.

IBBI (Insolvency Professionals) (Second Amendment) Regulations, 2023 notified

IBBI *vide* Notification No. IBBI/2023-24/GN/REG104, dated 20 September 2023, has notified changes to the application procedure of Insolvency Professionals before the Insolvency & Bankruptcy Board of India ('**IBBI**'). Regulation 6 dealing with 'Application for certificate of registration' now provides that the application by Insolvency Professional to the IBBI through the insolvency professional agency can now be made under Part II of Form A along with a non-refundable application fee of INR 20,000/-. Also, upon substitution of Regulation 1(A) it now provides that an insolvency professional entity eligible for registration as an insolvency professional can make an application to the IBBI in Part-II of Form AA of Second Schedule with a non-refundable fee of INR 2,00,000/-. Further, Regulations 10(A) and 10(B) have been inserted which provide for the procedure for 'Surrender of certificate of registration' and 'Special procedure for action on surrender, expulsion, etc.', respectively. By this notification, Form A under Second

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Schedule of the Principal Regulations has also been substituted with a new Form A (Unified Enrolment and Registration Application Form).

Listing of non-convertible debt securities by listed entities – SEBI (Listing Obligations and Disclosure Requirements) (Fourth Amendment) Regulations, 2023 notified

The Securities and Exchange Board of India ('**SEBI**') has notified SEBI (Listing Obligations and Disclosure Requirements) (Fourth Amendment) Regulations, 2023 through which Regulation 62A has been inserted. This regulation provides for the 'Listing of subsequent issuances of non-convertible debt securities' meaning that listed entity, whose non-convertible debt securities are listed shall list all such non-convertible debt securities proposed to be issued on or after 1 January 2024, on the stock exchange(s). In case a listed entity, whose subsequent issues of unlisted non-convertible debt securities made on or before 31 December 2023 are outstanding on the said date, it may list such securities, on the stock exchange. Lastly if a listed entity that proposes to list the non-convertible debt securities on the stock exchange on or after 1 January 2024, shall list all outstanding unlisted non-convertible debt securities previously issued on or after 1 January 2024, on the stock exchange(s) within three months from the date of the listing of the non-convertible debt securities proposed to be listed. Apart from the aforementioned changes, SEBI has also provided a list of securities which are not required to be listed by the listed entity.

Redressal of investor grievances through SEBI Complaint Redressal (SCORES) Platform and linking it to Online Dispute Resolution platform – SEBI Circular

SEBI *vide* its Circular No. SEBI/HO/OIAE/IGRD/CIR/P/2023/156 dated 20 September 2023, has come out with a framework for handling investor grievances received through SCORES by Entities and monitoring of the redressal process by designated bodies. On 16 August 2023, SEBI had notified SEBI (Facilitation of Grievance Redressal Mechanism) (Amendment) Regulations, 2023 investor grievance handling mechanism through SCORES by making the entire redressal process of grievances in the securities market comprehensive by providing a solution that makes the process more efficient by reducing timelines and by introducing auto-routing and auto-escalation of complaint. The present Circular subsequently provides a revised framework.

Annexure I states about the procedure: (1) Submission of the complaint by the investors and handling of the complaint by the entity (listed companies, etc.) by submitting an Action Taken Report (ATR) within 21 days; (2) Upon dissatisfaction through ATR submitted by the entity, First Review of the Complaint by Designated Bodies (specified in Schedule II); (3) Upon dissatisfaction through ATR submitted by Designated Body, the cognizance of Second Review can be taken by SEBI whose report shall be final. The Circular further provides for SCORES authentication for registered intermediaries, market infrastructure institutions, access to SCORES Portal and other requirements applicable to Designated Bodies; action for failure to redress investor complaints by listed companies. Further,

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Annexure II provides for general provisions regarding investor grievance redressal.

Holding of AGM, EGM through video conference clarified by MCA

The Ministry of Corporate Affairs ('**MCA**') has issued a General Circular dated 25 September 2023 providing certain clarifications on holding of AGM or EGM through video conference ('**VC**') or other audio-visual means ('**OAVM**'). It has been decided to allow companies whose AGMs are due in the Year 2023 or 2024, to conduct their AGMs through VC or OAVM on or before 30 September 2024 in accordance with the requirements laid down in Para 3 and Para 4 of the General Circular No. 20/2020 dated 5 May 2020. It has also been decided to allow and transact items through postal ballot in accordance with the framework provided in the earlier Circulars up to 30 September 2024. It is further clarified that General Circular shall not be construed as conferring any extension of statutory time for holding of AGMs by the companies under the Companies Act, 2013.

Limited Liability Partnership (Second Amendment) Rules, 2023 notified

The Ministry of Corporate Affairs has *vide* Notification dated 1 September 2023 notified Limited Liability Partnership (Second Amendment) Rules, 2023. Form 3 (Information with regard to Limited Liability Partnership Agreement and changes, if any, made therein) and Form 4 (Notice of appointment, cessation, change in name / address / designation of a designated partner or partner and consent to become a partner / designated partner) have been substituted with new Form 3 and Form 4 for their respective purposes.

Regulatory reporting by Alternative Investment funds – SEBI Circular

SEBI *vide* its Circular No. SEBI/HO/AFD/SEC-1/P/CIR/2023/0155, dated 14 September 2023, has notified the regulatory reporting requirements by Alternative Investment Funds ('**AIFs**'). Further, the quarterly reporting format has been revised, and the quarterly report shall be submitted within fifteen days from the end of each quarter.

Insolvency Professional Entities acting as Insolvency Professionals to submit CIRP forms on IBBI platform

Insolvency and Bankruptcy Board of India *vide* its Circular No. IBBI/CIRP/60/2023, dated 1 September 2023, has extended the facility for submitting the Corporate Insolvency Resolution Process (CIRP) forms on IBBI website to the Insolvency Professional Entities ('**IPEs**') acting as insolvency professionals. According to the Circular, IPEs shall access the IBBI website with the help of a unique username and password provided by the IBBI and authorise an IP handling the process to upload/ submit the CIRP Forms. Further, CIRP forms filed till 30 September 2023 shall not attract any fee as provided under Regulation 40B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

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Ratio Decidendi

- Contracts – Party when allowed to escape effect of a document signed by it – Plea of *non est factum* when available – Supreme Court
- Agreements inextricable in nature, containing non-compatible Arbitration clauses – Disputes to be resolved as per the main/umbrella Agreement – Delhi High Court
- After expiry of extension granted for completion of CIRP, Insolvency Resolution Professional / RP is not obliged to accept claim of creditor for considering it in the Resolution Plan – NCLAT

Contracts – Party when allowed to escape effect of a document signed by it – Plea of *non est factum* when available

The Hon'ble Supreme Court of India has held that the defense of *non est factum* (this is not the deed), if proven, shall absolve the signee from any liability that may arise from document signed. The Apex Court further held that the person claiming the doctrine of *non est factum,* must prove that: (a.) he belongs to the class of person, who without their fault were unable to have correct understanding of the document due to some disability which may include factors like blindness or illiteracy; (b) the signatory must have made a fundamental mistake as to the nature of the contents of the document being signed, including its practical effects; and (c) document must be radically different from the one intended to be signed.

Brief facts:

The Appellants who were plaintiff in the original suit **('Plaintiffs/Appellants')** agreed to enter a Power of Attorney **('POA')** with the Defendant. *Vide* the said POA, Defendants were to obtain rights to develop Appellant's land into several plots after obtaining necessary permissions from the Government Officials, so that the said plots could be sold to generate revenue for the Appellants. The Defendants deceitfully added two additional terms to the POA which enabled them to sell the property and make necessary endorsements in the government records.

Based on this POA the Defendants, without the knowledge of the Plaintiffs sold the property of the Plaintiffs to their relatives at undervalued rates. The Appellants later discovered the sale transactions for which they did not provide authorization to the Defendants. Gaining knowledge about the same, the Appellants preferred a suit for declaring them as the absolute owners of the said property on the grounds of misrepresentations in the POA. This suit was dismissed by the Trial court holding the contents of the POA to be genuine **('Trial Court')**. The Appellant preferred a first appeal against the judgement of the Trial Court **('First Appeal')**. In the said appeal, the Hon'ble Court, basis the principles of *non est factum*, decided that the contents of POA were fraudulently incorporated without any due authorization, with a view to depriving the Appellants of their valuable rights. The Defendants preferred second appeal against the first appeal wherein the Hon'ble Madras High Court concurred with the findings of the Trial court and reversed the order passed in the First Appeal **('Second Appeal')**. In the Second Appeal, the Hon'ble Court observed that the plea of *non est factum* was not taken before the Trial court. The present appeal was preferred before the Hon'ble Apex Court against the order passed in the Second Appeal.

Submissions by the Appellants/Plaintiff:

- The Appellants only executed the POA for the limited purpose of development of land by dividing it into plots and to obtain necessary permissions from the authorities.

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- The principle of *non est factum* was decided in favour of Appellants in the First Appeal. The Defendants have failed to prove that the Appellants knowingly and willingly, having understood the contents of the POA, had executed the same. The Defendant never produced the original POA, and it was alleged that the same has been lost.
- The Defendants had taken undue advantage of their illiteracy and resourcefulness to deprive the Plaintiffs of their rights, who are illiterate and simple rustic villagers.

Submissions by Respondent:

- The Appellants after admitting about the execution of the POA cannot dispute its contents.
- The POA being a registered document, its contents would be deemed to be correct unless proven otherwise. There is a presumption of the correctness of the contents of the POA. The doctrine of *non est factum* would not arise once the Appellants admit about the execution of POA.
- The scope of the present appeal is very limited, and unless exceptional and special circumstances are shown to establish the perversity in the judgment of the Hon'ble High Court, no interference is required to be made by the Hon'ble Apex Court.

Decision:

The Hon'ble Supreme Court observed that a plea of *non est factum* can be taken to plead that the said document is invalid as its executor/signatory was mistaken about its character at the time of executing the same. It is a latin maxim which literally means *'it is not the deed.'* A plea of *non est factum* is a defense available under the law of Contract to allow a person to escape the effect of a document which was executed by him in its true spirit.

The Court explained that the successful plea of *non-est factum* requires the following: (a.) The person pleading *non est factum* must belong to 'class of persons, who through no fault of their own, are unable to have any understanding of the purpose of the particular document because of blindness, illiteracy or some other disability' (b) 'The 'signatory must have made a fundamental mistake as to the nature of the contents of the document that is being signed', including its practical effects. (c) The document must have been radically different from one intended to be signed. The Hon'ble Supreme Court seconded the view taken by the Court in the First Appeal and held that the circumstances existed in this case for applying the doctrine of *non-est factum*.

The Hon'ble Apex Court further held that once the appellate court during the First Appeal after appreciating the evidence on record concluded that the plea of *non-est factum* was proved, the said finding, being a finding of fact, ought not have been interfered by the Hon'ble High Court in Second Appeal. Therefore, once the POA was found to be invalid, any further action taken pursuant to it cannot be sustained.

[*Ramathal and others* v. *K Rajamani (Dead) through Lrs and Anr.* – Judgement dated 17 Aug 2023, 2023 SCC OnLine SC 1022]

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Agreements inextricable in nature, containing non-compatible Arbitration clauses – Disputes to be resolved as per the main/umbrella Agreement

The Hon'ble Delhi High Court has held that in case of two inseparable agreements containing non-compatible arbitration clauses, the clause as mentioned in the main or umbrella agreement should supersede.

The Court also affirmed that it cannot exercise jurisdiction under Section 11(6) of the Arbitration & Conciliation Act, 1996 ('**Act**') in the absence of a notice invoking arbitration under Section 21 of the Act.

Brief facts:

L&T Housing Finance Ltd ('**Respondent No.1**)' is a company in the business of advancing finances. Raheja Developers Ltd. (**Respondent No. 2**)' is involved in the business of real estate and construction. Respondent No.2 has undertaken the construction of a real estate project called 'Raheja Vanya' situated at Sector-99A, Gurgaon **('Project')**

Petitioners approached Respondent No. 2 for purchasing residential unit under the Project and later approached Respondent No.1 for a loan towards payment of residential unit. Thereafter, Petitioners, Respondent No.1 and Respondent No.2 executed and entered into a Tripartite Agreement **('Tripartite Agreement')**.

A separate home loan agreement ('**Loan Agreement**') was executed between the Petitioner and Respondent No.1. The Petitioner secured the loan by mortgaging all rights, title and benefits accruing from the residential unit with Respondent No.1 and Respondent No.2 agreed and confirmed that it would not create any third-party rights in the mortgaged property. Based on the Tripartite Agreement, Respondent No. 1 sanctioned and disbursed loans to the Petitioners as per as per Loan Agreement. It was agreed between the Petitioners and Respondent No. 2 that pre-EMIs should be paid by Respondent No. 2 for a maximum period of 48 months and Respondent No. 1 shall deduct the pre-EMIs from the first disbursement.

Later on, Petitioners received a letter from Respondent No. 1 stating that the Basic Prime Lending Rate ('**BPLR**') was erroneously mentioned as 17.75% and the same has to be rectified as 18.10%. Petitioners protested against the same, leading to a dispute between the Parties.

Thereafter, Respondent No. 1 sent a legal notice demanding payment of EMI. Further, a notice from Respondent No.1 was delivered under Section 13(2) of SARFAESI Act stating that owing to defaults in the payment of loan instalments, the loan account of the Petitioners had been classified as Non-Performing Asset.

Subsequently, Petitioners invoked Arbitration under Clause 27 of Tripartite Agreement and approached the High Court of Delhi.

Contentions of Respondent:

Respondent No. 1 raised the objection that dispute for rectification of BPLR is within the ambit of Loan Agreement and not the Tripartite Agreement. The rate of interest, tenure of

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instalments, BPLR, etc. are disputes which only concern and relate to the Loan Agreement. Therefore, as per the Arbitration Clause under the Loan Agreement, the exclusive jurisdiction lies with the Courts at Kolkata and the petition filed under this Hon'ble Court has no territorial jurisdiction.

The second objection raised by Respondent No.1 was that mandatory notice of invocation under Section 21 of the Act was not served by the Petitioners and hence, the arbitration proceeding had not commenced.

Contentions of Petitioner:

As per subvention scheme under the Tripartite Agreement, both Respondent No.2 and Petitioners were liable to pay pre-EMIs and EMIs, respectively to Respondent No.1. The rate of interest applicable to the loan was linked to the lender's BPLR and the increase in the rate was to be borne by Respondent No. 2. Further, other terms or covenants of the Loan Agreement made it inseparable from the Tripartite Agreement executed between the Parties.

The unilateral appointment of sole Arbitrator by Respondent No.1 under Clause 27 of the Tripartite Agreement was in violation of Section 12(5) of the Act and various judicial pronouncements in this regard. Therefore, no purpose would have been served by sending notice under Section 21 of the Act as the appointment of an Arbitrator under the mentioned Clause would not have been viable. Further, the Petitioners had sent an email to Respondent No. 2 for the need for third-party assistance.

Analysis and decision of Court:

The Hon'ble Court has observed that a co-joint and holistic reading of both the Agreement, made it clear that the Loan Agreement and the Tripartite Agreement were inseparable in nature. The Agreements did not operate independent of each other and that the Loan Agreement was inextricable to the Tripartite Agreement, which was the main or umbrella Agreement. The Court put reliance on the Supreme Court's judgment in the case of *Olympus Superstructures Pvt Ltd.* v. *Meena Vijay Khetan and Other* [(1999) 5 SCC 651] and *Balasore Alloys Limited* v. *Medima LLC* [(2020) 9 SCC 136] and concluded that when dissimilarity occurs in arbitration clause of inter-connected agreement, the disputes should be resolved under the main or umbrella agreement, which in the present case was the Tripartite Agreement. Therefore, on the basis of the Tripartite Agreement, the Hon'ble High Court of Delhi had jurisdiction over the present dispute.

To the second objection raised by Respondent No. 1, the Hon'ble Court relied on various judgements and the statutory provision and held that only in cases where an Arbitrator is not appointed as per the procedure agreed between the parties or on account of failure of either of the parties, the jurisdiction of the Court can be invoked in accordance with Section 11(6) of the Act.

The Court also took into account the e-mail sent by the Petitioner to Respondent No. 2, which the Petitioner advocated to be construed as an invocation under Section 21 of the Act. The Court placing its reliance on the case of *Bharat Chugh* v. *MC Agarwal HUF* [2021 SCC OnLine Del 5373], held that notice

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invoking arbitration must refer to the arbitration clause of the agreement. It further held that notice under Section 21 of the Act is a pre-requisite to invoke jurisdiction of the Court under Section 11(6) and has clarified that notice sent *via* email to Respondent No. 2 did not constitute a notice under Section 21 of the Act.

Therefore, the first objection raised by Respondent No.1 with respect to invocation of Arbitration clause under the Tripartite Agreement was held in favour of the Petitioner, while the second objection with respect to invocation of notice under Section 21 of the Act was decided in favour of Respondent No.1, subsequently leading to dismissal of the petition filed by the Petitioner.

[*Amit Guglani* v. *L&T Housing Finance* – Judgment dated 22 August 2023 in ARB.P. 1317/2022 and I.A. No. 19286/2022, Delhi High Court]

After expiry of extension granted for completion of CIRP, Insolvency Resolution Professional / RP is not obliged to accept claim of creditor for considering it in the Resolution Plan

The National Company Law Appellate Tribunal (**'NCLAT'**) has held that a creditor shall submit its claim with proof on or before the last date mentioned in the Public Announcement. If the creditor fails to submit its claim within the time stipulated in the Public Announcement, it may submit its claim on or before the completion of time extended for concluding the Corporate Insolvency Resolution Process **('CIRP')**.

Brief facts:

In the present case, Insolvency Proceeding was initiated against Radha Madhav Corporation Ltd. ('**RMCL'**) and the CIRP commenced on 22 October 2020. The IRP issued a Public Announcement on 12 November 2020 inviting claims against the Corporate Debtor. The last date for submission of claims was 25 November 2020. The Deputy Commissioner, UTGST **('UTGST')** and Assistant Commissioner CGST and Central Excise **('AC-CGST')** submitted their claims against the Corporate Debtor on 9 November 2021 and 2 November 2021 respectively, after a delay period of 11 (eleven) months from the last date to submit claims to be considered in the Resolution. Hence, the said claims were rejected by the Resolution Professional ('**RP**') on grounds of delay.

The Committee of Creditors (**'CoC'**) approved a Resolution Plan filed by the Successful Resolution Applicant **('SRA')** by 100 % majority. At the time of Resolution Plan to be approved by NCLT, UTGST and AC-CGST filed Interim Applications before the NCLT, against non-consideration of their claims by the RP and rejection of the Resolution Plan on the said basis. The NCLT on 1 August 2022 approved the Resolution Plan and dismissed the said Interim Application filed by UTGST and AC-CGST. Consequently, against the orders of NCLT, UTGST and AC-CGST filed appeals challenging the approval of the Resolution Plan and the rejection of their claims before the NCLAT.

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Submission by the Appellant:

The Appellant i.e., UTGST and AC-CGST, submitted that RP was incorrect in rejecting their claims on account of delay. In support of the same, the Appellant pointed out the following factors which should have been considered by RP to decide on the aspect of delay:

- The COVID-19 pandemic was prevailing at the time of the last date for filing claims, and the administration was stretched due to the same.
- They had filed Interim Applications before the Adjudicating Authority (NCLT) for issuing directions to the RP to admit their claim by allowing exclusion of certain period (COVID-19) for the purposes of determining limitation.
- Out of the total amount of INR 36.40 crore sanctioned in the Resolution Plan, INR 36 crore were allotted to the Single member of COC. They argued that this resolution plan does not meet the requirements of Section 30(2) of the IBC and therefore was not binding on the State/government. They relied on applicability of the judgment of the Hon'ble Supreme Court in the matter of *State Tax Officer v. Rainbow Papers Limited* 2022 (‘***Rainbow***’) to support their contention.

Submission by the Respondent:

- The RP argued that it was constrained not to accept the claim of UTGST as it was filed beyond the prescribed period. They also argued that once a Resolution Plan is approved by the Adjudicating Authority it shall be binding on the Corporate Debtor including government.
- RP is required to follow the timelines as provided under Regulation 12 of Insolvency and Bankruptcy Board of India (CIRP for Corporate Persons) Regulations, 2016, which lays down the process for filing the claim. Since the present claim was filed beyond the prescribed period, the RP was constrained to not accept the claims. They relied on the judgement of the Hon'ble Supreme Court in *Essar Steel India Ltd. Committee of Creditors* v. *Satish Kumar Gupta* to support their contention.
- The Resolution Plan does not contravene any provisions of law for the time being in force and was in compliance with the provisions of Regulations 38 and 39 of the IBBI (CIRP of the Corporate Person) Regulations, 2016, and the interests of all stakeholders were taken care of.
- The judgement of *Rainbow* (*supra*) does not come to the aid of AC-CGST since that judgment was passed on 6 September 2022, whereas the resolution plan in this matter was approved on 1 August 2022 and in terms of the settled position of law of prospective overruling, *Rainbow* (*supra*) was not applicable in the present matter.

Decision of the Tribunal:

The Tribunal examined the nature and extent of the inherent powers of the RP to accept claims after the last date of submission of claims and held that the RP is not duty bound to collate claims which are belatedly received after the last date as same will delay the CIRP process. In support of their finding,

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reliance was placed on the judgement of this Tribunal in *Deputy Commissioner, Central GST* v. *Mr. Kiran Shah, Resolution Professional,* [Comp. App. (AT) (Ins) No. 328 of 2021] and in *Mukul Kumar, Resolution Professional of KST Infrastructure Ltd.* v. *RPS Infrastructure Ltd* [Company Appeal (AT) (Insolvency) No. 1050 of 2020], wherein it has been held that whenever any claim is filed after the extended period provided in Regulation 12(2) of the CIRP Regulations, the RP should reject the claim.

The Appellate Tribunal also noted that the legislation has not provided any discretion to RP for admitting any claim after the extended period.

NCLAT held that there has been no dereliction of duty on the part of the RP in rejecting the belated claims of UTGST and AC-CGST. Considering the same, NCLAT do not find any error or irregularity on the part of RP to have rejected the belated claims of UTGST and AC-CGST.

[*Deputy Commissioner, UTGST, Daman* v. *Rajeev Dhingra* – Company Appeal (AT) (Insolvency) No. 1340 of 2022 dated 14 September 2023, NCLAT]

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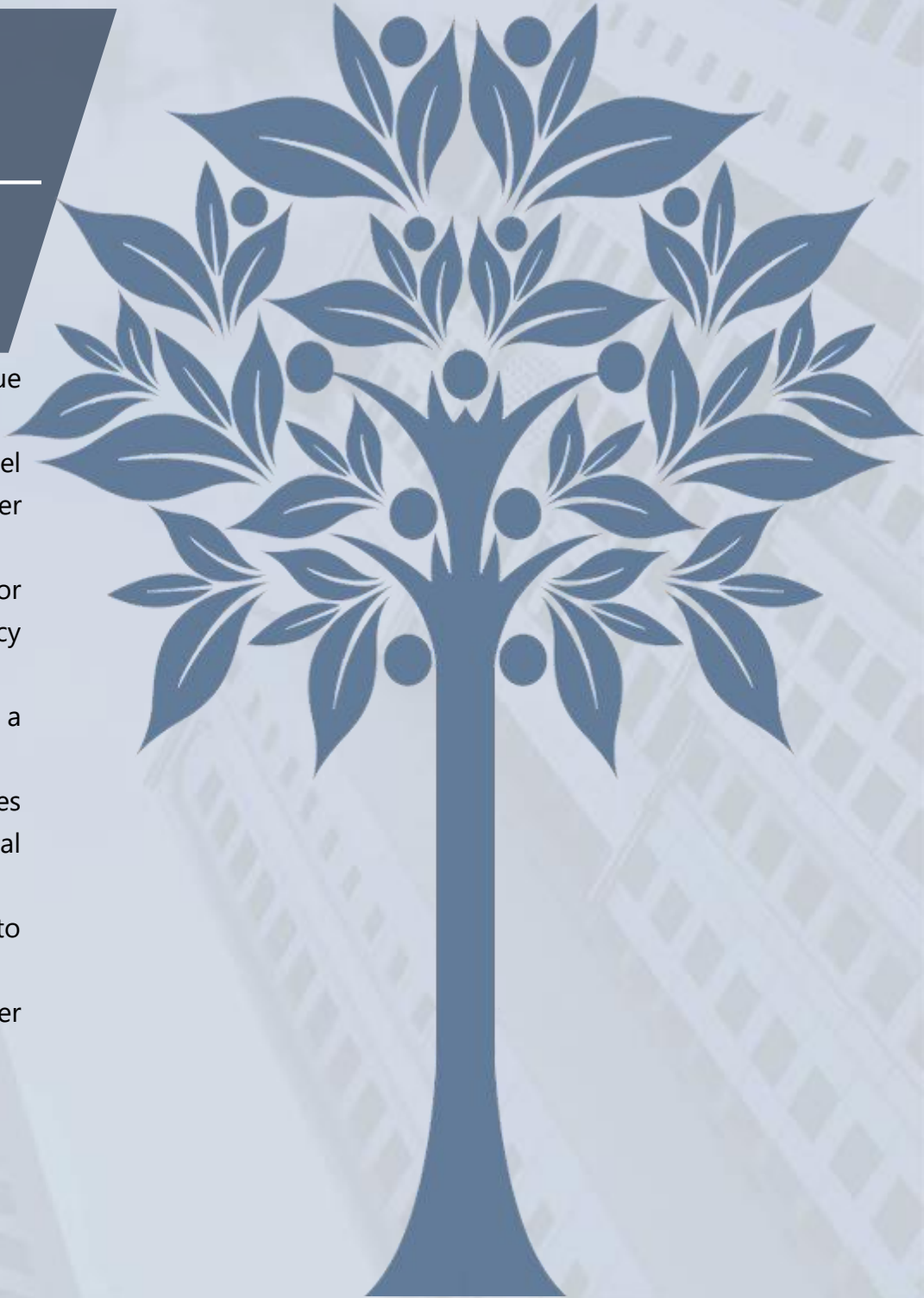
News Nuggets



- Arbitration clause in an unstamped agreement, whether valid? – Issue referred to 7-Judge Bench of the Supreme Court
- Insolvency – Liquidator does not possess unfettered discretion to cancel valid auction on mere expectation of higher price in future – Former promoter director is not a 'related person' in case of bidding of assets
- Insolvency – New management of corporate debtor is not responsible for non-compliances of MCA filings occurring before insolvency commencement date
- Insolvency – No provision for re-opening of a CIRP under IBC – Where a settlement fails, only a petition for fresh admission admissible
- Insolvency – CoC's decision to accept relinquishment of personal guarantees is a commercial decision which cannot be challenged by dissenting financial creditor
- Arbitration – Claims cannot be referred to arbitration when prerequisites to arbitration as per the agreement are not fulfilled
- Arbitration – Court can, within the limited scope of judicial scrutiny under Section 11 of A&C Act, examine if claims are frivolous or meritless

Arbitration clause in an unstamped agreement, whether valid? – Issue referred to 7-Judge Bench of the Supreme Court

The 5-Judge Bench of the Supreme Court has referred to a 7-Judge Bench the question of validity of an arbitration agreement which is part of an unstamped or insufficiently stamped agreement or contract. The Court in this regard observed that there are larger ramifications and consequences of the view of the majority decision in a 5-Judge Bench of the Court in *N N Global Mercantile Private Limited* v. *Indo Unique Flame Limited and Others* [(2023) 7 SCC 1]. It may be noted that the Court in the said decision in the case of *N N Global* had held that arbitration cannot be invoked when the arbitration agreement, or the arbitration clause in a contract, is contained in an unstamped or insufficiently stamped agreement or contract. The present 5-Judge Bench was hearing a curative petition on 26 September 2023 in *Bhaskar Raju and Brothers* v. *Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram Other Charities* and has directed the matter to be listed before the 7-Judge Bench on 11 October 2023.

Insolvency – Liquidator does not possess unfettered discretion to cancel valid auction on mere expectation of higher price in future – Former promoter director is not a 'related person' in case of bidding of assets

In a case where the Liquidator after issuing the certificate that the appellant had won the auction of the subject property, cancelled the e-auction without giving any justification or reason for such cancellation, the Supreme Court has stated that it is incomprehensible that an administrative authority can take a decision without disclosing the reasons for taking such a decision.

On the contention that there was no requirement for the Liquidator to give reasons for cancellation of the bid during the period prior to 30 September 2021, the Court was of the view noted that while para 1(11A) came to be inserted in Schedule 1 to the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 only with effect from 30 September 2021, it does not imply that an auction sale or the highest bid prior to the aforesaid date could be cancelled by the Liquidator exercising unfettered discretion and without furnishing any reason.

Allowing the appeal filed against the NCLAT decision, the Apex Court in *EVA Agro Feeds Private Limited* v. *Punjab National Bank* [Judgement dated 6 September 2023], was also of the view that mere expectation of the Liquidator that a still higher price may be obtained can be no good ground to cancel an otherwise valid auction and go for another round of auction. The Supreme Court in this regard observed that even after cancelling the highest bid of the appellant, in the subsequent sale notice, the Liquidator had again fixed the reserve price of the subject property at INR 10 crore, which was the reserve price in the previous round of auction sale and which was also the bid value of the appellant.

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The Court ruled that that there can be no absolute or unfettered discretion on the part of the Liquidator to cancel an auction which is otherwise valid.

Further, the Court also rejected the contention that since the director and principal shareholder of the appellant was also one of the promotor director and principal shareholder of the corporate debtor, he is a 'related party' of the corporate debtor and as such is not eligible. The Apex Court in this regard noted that that the 'related party' had ceased to be in the helm of affairs of the corporate debtor more than a decade ago and that he was not in charge of the company or an influential member of the company i.e., the corporate debtor when the appellant had made its bid pursuant to the auction sale notice.

Insolvency – New management of corporate debtor is not responsible for non-compliances of MCA filings occurring before insolvency commencement date

The National Company Law Tribunal, Chandigarh Bench ('**NCLT**') has held that the current management of the corporate debtor shall not be held accountable for the misdoings or misconduct of the previous promoters or the directors of the corporate debtor before the insolvency commencement date. In *Skyhigh Infraland Private Limited* v. *Monitoring Committee of Corporate Debtor* [decision dated 4 September 2023], the NCLT had admitted the resolution plan by the Successful Resolution Applicant ('**SRA**') against the corporate debtor. Subsequently, when the SRA intended to comply with statutory requirements of removing the previous promoters and proceeded for statutory filings with respect to the same at Ministry of Corporate Affairs ('**MCA**') Portal, they were denied with following remarks i.e., 'not marked for management dispute'. The NCLT placed reliance on the Supreme Court judgement in *Committee of Creditor of Essar Steel India Limited* v. *Satish Kumar Gupta & Ors.* and held that the new management of the corporate debtor shall not be made responsible for the defaults that arose before the period when the insolvency commenced. It directed the Registrar of Companies to permit the new management to submit the required returns and financial statements as mandated under the Companies Act, 2013 and the Rules thereunder.

Insolvency – No provision for re-opening of a CIRP under IBC – Where a settlement fails, only a petition for fresh admission admissible

The National Company Law Tribunal, Mumbai Bench ('**NCLT**'), has held that the Insolvency and Bankruptcy Code, 2016 ('**IBC**') does not contain any provision for the restoration of a Corporate Insolvency Resolution Process ('**CIRP**') once the same has been ordered to be closed by the adjudicating authority. In *Amluckie Investment Company Limited* v. *Skill Infrastructure Limited* [Decision dated 25 August 2023], the parties had entered into a settlement agreement after the initiation of CIRP and the National Company Law Appellate Tribunal ('**NCLAT**') had observed that in case of default on the part of the corporate debtor in adhering to the terms of the settlement agreement, the financial creditor shall be at liberty to approach the adjudicating authority to reopen the CIRP in accordance with law. Subsequently, when the corporate debtor

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failed to honour the settlement agreement, the financial creditor filed an interlocutory application seeking the revival of CIRP against the corporate debtor. However, the NCLT held that the aforementioned words as stated by the NCLAT shall only mean to warrant the restoration of a petition under Section 7 of the IBC for fresh admission and cannot be interpreted to resume the CIRP once the same has been concluded. Further, the NCLT also observed that the words 'in accordance with law' as stated by the NCLAT clearly indicate that the reopening of the proceedings shall be in accordance with the provisions of the IBC, and since the IBC does not provide for revival of CIRP in case of failure of settlement between the parties, the same cannot be interpreted in disregard of the provisions of the IBC.

Insolvency – CoC's decision to accept relinquishment of personal guarantees is a commercial decision which cannot be challenged by dissenting financial creditor

The National Company Law Appellate Tribunal, New Delhi Bench, ('**NCLAT**') while adjudicating an appeal filed in *SVA Family Welfare Trust (SVA) & Anr.* v. *Ujaas Energy Ltd. & Ors* [Decision dated 21 August 2023] has reversed the National Company Law Tribunal's ('**NCLT**') order and upheld the decision of the Committee of Creditors ('**CoC**') to accept a value for relinquishment of personal guarantees of the corporate debtor under the resolution plan submitted by the successful resolution applicant. The said resolution plan contained a clause whereby the rights under personal guarantees of the corporate debtor would stand extinguished and the financial creditors would be paid compensation towards release of such personal guarantees and the same was approved by the CoC with a vote share of 78.04% with only one dissenter which held 5.83 vote share in CoC. In this regard, the NCLT rejected the plan on the ground that CoC cannot extinguish rights of the particular secured creditor to proceed against the personal guarantor of the corporate debtor and so, the plan contravened Section 30(2)(e) of the Insolvency and Bankruptcy Code, 2016. Now, the NCLAT while agreeing to the appellant's arguments that personal guarantees are security interest under IBC and can be dealt with in a resolution plan, and placing reliance on the judgment of the Hon'ble Supreme Court in *Edelweiss Asset Reconstruction Company Ltd.* v. *Mr. Anuj Jain*, has held that there is no error in the consideration by the CoC of the resolution plan submitted by the successful resolution applicant and the commercial wisdom of the CoC by approving the resolution plan ought to be given due weightage.

Arbitration – Claims cannot be referred to arbitration when prerequisites to arbitration as per the agreement are not fulfilled

The Hon'ble High Court of Delhi has dismissed the application for appointment of arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 stating that prerequisites to arbitration as per the agreement between the parties were not fulfilled. In *BCC-MONALISHA (JV)* v. *Container Corporation of India* [Decision dated 28 August 2023], the agreement mentioned that the parties shall be required to notify the General Manger as a pre-arbitration requirement and also stated that only those disputes shall be referred to arbitration

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whose cumulative claim value is less than or equal to 20 per cent of the contract value. Dismissing the application, the High Court observed that the petitioner failed to notify its claims to the General Manager which was a prerequisite to arbitration and also failed to indicate the claim values against certain items in order to showcase the claim is within the threshold limit. The High Court dismissed the petition stating that prerequisites to arbitration as per the agreement between the parties were not fulfilled.

Arbitration – Court can, within the limited scope of judicial scrutiny under Section 11 of A&C Act, examine if claims are frivolous or meritless

The Hon'ble Bombay High Court has held that despite the limited scope of judicial scrutiny provided under Section 11 of the Arbitration and Conciliation Act, 1996 ('**A&C Act**'), the Court may refuse to appoint an arbitrator when on a *prima facie* scrutiny of the material on record, it can conclude that the claims sought to be arbitrated are frivolous and have no merit. In the case of *22Light* v. *OESPL Pvt Ltd.* [Decision dated 22 August 2023], when a dispute arose between the parties with respect to the respondent being liable to make payment to the petitioner, the petitioner filed an application under Section 11 of the A&C Act. In this regard, the respondent contended that the claims made by the petitioner were meritless, however, the petitioner contended that Section 11 of the A&C Act states that Court shall only examine the existence of an arbitration agreement between the parties which was undisputed in the instant case and that it shall be beyond the scope of the said section to go into the merits of claims. The High Court while rejecting the petitioner's application, held that it was entitled to refuse to appoint an arbitrator under Section 11 of the A&C At where it was clearly evident that the claims sought to be arbitrated were frivolous and meritless.

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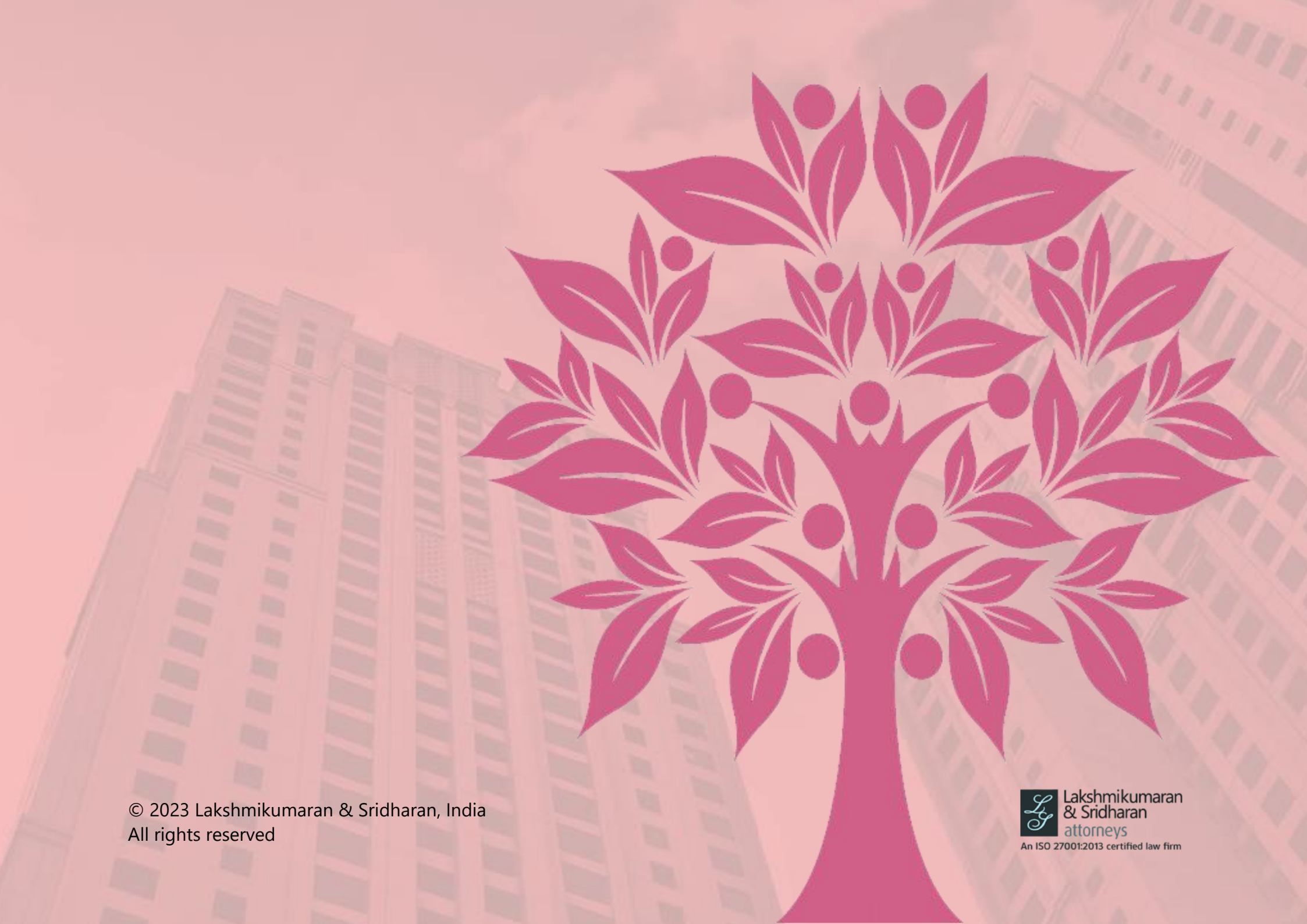

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