DUA ASSOCIATES
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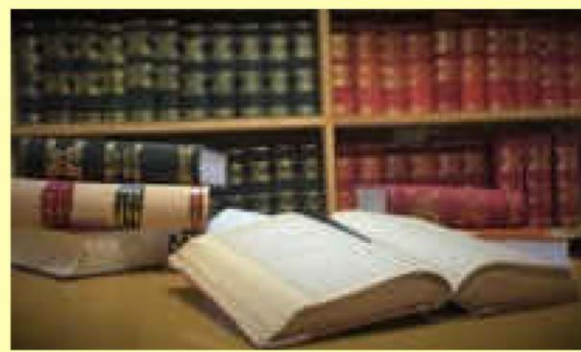

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UPDATES

I. FEMA & FDI

i. Review of the Foreign Direct Investment Policy in the Telecom Sector

The Department for Promotion of Industry and Internal Trade has amended the extant Consolidated FDI Policy Circular of 2020, as amended from time to time ("**FDI Policy**"), by way of Press Note 4 of 2021 ("**Press Note 4**") to permit 100% (one hundred percent) foreign direct investment in the telecom sector (including telecom infrastructure service providers category 1) under the automatic route. Prior to the aforementioned amendment to the FDI Policy, any investment beyond 49% (forty nine percent) in the telecom sector required the prior approval of the Government.

As per the Press Note 4, all Indian companies engaged in telecom services are eligible to receive FDI to the extent of 100% (one hundred percent) under the automatic route, including telecom infrastructure providers category-I, viz. basic, cellular, United Access Services, Unified license (Access services), Unified License, National/ International Long Distance, Commercial V-Sat, Public Mobile Radio Trunked Services (PMRTS), Global Mobile Personal Communications Services (GMPCS), all types of ISP licenses, Voice Mail/ Audiotex/ UMS, Resale of IPLC, Mobile Number Portability services, Infrastructure Provider Category-I (providing dark fibre, right of way, duct space, tower) and other service providers as may be permitted by the Department of Telecommunications.

The Press Note 4 further provides that the licensing, security and any other terms as may be specified by the Department of Telecommunications, from time to time, must be observed by the licensee/ entities providing the telecom services, as well as the investors.

The Press Note 4 also clarifies that investments in the telecom sector from countries sharing a land border with India would however require prior approval of the Government.

The full text of Press Note 4 can be accessed here.

ii. Investment by Foreign Portfolio Investors in Debt – Review

The Reserve Bank of India ("**RBI**") has by way of A.P. (DIR Series) Circular No. 19 dated November 8, 2021 ("**Circular**"), permitted Foreign Portfolio Investors ("**FPIs**") to invest in debt securities issued by Infrastructure Investment Trusts ("**InvITs**") and Real Estate Investment Trusts ("**REITs**").

The Circular provides that FPIs can acquire debt securities issued by InvITs and REITs under the Medium-Term Framework ("**MTF**") or the Voluntary Retention Route ("**VRR**"). Such investments would be reckoned within the limits and would be subject to the terms and conditions for investments by FPIs in debt securities under the respective regulations of MTF and VRR.

To reflect the above, the RBI has made necessary amendments to the Foreign Exchange Management (Debt Instruments) Regulations, 2019, by way of Foreign Exchange Management (Debt Instruments) (First Amendment) Regulations, 2021 ("**First Amendment Regulations**").

The full text of the Circular can be accessed here and the full text of the First Amendment Regulations can be accessed here.

iii. External Commercial Borrowings and Trade Credits Policy – Changes due to LIBOR Transition

The Reserve Bank of India ("**RBI**") has by way of A.P. (DIR Series) Circular No. 19 dated December 8, 2021 ("**Circular**"), revised the benchmark rates and the maximum spread over benchmark for calculating the all-in-cost, for foreign currency External Commercial Borrowings ("**ECBs**") and Trade Credits ("**TCs**").

Prior to the Circular, the Master Direction - External Commercial Borrowings, Trade Credits and Structured Obligations dated March 26, 2019 (as amended), benchmark rate in case of foreign currency ("**FCY**") ECBs/TCs specified 6 (six) months London Inter-Bank Offered Rate ("**LIBOR**") of different currencies or any other 6-month interbank interest rate applicable to the currency of borrowing, e.g., Euro Interbank Offered Rate ("**EURIBOR**"). Going forward, the benchmark rate in case of FCY ECBs/TCs would refer to any widely accepted interbank rate or alternative reference rate ("**ARR**") of 6 (six) month tenor, applicable to the currency of borrowing.

The Circular further provides that the all in-cost ceiling for new FCY ECBs has been increased to 500 bps and for new TCs to 300 bps, over the benchmark rates.

The Circular further provides that in order to enable smooth transition of existing ECBs/ TCs linked to LIBOR whose benchmarks are changed to ARRs, the all-in cost ceiling for such ECBs/ TCs has been revised upwards by 100 basis points to 550 bps and 350 bps, respectively, over the ARR. The Circular mandates that the authorised dealer Category-I banks must ensure that any such revision in ceiling is only on account of transition from LIBOR to alternative benchmarks and not otherwise.

The Circular clarifies that there is no change in the all-in-cost benchmark and ceiling for INR ECBs/ TCs.

The Master Direction - External Commercial Borrowings, Trade Credits and Structured Obligations has also been updated to reflect the above changes.

The full text of the Circular can be accessed here and the full text of the updated Master Direction - External Commercial Borrowings, Trade Credits and Structured Obligations can be accessed here.

II. CORPORATE

i. Circular - Relaxation on the levy of additional fees for filing certain e–forms for the financial year ended on March 31, 2021

The Ministry of Corporate Affairs has by way of General Circular No. 22/ 2021, dated December 29, 2021 ("**Circular**"), relaxed the levy of additional fees that would be levied for the filing of certain e-forms in relation to the annual financial statements/ returns, for the financial year ended on March 31, 2021.

The Circular clarifies that no additional fees would be levied up to February 15, 2022, for the filing of the e-forms: (i) AOC–4; (ii) AOC–4 (CFS); (iii) AOC–4 XBRL; and (iv) AOC–4 Non–XBRL, and that no additional fees would be levied up to February 28, 2022, for the filing of e-form MGT–7/ MGT–7A, for the financial year ended on March 31, 2021. The Circular further clarifies that only the normal fees payable for filing of the aforesaid e-forms would be payable during this period.

The full text of the Circular can be accessed here.

ii. Circulars – Clarifications on holding Annual General Meetings through Video Conferencing and Other Audio–Visual Means

In view of the ongoing Covid–19 pandemic, the Ministry of Corporate Affairs ("**MCA**") has by way of General Circular No. 19/ 2021, dated December 8, 2021 ("**Circular No. 1**"), allowed companies whose annual general meetings ("**AGMs**") were due to be held in the year 2021, to conduct the same through video conferencing and other audio–visual means, on or before June 30, 2022.

The MCA has further, by way of General Circular No. 21/ 2021, dated December 14, 2021 ("**Circular No. 2**"), also allowed companies who are proposing to organise their AGMs in 2022, for the financial year ending/ ended any time before or on March 31, 2022, to conduct their AGMs through video conferencing and other audio–visual means, as per the respective due dates, by June 30, 2022.

The abovementioned Circular No. 1 and Circular No. 2 further clarifies that the extensions granted therein, do not confer any extension of time for holding the AGM, in terms of the Companies Act, 2013 ("**Act**"), and that the companies that have not adhered to the relevant timelines would be liable to legal action in terms of the provisions of the Act. The terms and conditions as set out in the General Circular No. 20/ 2020, dated May 5, 2020, in relation to the holding of AGMs in this manner and as applicable, would, however, have to be adhered to.

The full text of Circular No. 1 and Circular No. 2 can be accessed here and here.

iii. Circular – Extension of Time to Conduct Extraordinary General Meetings through Video Conferencing or Other Audio-Visual Means

In view of the ongoing Covid–19 pandemic, the Ministry of Corporate Affairs has by way of General Circular No. 20/ 2021, dated December 8, 2021, allowed companies, to conduct their extraordinary general meetings through video conferencing or other audio-visual means or transact items through postal ballot, up to June 30, 2022. All of the other terms and conditions of the earlier circulars issued by the Ministry of Corporate Affairs, on the matter would remain unchanged and would have to be complied with.

The full text of the General Circular can be accessed here.

III. COMPETITION

A. REGULATORY UPDATES

i. Competition Commission of India enters into a MoU with the Competition Commission of Mauritius

The Competition Commission of India ("**CCI**") has entered into a Memorandum of Understanding ("**MoU"**) with the Competition Commission of Mauritius. The MoU between the two regulators is aimed at promoting and strengthening of co-operation in competition law and policy through exchange of information, sharing of best practices and capacity building initiatives. Further, the MoU is expected to help address anti-competitive restraints that affect international trade, improve enforcement of the

Competition Act and capacity building, among others. The MoU was subsequently approved by the Union Cabinet.

Section 18 of the Competition Act, 2002 ("**Act**") permits the CCI to enter into such arrangements with any agency of any foreign country for the purpose of discharging its duties or performing its functions under the Act.

ii. Market study on the pharmaceutical sector in India by the Competition Commission of India

The Competition Commission of India ("**CCI**") recently conducted a market study in pharmaceutical sector in India. Following were its key findings:

- The CCI found that the market for generic drugs is driven by brand competition instead of price competition despite such drugs being functionally and chemically identical. Brand differentiation in terms of a perception of different levels of quality and trade margins offered to incentivise chemists were key drivers of brand competition in India's markets for generics.

- Manufacturers that concentrate their efforts on the creation of brand image and brand loyalty have been able to command a price premium on chemically identical drugs by striving "for the patronage of prescribing physicians,".

- Patients who are unaware of the attributes and substitutes for drugs simply purchase medications prescribed by physicians and dispensed by chemists.

- Pharmaceuticals including generic drugs account for about 43.2% (forty three point two percent) of out of pocket healthcare expenditure in India according to the CCI study and about 62.7% (sixty two point seven percent) of the total health spending in the country.

- Enforcement and interpretation of quality regulations was not uniform across states and different regulatory and testing capacities had led to different quality standards being followed.

The CCI recommended that:

- Effective price competition in generics can benefit consumers and improve access to affordable healthcare.

- A mechanism may be devised under the aegis of the Central Drugs Standard Control Organisation to create awareness on quality issues, build capacity, and harmonise training and practices across the country with a view to ensure uniform and consistent application of quality standards.

- A National Digital Drugs Databank be created and made available to regulators, industry, physicians and consumers to address information asymmetry in the sector.

The full text of the report can be accessed here.

B. JUDICIAL PRONOUNCEMENTS

i. GAIL (India) Limited v. PMP Infratech Private Ltd.

[Case No. 41 of 2019, decided on October 11, 2021, by Competition Commission of India]

Background:

The Informant, GAIL (India) Limited ("**GAIL India**"), is the largest state-owned natural gas processing and distribution company. PMP Infratech is a private company engaged in the business of pre-engineering building services and road and bridge construction services. Rati Engineering ("**Rati**") is a partnership firm, engaged in a similar business. The Informant floated tenders each year from 2015-2018 for restoration of well sites, disposal of drilling wastes and other such services. The Informant alleged that Rati took part in the first tender, even though it did not qualify the pre-condition of having successfully completed a similar tender of value Rs. 3,94,00,000/- (Rupees Three Crores Ninety Four Lakhs) in the previous 7 (seven) years. The informant further alleged that in the second tender, its vigilance team found that the IP address used to submit the tenders for both of the OPs was the same, and the tenders were being submitted exactly one day apart. Therefore, the Competition Commission of India ("**CCI**"), finding a *prima facie* contravention of Sec 3(3) read with 3(1) of the Competition Act, 2002 ("**Act**"), ordered the DG to conduct an investigation into the matter in January 2020.

The DG report, based on electronic and documentary evidence, found that the two OPs did indeed engage in collusive bid-rigging, for the tender floated in the FY 2017-18, thereby violating Sec 3(3) read with Sec 3(1) of the Act. The OPs responded by stating that the two bids were submitted from the same IP address as Rati was facing technical difficulties with its Java software, they used the office of PMP Infratech to submit their bid. The parties further alleged that the emails sent between the 2 (two) OPs contained public information regarding the tenders, and no confidential or price-sensitive information. Therefore, mere sharing of queries and public information between the parties was not sufficient to conclude a case of bid-rigging.

Conclusions of the CCI:

The CCI rejected these arguments, and agreed with the DG's report, finding that the OPs contravened Sec 3(3)(d) read with Sec 3(1) of the Act by indulging in anticompetitive agreements leading to collusive bid-rigging of tenders floated by GAIL India. Taking a lenient view of the situation of both the parties, the CCI fined PMP Infratech a penalty of Rs. 2,00,000/- (Rupees Two Lakhs) and its director a penalty of Rs. 1,00,000/- (Rupees One Lakh). CCI fined Rati Rs. 2,50,000/- (Rupees Two Lakhs Fifty Thousand), and its partner a penalty of Rs. 50,000/- (Rupees fifty thousand).

ii. Eastern Railway, Kolkata v. M/s Chandra Brothers and Others

[Reference Case No. 02 of 2018, decided on October 12, 2021, by Competition Commission of India]

Background:

The informant was a Senior Deputy General Manager for Eastern Railways. The opposite parties, 5 (five) in total ("**OPs**"), were Research Designs and Standards Organization approved vendors engaged in the manufacture and supply of Axel Bearings to the Indian Railways. During an investigation by the Informant,

it was found that all of the OPs had quoted the exact same price for three tenders floated between August 2012 and August 2014. The Competition Commission of India ("**CCI**"), finding *prima facie* this to be a case of cartelization and bid-rigging, directed the DG to cause an investigation into the matter. The DG submitted its report in September 2020.

In his report, the DG found that the parties were exchanging emails and sharing information with each other regarding the allocation of Axel Bearing tenders floated by many zones of Indian Railways, including the Eastern Railways. The DG found that there was an agreement amongst the cartel members (OPs) to share the quantities of Axle Bearings in tenders floated by the Railways. In case of a shortfall of a particular cartel member in such an allocation, compensation was made to that member by way of others not submitting bids in particular tendres so as to allow that particular member to win the tender. Therefore, the DG concluded that these parties were engaged in cartelization and bid rigging of tenders floated by the Railways. Further, the DG included three more parties in the proceedings after he concluded that such parties were also a part of the cartel.

One of the parties contended that mere price parallelism cannot be the reason for arriving at a conclusion of collusive agreement or bid rigging, particularly in a monopolistic market, given there is one buyer and the demand can be predicted through repetitive bidding and the fact that the products are identical. Other parties agreed with the DG's report and prayed that the CCI take their cooperation into account while deciding on the amount of monetary penalties to be incurred by the parties.

Conclusions of the CCI:

The CCI agreed with the report of the DG, and found all 8 (eight) parties to be in violation of Sec 3(3) read with Sec 3(1) of the Competition Act, 2002. However, noting that all the parties in this case were MSMEs having limited staff and a small turnover, and also the impact of COVID-19 on such parties, the CCI decided not to impose a penalty on such parties, given that such an imposition might make the firms economically unviable and that might further reduce the competition in a market already characterized by the presence of a few players.

iii. Food Corporation of India v. Shivalik Agro Poly Products Ltd. and Others

[Reference Case No. 07 of 2018, decided on October 29, 2021, by Competition Commission of India]

Background:

The case was initiated by Competition Commission of India ("**CCI**") on the basis of a Reference filed on behalf of Food Corporation of India ("**FCI**") against Shivalik Agro Poly Products Ltd., Climax Synthetics Pvt. Ltd. Arun Manufacturing Services Pvt. Ltd. and Bag Poly International Pvt. Ltd. alleging *inter alia* cartelisation in the bidding process for procurement of Low Density Poly Ethylene covers ("**LDPE**") during the period 2005 to 2017 in contravention of the provisions of Section 3 of the Competition Act, 2002 ("**Act**").

It was averred in the Reference that large quantities of LDPE covers are required for safeguarding huge food grain stocks from rain and fumigation. In this regard, it was stated that FCI purchases LDPE covers through centralised rate running contracts entered into with various manufacturers/suppliers by inviting bids through tenders. During the period from 2005 to 2017, the FCI had floated a total of seven tenders and awarded the impugned tenders to L-1 bidder(s), except for Tender No.1 and Tender No. 5 floated in the

years 2005 and 2015 respectively, which were scrapped. Prior to 2012, the bidders quoted identical bids and in post negotiations after opening the tender, reduced the bid amount identically, but in 2012, the tender form was modified, prohibiting the Informant from negotiating with bidders after opening the tender.

FCI alleged that the Opposite Parties ("**OPs**") cosmetically differing rates in the impugned tenders. Thus, OPs were alleged to be involved in the anti-competitive conduct of bid-rigging in violation of the provisions of Section 3 of the Act.

The DG after investigation concluded that OPs were involved in fixing the price of LDPE covers, limiting/restricting the supply of LDPE covers, sharing tender quantities, and thereby rigged the bids in respect of the tenders floated by FCI and other government agencies for procurement of LDPE covers. As such, the DG noted contravention of the provisions of Section 3 (3) (a)/ (b)/ (c)/ (d) of the Act.

The OPs had filed their Leniency Petitions and did not dispute any of the findings made by the DG in the investigation report. During the oral hearing also, the OPs reiterated that they had co-operated with the DG and made vital disclosures before the DG.

Conclusions of the CCI:

The CCI found that the OPs had indulged in cartelization in the supply of LDPE to the FCI by means of directly or indirectly determining prices, allocating tenders, coordinating bid prices and manipulating the bidding process.

The CCI issued a cease and desist order against the firms found guilty of bid rigging and cartelization in the said tenders floated by FCI. However, the CCI refrained from imposing any monetary penalty considering that the OPs had filed lesser penalty applications and admitted their conduct, confessed their modus operandi during investigation thereby fully cooperated with the CCI. Moreover, the firms were also MSMEs with limited staff/ turnover and the prevailing economic situation arising due to the outbreak of COVID-19, stress wrought upon the MSME sector in the wake of the said pandemic.

iv. In Re: Anti-competitive conduct in the paper manufacturing industry

[Judgment of the Hon'ble CCI dated November 17, 2021, in Suo Motu Case No. 5 of 2016]

Background:

The case was initiated suo motu by the Competition Commission of India ("**CCI**") on the basis of certain material found during the ongoing investigations of two other cases. These firms were alleged to have used an association of paper manufacturing-firms as a front to discuss and agree upon increases in non-wood based paper. Although the Director General ("**DG**") investigated 21 (twenty one) original paper manufacturers and the association, DG only recorded findings of contravention of the provisions of section 3(1) of the Competition Act, 2002 ("**Act**") read with section 3(3)(a) thereof, against 10 (ten) such paper manufacturers and the association. The period of cartel was noted by the DG to be from September 2012 till March 2013. The CCI found these companies and an association which provided its platform, for such activities to have indulged in cartelisation in fixing the prices of writing and printing paper.

Conclusions of the CCI:

The CCI concluded that companies manufacturing paper from agricultural waste and recycled wastepaper as well as an association, had contravened the provisions of section 3(1) of the Competition Act, 2002 (**Act**), read with Section 3(3)(a) thereof, which proscribe anti-competitive agreements. The Commission noted in its order that the standard of proof to prove an agreement (as under Sec 2(b)) between parties alleged to have formed a cartel is on the basis of 'preponderance of probabilities' and not 'beyond reasonable doubt'.

However, considering that during the pandemic, most businesses moved to the virtual mode thereby reducing the need for paper and affecting the paper business, the CCI imposed a symbolic penalty of Rs. 5,00,000/- (Rupees five lakhs) each on the 10 (ten) paper manufacturers found guilty of cartelisation. Further, a penalty of Rs. 2,50,000/- (Rupees two lakhs fifty thousand) was imposed on the association for providing its platform for anti-competitive activities. Apart from the above, CCI also directed the above paper manufacturers and the association, and their respective officials who have been held liable in terms of the provisions of Section 48 of the Act, to cease and desist in the future from indulging in anti-competitive conduct.

v. In Re: Velankani Electronics Private Limited

[Reference Case No. 18 of 2018, decided on December 3, 2021, by Competition Commission of India]

Background:

The Informant, Velankani Electronics, was engaged in the business of manufacturing and supplying servers, amongst other electronic items. Intel is a leading manufacturer of semi-conductor chips. For having a competitive edge in the market and reducing costs, the Informant, in the manufacturing process of servers, decided to manufacture their own server boards, instead of buying them from their competitors. For doing so, they required additional reference design files from the processor-manufacturer, so as to incorporate the processor into the server board seamlessly. The Informant alleged that Intel, the manufacture that it sought to buy the reference design files from, refused to provide the Informant with the necessary files, thereby denying the Informant market access and abusing its dominant position in the relevant market. According to the Informant, such files were provided to other original equipment manufacturers, like Dell, HP, Lenovo etc. Hence, Intel's conduct amounted to a violation of section 4(2)(c), 4(2)(b) and 4(2)(e) of the Competition Act, 2002 ("**Act**").

Therefore the Competition Commission of India ("**CCI**") ordered the DG to investigate into the matter and thereafter submit a report. The DG investigated the matter and found that:

- the relevant market was 'processors for servers in India'.
- Intel was, in fact, a dominant player in the market for processors for servers in India.
- All the requisite files that were needed for the to make their server boards were provided to them by Intel. Therefore, there was no denial of market access to the informant in contravention to section 4(2)(c) of the Act. Further, there was no restriction on the production of servers and therefore, no contravention to section 4(2)(b) of the Act.

- Intel did not deny access to the information that was required by the Informant to enter into the market, and therefore there was no violation of Sec 4(2)(e).

Conclusions of the CCI:

The CCI after examining the report by DG and other documents observed that there was no deliberate denial of any requisite file (reference design file or simulation file) by Intel to Velankani.

The CCI accordingly concluded that no case of contravention of the provisions of Section 4 of the Act by Intel was made out in the present matter. Accordingly, the matter was directed to be closed forthwith in terms of Section 26(6) of the Act.

Upon the confidentiality requests made by the parties, the CCI directed that two versions of the order are to be prepared, i.e., a non-confidential qua parties version and the public version. The same was done as per the requests made by the parties, and the provisions of Section 57 of the Act.

vi. Together We Fight Society v. Apple Inc. & Another

[Case No. 24 of 2021, decided on December 31, 2021, by Competition Commission of India]

Background:

The Informant, an NGO, filed a complaint with Competition Commission of India ("**CCI**") under Sec 19(1)(a) of the Competition Act, 2002 ("**Act**") against Apple Inc ("**Apple**") for allegedly contravening Sec 4 of the Act by abusing its dominant position. The informant's allegations were as follows:

- That Apple is a dominant entity in the relevant markets of non-licensable smart mobile operating system, market for app store for apple smart mobile operating systems in India and market for apps facilitating payment through UPI. The Apple App Store, owned and operated by Apple, comes pre-installed in Apple mobile devices and is the only way to download apps for users. Other competing app stores are not allowed to operate on the Apple operating system, iOS. Therefore, Apple has a monopoly in the iOS Apple distribution market. Developers are also bound to the App Store, as if they decide not to make their apps accessible through it, they will forgo all iOS users in a particular jurisdiction.

- That the App Store Review Guidelines are one-sided, take it or leave it type of contracts, where the developers have no say and whose applicability and adjudication lies at the hands of Apple. This is in violation of both Sec 4(2)(a)(i) and Sec 4(2)(c). Also, these guidelines make it mandatory for app developers to use Apple's own in-app payment system of purchases made in-app by users; this system charges a 30% (thirty percent) commission, as compared to other similar services which charge a commission between 1%-5% of the transaction value. These are again in violation of the aforementioned sections. This mandatory tie-in also makes it difficult for multi-platform apps to inform their users of the ability to make out-of-app purchases, and developers have no choice but to assent to this tie-in, given Apple's monopoly in this market. This is violation of Sec 4(2)(d) and 4(2)(e).

Apple replied to these submissions, stating:

- That the App Store is a key part of the integrated ecosystem that is essential to Apple's business model.

- That the relevant market laid out by the informant is narrow; the relevant market should actually be the overall market for smartphones in India, in which Apple's market share is between 0-5%. Therefore, Apple is not a dominant entity in this market.

- Even if the informant's relevant market were to be considered, mere dominance in a market is not in itself violative of the Act, and there is no evidence to suggest Apple's abuse of such dominance.

- The commission that Apple charges is its compensation for providing developers with a built-in user base and significant technical and marketing know-how through the App Store. Therefore, the commission is consistent with the value that developers receive from Apple.

- A recent US District Court decision, Epic Games vs Apple, embraces App Store's model.

Conclusions of the CCI:

The CCI held that *prima facie*:

- the relevant market for examination of App Store policies would be the market for app stores for iOS in India, as the relevant market would have to be defined from the perspective of app developers and not the end users.

- Apple seems to have a monopoly position in the market. The CCI also held that prima facie Apple's mandatory use of the In-App payment system restricts the app-developers' choice to select their own payment processing system, which is unfair in terms of Section 4(2)(a) of the Act.

- Further the intermediation by Apple between the app developer and the end user for payment processing purposes would result in Apple leveraging its dominant position to enter/protect its downstream market of various verticals, in violation of Section 4(2)(e) of the Act.

- The tie-in of the App Store usage to the usage of its In-App payment system was in contravention of Section 4(2)(e) of the Act.

Therefore, the CCI has directed the DG to conduct investigation into the matter and file a report.

vii. Proceedings against Amazon.com NV Investment Holdings LLC under Sections 43A, 44 and 45 of the Competition Act, 2002

[In Combination Registration No. C-2019/09/688, Order dated December 17, 2021, by Competition Commission of India]

Background:

Future Coupons Private Limited ("**FCPL**") filed an application dated March 25, 2021, alleging that Amazon has taken a contradictory stand in the arbitration and constitutional court proceedings as compared to the representations and submissions made by them before the Competition Commission of India ("**CCI**") in relation to transfer of assets of Future Retail Limited ("**FRL**"), a company in which FCPL holds 9.82% (nine point eight two percent) shareholding. On consideration of the application the CCI issued a show-cause notice to Amazon as they were of a *prima facie* view that: (a) Amazon failed to identify and notify FRL shareholders agreement ("**FRL SHA**") as a part of the Combination, in terms of Regulation 9(4) and Regulation 9(5) of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**"); (b) Amazon had concealed its strategic interest over FRL; and (c) Amazon had made false and incorrect representations and concealed/suppressed material facts in contravention of the provisions of the Competition Act, 2002 ("**Act**").

The primary issue before the CCI was whether Amazon had indulged in misrepresentation, making false statement and/or suppression material facts in relation to the scope and purpose of the Combination; and failed to identify and notify FRL SHA as an inter-connected part of the Combination, in terms of Regulations 9(4) and 9(5) of the Combination Regulations.

Conclusions of the CCI:

The CCI observed that the facts, particulars and documents required to be furnished under Form I, including the purpose of the combination (Item 5.3), inter-connected transactions (Item 5.1.2) and documents considered by boards of the parties or key managerial personnel (Item 8.8), are essential to have a full, clear and complete picture of the notified combination. CCI concluded that Amazon's suppression of relevant information amounted to having obtained its consent by fraud. Hence, CCI suspended its order of approval granted vide Order dated November 28, 2019, directed Amazon to request for approval by filing Form II (Long Form) and imposed penalty of Rs. 202,00,00,000/- (Rupees two hundred and two crores) on Amazon.

viii. CCI approves acquisition of shareholding in Air India Limited, Air India Express Limited and Air India SATS Airport Services Private Limited by Talace Private Limited

[C-2021/11/883]

Background:

Talace had approached the Competition Commission of India ("**CCI**") requesting prior approval for the proposed combination vide which Talace would acquire 100% (one hundred percent) equity share capital and sole control over the management and operations of Air India Limited ("**Air India**") and Air India Express Limited ("**AIXL**"), and 50% (fifty percent) equity share capital and joint control over the management and operations of Air India SATS Airport Services Private Limited ("**AISATS**"). The

combination related to the proposed strategic divestment by the Government of India of its 100% (one hundred percent) equity share capital and control in Air India along with Air India's 100% (one hundred percent) shareholding in AIXL and 50% (fifty percent) shareholding in AISATS.

Talace Private Limited ("**Talace**") is a wholly owned subsidiary of Tata Sons. Tata Sons is an investment holding company, which is registered as a core investment company with the Reserve Bank of India and classified as a "Systemically Important Non-Deposit Taking Core Investment Company".

Conclusions of the CCI:

While the detailed order of the CCI is awaited, CCI has concluded that the proposed combination will not cause any appreciable adverse effect on competition in the relevant market.

ix. Mr. Rizwanul Haq Khan v. Merson India & Assam Carbon

[Judgment of the CCI dated November 1, 2021, Ref Case No. 02 of 2016]

Background:

The informant was a Deputy Chief Materials Manager for the Southern Railways. The opposite parties were Mersen India and Assam Carbon ("**OPs**"). While the former is a multinational manufacturing company, the latter are MSMEs, both engaged in the supply of carbon brushes and brush holders for industrial electric motors. The OPs are the only approved vendors of such carbon brushes in India, and the Railways has been procuring such brushes for a considerable amount of time. The informant, alleged that both the OPs had been steadily hiking the rates of carbon brushes for a period of five years, from 2010-2015, without any justification. The informant further alleged that tenders floated by the Informant had been rigged by the parties by way of cartelization and collusive bidding. In Sep 2017, the Competition Commission of India ("**CCI**") directed the DG to proceed with an investigation into the matter under Sec 26(1) of the Competition Act, 2002 ("**Act**").

The DG submitted his report in April 2021. During the investigation, both the OPs filed for leniency under Regulation 5(2) of the Competition Commission of India (Lesser Penalty) Regulations 2009. The DG's report contained the following conclusions:

- That as per the requirements of Sec 3(1) of the Act, both the parties were enterprises under Sec 2(h) of the Act.

- That both the parties were engaged in identical or similar trade of goods or provision of services, given that both were engaged in the manufacture and supply of carbon brushes in India. Even though Mersen provided the Imported Grade of such brushes and Assam, the Indigenous Grade, the Informant stated that the Railways did not make any such distinction.

- That based on the evidence collected during the investigation, such as WhatsApp messages and emails, it was clear that the OPs parties engaged in anti-competitive practices in contravention of Sec 3(3)(d) read with Sec 3(1) of the Act, 2015 onwards.

- That the MD of Mersen and the Director & Non-Executive Chairman of Assam carbon were responsible for such contravention.

The main objection to the DG's finding raised by Merson was that the Commission had prima facie found anti-competitive conduct for the period of 2010-2015; however, the DG found such anti-competitive conduct to be taking place from 2015-2019, a period for which the Commission did not authorize investigation.

***Conclusions of the CCI*:**

The CCI, while quoting *Excel Corp Care v CCI*[1], stated that while the initial compliant may be limited in scope, the DG can investigate other violations that may emerge during such investigation. The CCI therefore agreed with the DG report and held both the parties to have contravened section 3(3)(d) read with section 3(1) of the Act for the period of 2015-2019. While taking into account that both the enterprises suffered losses, the fact that both the parties had filed lesser penalty applications while acknowledging their conduct and also the impact of COVID-19 on the MSME sector, the CCI decided not to impose a monetary penalty on the parties, and asked the parties to cease and desist from engaging in such activities in the future.

x. TT Friendly Super League Association v. The Suburban Table Tennis Association and Others

[Order of the CCI dated November 17, 2021, in Case No. 19 of 2021]

***Background*:**

The Informant was an NGO with the stated objective of promoting Table Tennis ("**TT**") in India. It conducted friendly matches for its members in and around Mumbai. The Suburban Table Tennis Association ("**STTA**") is a registered society with jurisdiction over Mumbai to conduct district tournaments for the State Table Tennis Association. The Informant alleged before the Competition Commission of India ("**CCI**") that the General Secretary of the STTA posted a circular on a WhatsApp group consisting of its players, advising them not to join any 'unaffiliated organization or play any unaffiliated organization's matches'. This was done under the threat of being barred from participating in district and state-level tournaments. The Informant alleges that this message was aimed at the Informant, and that as a consequence of the message, many players refused to register with the Informant, and refused to play the matches organized by the Informant, causing it financial loss. It was further alleged that the Memorandum of Association of STTA is unfairly restrictive in nature and therefore anti-competitive.

STTA replied by arguing that it did not fall under the definition of 'enterprise' as given in Section 2(h) of the Competition Act, 2002 ("**Act**"), as it was not carrying on any of the activities listen in the definition. STTA further argued that members of STTA could not be considered to be 'consumers' as under Section 2(f) of the Act. It was also pointed out by STTA that the informant that parallel organizations could not be permitted to run along with STTA, which would dilute/frustrate the objectives of recognized associations. Bringing discipline into sports and preventing players from participating in unsanctioned tournaments was the mandate and goal of STTA, which derived these powers from its Memorandum of Association.

[1] (2017) 8 SCC 47.

Conclusions of the CCI:

The CCI held that the thrust of the term 'enterprise' is on the economic nature of the activities being discharged by the concerned entity. Even non-commercial economic activities would be considered to be under the purview of this Act. Therefore, the CCI held that *prima facie*:

- STTA fell under the definition of the term 'enterprise'.
- The relevant market is the market for organization of table tennis tournaments in India.
- STTA is in a dominant position in the relevant market as defined above.
- The WhatsApp message barring members of STTA from taking part in any of the Informant's matches or taking up membership with the Informant, contravened section 4(2)(c) of the Act as it may result in the denial of market access to the Informant.
- Certain parts of the MoA of STTA, which gave STTA the power to follow through on its General Secretary's message, to be prima facie anticompetitive in nature and in violation of section 4(2)(a)(i), section 4(2)(b)(i) and section 4(2)(c) of the Act.

Therefore, the CCI ordered the DG to conduct an investigation into the matter and file a report.

xi. Kalpit Sultania v. IREL India

[Order of the CCI dated January 3, 2022, in Case No. 22 of 2021]

Background:

IREL India is a GoI Undertaking, classified as a Miniratna-I company. It is engaged in the business of mining of certain minerals, one of them being Beach Sand Sillimanite ("**BSS**"). BSS is used by refractory manufacturers for lining furnaces and also by the ceramic industry. In 2016, BSS was included in the category of atomic minerals by the Central Government. Thereafter, the Department of Atomic Energy in 2019 prohibited the grant of operating rights with respect to atomic minerals in the country to anyone other than a Government-owned organization. Therefore, IREL is the only entity currently in the production and supply of BSS in India. The Informant suggested that the relevant market is the market for 'mining and supply of BSS in India'. The Informant alleged that this monopoly of production and supply gives IREL a dominant position in this market. The informant alleged that IREL was abusing such dominance by:

- Arbitrarily indulging in prohibitive increasing increase in the prices of BSS of Rs. 5,000/- (Rupees five thousand) per MT over a period of 4 (four) years.
- Engaging in discriminatory pricing by selling BSS to domestic buyers at a higher price than foreign buyers.

Therefore, the informant alleged that these actions constituted a contravention of Sec 4(2)(a)(i) and Sec 4(2)(b)(i) of the Competition Act, 2002 ("**Act**"). IREL on the other hand submitted that it could not be covered under the term 'enterprise', as its functions are related to the sovereign function of the State, as provided in the exception to the ambit of the term 'enterprise'.

Conclusions of the CCI:

The Competition Commission of India ("**CCI**") rejected IREL's argument that it could not be considered to be an enterprise, as it sold the product in question both to domestic as well as foreign entities. CCI concluded that, given the fact that the substance in question, BSS, was used in both ceramic and foundry industries, being civil in nature, it could not be said that IREL was performing a sovereign function. Therefore, the CCI held that *prime facie*:

- IREL is an enterprise.
- IREL was a dominant player in the market of 'mining and supply of BSS in India'.
- Since IREL did not provide an explanation to its alleged discriminatory prices and predatory price increases, it was in violation of Section 4(2) of the Act.

Therefore, the CCI ordered the DG to conduct an investigation into the matter and file a report.

IV. INSOLVENCY & BANKRUPTCY

A. REGULATORY UPDATES

i. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – Amended

The Insolvency and Bankruptcy Board of India ("**Board**"), by way its gazette notification dated September 30, 2021 bearing No. IBBI/2021-22/GN/REG078, has published the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2021 ("**Amendment CIRP**") to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 by *inter alia* inserting/ substituting the following:

- **Sub-regulation 4A in Regulation 36A** – By virtue of this insertion, resolution professionals are allowed to modify their invitation for submission of expression of interest from interested and eligible prospective resolution applicants. The modification is to be published in the same manner as the initial invitation of expression of interest was made and the modification has been permitted to be done only once.
- **Sub-regulation 1A and 1B in Regulation 39 –** Sub-regulation 1A of Regulation 39 has been substituted by sub-regulation 1A and 1B. By this substitution, resolution professionals can now allow resolution applicants to modify their resolution plans once, or resolution professionals may choose to use the challenge mechanism to enable resolution applicants to improve their plans. Further Sub-regulation 1B makes it clear that the Committee of Creditors cannot consider any resolution plans that are received after a prescribed period of time, which are received from persons who are not part of the final list of prospective resolution applicants; and that are not compliant with Section 30 of the IBC.

The abovementioned insertions/ substitutions are applicable to the corporate insolvency resolution processes that are ongoing and those which commence on or after the date of the commencement of the Amendment CIRP i.e., September 30, 2021.

The full text of the Notification can be accessed here.

ii. The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 – Amended

The Insolvency and Bankruptcy Board of India by way of its gazette notification dated September 30, 2021 bearing no. IBBI/2021-22/GN/REG079, has published the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2021 to amend the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("**Liquidation Process Regulations**") by *inter alia* inserting/ substituting the following:

- **Sub-regulation (1) of Regulation 31A** – By virtue of this substitution, the liquidator should consult the consultation committee regarding the appointment of professionals and their remuneration, apart from consulting the consultation committee regarding sales under Regulation 32. Further, all decisions, if any, taken before the constitution of the consultation committee, will have to be placed before the consultation committee for their information in their first meeting.

- **Sub-regulation (4) of Regulation 31A** – By this substitution, it is clarified that in the event of a failure of a nomination of representatives by stakeholders of any class, such representatives must be selected by a majority of the voting share of the class of stakeholders, present and voting, instead of the stakeholders with the highest claim amount in each class being included in the consultation committee (*as it stood earlier*).

- **Proviso in clause (3) in Paragraph 1 of Schedule I –** By this insertion, the liquidator cannot now require a non-refundable deposit or fee to be paid, for participation in an auction under the liquidation process. Further, the earnest money deposit must not exceed 10% (ten percent) of the reserve price.

- **Clause (11A) in Paragraph 1 of Schedule I –** By this insertion, the liquidator is now required to mention the reasons for rejecting the highest bid, in the auction process, in the next progress report.

The full text of the Notification can be accessed here.

iii. IBBI's Electronic Platform for hosting Public Notices of Auctions of Liquidation Assets under the Liquidation Process Regulations

The Insolvency and Bankruptcy Board of India, in exercise of its powers under Section 196 of the Insolvency and Bankruptcy Code, 2016, by way of its Circular bearing No. IBBI/LIQ/44/2021 dated September 30, 2021, has provided a centralised electronic platform for hosting public notices of auctions of liquidation assets, on its website: www.ibbi.gov.in. With effect from October 1, 2021, all liquidators are directed to upload the public notice of every auction of any liquidation asset on the website on the same day of its publication in newspapers, through their designated login page.

The full text of the Circular can be accessed here.

iv. No Objection Certificate or No Dues Certificate from the Income Tax Department during Voluntary Liquidation Process under the Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Board of India, in exercise of its powers under Section 196 of the Insolvency and Bankruptcy Code, 2016, by way of its Circular bearing No. IBBI/LIQ/45/2021 dated November 15, 2021, has clarified that an insolvency professional handling a voluntary liquidation process is not required to seek any 'No Objection Certificate (NOC)/ No Dues Certificate (NDC)' from the Income Tax Department, as part of compliance in the said process.

The full text of the Circular can be accessed here.

B. JUDICIAL PRONOUNCEMENTS

i. Tata Consultancy Services Limited v. Vishal Ghisulal Jain

[Judgment of the Hon'ble Supreme Court of India dated November 23, 2021, in Civil Appeal No. 3045 of 2020]

Background:

The appellate jurisdiction of the Hon'ble Supreme Court of India was invoked by Tata Consultancy Services Limited ("**Appellant**") challenging the order passed by the National Company Law Appellate Tribunal ("**NCLAT**"), upholding the interim order passed by the National Company Law Tribunal ("**NCLT**"). The interim order of the NCLT stayed the termination by the Appellant of its facilities agreement ("**Contract**") with SK Wheels Private Limited ("**Corporate Debtor**"). The brief facts pertaining to the dispute are explained in the following paragraph.

In 2018, the Appellant had issued several notices to the Corporate Debtor complaining of a breach of material terms of the Contract and asking for the same to be remedied. This was followed by the initiation of the Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor on March 29, 2019. On June 10, 2019, the Appellant issued a notice of termination of the Contract terminating the Contract with immediate effect. Aggrieved by the said termination of the Contract, the Corporate Debtor filed a miscellaneous application before the NCLT under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") for quashing the termination notice. The NCLT proceeded to pass an ad-interim stay of the termination notice issued by the Appellant and directed the Appellant to comply with the terms of the Contract. The NCLT also found that *prima facie* the Contract was terminated without serving the requisite notice of 30 (thirty) days as required under the Contract. Aggrieved by this order passed by the NCLT, the Appellant preferred an appeal to the NCLAT. The NCLAT upheld the order passed by the NCLT on the ground that the main objective of the IBC is to ensure that the Corporate Debtor remains as a going concern.

The main contentions raised by the Appellant in appeal before the Hon'ble Supreme Court of India *inter alia* were - *Firstly*, Section 14 of the IBC only relates to the provision of goods and services to the Corporate Debtor for the imposition of a moratorium, and the present case is not covered under the same, as it is the Appellant who was availing the services of the Corporate Debtor. *Secondly*, the termination notice was not issued because the Corporate Debtor was undergoing a CIRP, but was issued on account of the material breaches of the Contract, after giving the Corporate Debtor multiple opportunities to remedy the same. *Thirdly*, the NCLT cannot invoke its residuary powers under Section 60(5)(c) of the IBC where there is a patent lack of jurisdiction, as, the IBC does not permit a statutory override of all contracts entered with the

Corporate Debtor. *Fourthly*, the impugned order has resulted in a determinable contract becoming a non-terminable contract overlooking the mandate of Section 14 of the Specific Relief Act, 1963.

The main contentions taken up by the resolution professional, appearing on behalf of the Corporate Debtor *inter alia* were – *Firstly*, that the dispute was covered under Section 60(5)(c) of the IBC which vests the NCLT with power to adjudicate issues relating to fact or law in respect of a company undergoing CIRP. *Secondly* that the argument that the contractual dispute can be decided only through arbitration and the provisions of the Indian Contract Act, 1872 and Specific Relief Act, 1963 are incorrect, since Section 238 of the IBC has an overriding effect over other laws. *Thirdly*, that the Hon'ble Supreme Court of India had held in the case of *Gujarat Urja Vikas v Amit Gupta, Company Appeal (AT) (Insolvency) No. 237 of 2020* ("**Gujarat Urja**"), that Section 14 is not exhaustive of the grounds of judicial intervention contemplated under the IBC, otherwise Section 60(5)(c) of the IBC would be otiose. *Fourthly*, that the Contract was the main source of revenue generation of the Corporate Debtor and the objective of the IBC is that the Corporate Debtor must be preserved as a going concern. *Fifthly*, that there was non-compliance with the provisions of the Contract with respect to termination.

The Hon'ble Supreme Court framed the following 2 (two) issues for consideration –

- Whether the NCLT can exercise its residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate upon the contractual dispute between the parties; and
- Whether in the exercise of such a residuary jurisdiction, it can impose an ad-interim stay on the termination of the Contract.

Findings:

With regard to the ambit of the exercise of the adjudicatory functions by the NCLT, vis-à-vis Section 14, given the facts of the case at hand, the Hon'ble Supreme Court held that admittedly, the Appellant is neither supplying any goods or services to the Corporate Debtor in terms of Section 14(2) of the IBC nor is it recovering any property that is in the possession or occupation of the Corporate Debtor, as envisioned under Section 14(1)(d) of the IBC. It was observed that the Appellant was availing of the services provided by the Corporate Debtor. Thus, the Court concluded that Section 14 of the IBC was indeed not applicable to the case at hand. However, placing reliance on the case of Gujarat Urja, the Hon'ble Supreme Court held that the NCLT's jurisdiction under Section 60(5)(c) of the IBC is not limited by Section 14 of the IBC, in terms of the grounds of judicial intervention envisaged under the IBC. The Hon'ble Supreme Court re-affirmed that the NCLT can indeed exercise its residuary jurisdiction under Section 60(5)(c) of the IBC, to adjudicate on questions of law and fact that relate to or arise during a CIRP, even in instances where a clause for referring the dispute between parties to arbitration exists. The Hon'ble Supreme Court further reiterated that when the disputes arise dehors the insolvency of the Corporate Debtor, the resolution professional must approach the relevant competent authority.

Upon analysis of the facts at hand in the present case, the Hon'ble Supreme Court set aside the judgment rendered by the NCLAT and dismissed the proceedings against the Appellant for absence of jurisdiction for *inter alia* the following reasons:

- Before the initiation of the CIRP, the Appellant had on multiple occasions communicated to the Corporate Debtor that there were deficiencies in its services. In the case of Gujarat Urja, the contract in question was terminated by a third-party based on an *ipso facto* clause, i.e., the fact of insolvency

itself constituted an event of default. The Hon'ble Supreme Court reiterated that the adjudication of the dispute must have a nexus to the insolvency of the Corporate Debtor, however, in the present case the termination was based on grounds unrelated to the insolvency of the Corporate Debtor. The Hon'ble Supreme Court concluded that the trajectory of events in the present case make it clear that the alleged breaches in the termination notice were not a smokescreen to terminate the Contract because of the insolvency of the Corporate Debtor.

- Making reference to the Gujarat Urja case, the Hon'ble Supreme Court held that even if a contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract *only* if it is central to the success of the CIRP. The Court pointed out that it is crucial that the termination of the contract *should* result in the corporate death of the Corporate Debtor.

- The narrow exception crafted in the Gujarat Urja case must be borne in mind by the NCLT and NCLAT even while examining prayers for interim relief. The Court observed that the orders of the NCLT and NCLAT do not indicate as to how the Contract was central to the survival of the Corporate Debtor as a going concern. The NCLT had merely relied upon the procedural infirmity of the requirement of a 30 (thirty) day notice period, to be given to the Corporate Debtor for remedy of breach, prior to termination.

ii. Ebix Singapore Private Limited. v. Committee of Creditors of Educomp Solutions Limited & Another

[Judgment of the Hon'ble Supreme Court of India dated September 13, 2021, in Civil Appeal No. 3224 of 2020 and connected appeals]

Background:

The judgement in Civil Appeal No. 3224 of 2020 was passed in an appeal against the order of the National Company Law Appellate Tribunal ("**NCLAT**") dated July 29, 2020, whereby the NCLAT set aside the order of the National Company Law Tribunal ("**NCLT**"). The NCLT had permitted the successful resolution applicant ("**RA**") to withdraw its resolution plan, after it had been accepted by the Committee of Creditors ("**CoC**"), but prior to its acceptance by the NCLT, on the grounds that an unwilling resolution applicant would not be able to effectively implement a resolution plan. The NCLAT had however set aside the order of the NCLT permitting withdrawal of the resolution plan on the ground that it was barred by res judicata and that the NCLT does not have jurisdiction to permit such a withdrawal.

On May 5, 2017, Educomp Solutions Limited ("**Educomp**") had filed a petition under Section 10 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") seeking to initiate voluntary corporate insolvency resolution ("**CIRP**") and the same was admitted. The appellant in Civil Appeal No. 3224 of 2020 i.e., Ebix Singapore Private Limited ("**Ebix/ Appellant**"), was declared as the successful resolution applicant by the CoC and an application came to be filed before the NCLT seeking approval to the resolution plan accepted by the CoC.

In the interim, there were several news reports pertaining to allegations of financial mismanagement of Educomp between 2014-18 and consequently, the Ministry of Corporate Affairs ("**MCA**") directed an SFIO investigation into its affairs. Accordingly, a resolution was passed by the CoC to appoint an independent agency to conduct a Special Investigation Audit into the affairs of Educomp. The same was placed before the NCLT when it was still hearing the approval application.

While the above application for approval of the resolution plan was still pending, Ebix filed withdrawal applications before the NCLT to withdraw its resolution plan on *inter alia* the following grounds:

- The approval of the resolution plan had been pending for 17 (seventeen) months.
- The CIRP had been continuing for 26 (twenty six) months.
- The tenure of the government contracts awarded to Educomp, which were crucial for keeping the business of Educomp as a going concern, were expiring.
- Serious fraud allegations had been reported against the affairs of Educomp.

The first 2 (two) withdrawal applications were rejected by the NCLT on various grounds without going into their merits. However, the NCLT allowed the third withdrawal application filed by Ebix on the grounds that an unwilling resolution applicant would not be able to effectively implement a resolution plan. The same however was reversed by the NCLAT which held that the application to withdraw from the resolution plan could not have been allowed since it was barred by *res judicata* and that the NCLT did not have the jurisdiction to permit such a withdrawal.

The issue before the Hon'ble Supreme Court was - Whether a successful resolution applicant could withdraw or modify a resolution plan, once it was submitted to the NCLT and before it is approved by the NCLT under Section 31(1) of the IBC.

Findings:

The Hon'ble Supreme Court after examining and setting out the objectives of the IBC and nature of a resolution plan under the IBC has held that a successful resolution applicant cannot withdraw or modify a resolution plan, once it was submitted to the adjudicating authority/ NCLT for approval since –

- There is no provision in the IBC permitting withdrawal of a resolution plan and such withdrawal cannot be allowed through judicial interpretation. The same could only be effected through legislative amendment.
- A resolution plan accepted by the CoC is binding and irrevocable, as between the CoC and the successful resolution applicant, in terms of the IBC and applicable regulations, and is not binding only after it is approved by the NCLT.
- If permitted to be modified/ withdrawn, it may introduce elements in the insolvency process that may lead to unpredictability, delay and complexity not contemplated by the legislature and which may frustrate the very object of the IBC.

The Hon'ble Supreme Court has also while considering the nature of a resolution plan under the IBC held that while the principles of contractual construction and interpretation may serve as interpretive aids in the event of ambiguity over the terms of a resolution plan, the resolution plan itself being a creature governed by statute (and being binding by virtue of statutory provisions on non-parties to the resolution plan) cannot be construed as a contract and hence the remedies specific to the contract act cannot be applied *de-hors* the over-riding principles of the IBC.

iii. Bijoy Prabhakaran Pulipra (RP) PVS Memorial Hospital Private Limited v. State Tax Officer (Works Contract)

[Judgement of the National Company Law Appellate Tribunal, Chennai Bench dated October 7, 2021, in Company Appeal (AT)(CH)(Insolvency) No. 42 of 2021]

Background:

An application was filed for initiation of the corporate insolvency resolution proceedings ("**CIRP**") under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), by Dr. N.P Kamlesh and M/s OCS Group (India) Pvt. Ltd against PVS Memorial Hospital ("**Corporate Debtor**"), which was admitted by the National Company Law Tribunal ("**NCLT**"), Kochi Bench on October 16, 2019. The appellant who was appointed the Interim Resolution Professional ("**IRP**") by the NCLT was appointed as the Resolution Professional ("**RP**"), based on the resolution passed by the Committee of Creditors ("**CoC**") on December 17, 2019.

During the CIRP, the RP had admitted a claim of the respondent to the tune of Rs. 28,41,59,349.06/- (Rupees twenty eight crores forty one lakhs fifty nine thousand three hundred and forty nine and paise six).

In view of certain information received from the promoters of the Corporate Debtor regarding the claims of the respondent, the CoC thereafter had passed a resolution dated July 15, 2020 to file an appeal before the Joint Commissioner for reassessment of the GST liability of the Corporate Debtor.

The RP had however revised the admitted claim amount of the respondent to Rs. 1,06,09,299/- (Rupees one crore six lakhs nine thousand two hundred and ninety nine) after due verification of the GST claim, with the books of accounts of the Corporate Debtor, in accordance with Regulation 14 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") and had sent detailed information on the revision of the admitted claim to the respondent on August 10, 2020. Being aggrieved by the revision of the admitted claim, the respondent filed an appeal under Section 60(5) of the IBC, before the Adjudicating Authority to allow the claim of the respondent in full. The Adjudicating Authority by way of its order dated November 4, 2020 had directed the appellant to file an appeal before the Joint Commissioner, State Sales Tax Department for reassessment of the GST payable for the financial year 2018-19, and in light of the notification issued by the Government of India dated June 28, 2017, within 2 (two) weeks from the order.

The appellant had thereafter filed an application before the NCLT, Kochi in MA/205/KOB/2020 seeking for a clarification in respect of filing an appeal before the Joint Commissioner, State Sales Tax Department as directed in the order of the NCLT dated November 4, 2020. The appellant sought for clarifications of the following nature –

- Whether the RP under Regulations 13 and 14 of the CIRP Regulations has the authority to file an appeal before the Joint Commissioner, GST for verification and determination of the claim submitted by the GST department?

- If any order or decree passed by the Appellate Authority under the Central Goods and Services Tax Act, 2017 pursuant to the appeal filed by the Corporate Debtor would be binding on the Corporate Debtor, when there is a moratorium declared by the NCLT under Section 14 of the IBC?

- If the requirement of pre-deposit mandated under Section 107 of the Central Goods and Service Tax Act, 2017 would be prejudicial to the interests of the CIRP?

In terms of the order dated January 28, 2021, the NCLT had disposed of MA/205/KOB/2020 stating that there was no clarification required. Challenging the said order, the appellant had filed the instant appeal.

Findings:

The NCLAT dismissed the appeal holding that:

- All the assessment orders were passed before the declaration of moratorium and therefore have attained finality in absence of a challenge against the assessment orders before the respective appellant authority as provided under the different statues.

- GST is a tax levied under the assessment order as per the Central Goods and Service Act, 2017 and it cannot be edited/ reduced by the RP himself. The RP, if aggrieved by the order should have filed an appeal under the provisions of the Central Goods and Services Tax Act, 2017 / applicable SGST Act. Section 238 of the IBC cannot be read as confirming any appellate or adjudicatory jurisdiction in respect of issues arising out of other statues.

- The scope of the RP under Regulation 14 of the CIRP Regulations is to determine the amount of the claim in cases where the amount claimed by the creditor is not precise due to any contingency or other reasons. However, the exercise of the power in revising the GST assessment order was beyond the jurisdiction of the RP. The RP does not have any adjudicatory power under the Central Goods and Service Act, 2017.

- The IBC is a complete code in itself. While Section 28 of the IBC permits the CoC to approve certain actions in the CIRP, the exercise of this power is limited to its commercial wisdom and does not extend to exercise of judicial power. Acceptance or rejection of claim is the duty of the RP and the aggrieved party can agitate their claims before the Adjudicating Authority.

- Section 60(5)(c) of the IBC is very broad in its sweep in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But the decision taken by the Government or Statutory Authority in relation to the matter which is in the realm of public law, cannot be brought within the fold of the phrase ‘arising out of or in relation to the Insolvency Resolution’ appearing in Section 60(5)(c) of the IBC.

iv. Central Board of Indirect Taxes and Customs v. Sundaresh Bhatt, the Liquidator of ABG Shipyard

[Judgment of the National Company Law Appellate Tribunal, Principal Bench, New Delhi dated November 22, 2021, in Company Appeal (AT) (Insolvency) No. 236 of 2021]

Background:

The appeal emanates from an Order dated February 25, 2020 passed by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad (“**NCLT**”) on an interlocutory application filed by the Mr. Sunadresh Bhatt, liquidator of ABG Shipyard (“**Respondent**”), in Company Petition (IB) No.

53/NCLT/AHM/2017, whereby the NCLT had *inter alia* issued directions to the Central Board of Indirect Taxes and Customs ("**Appellant**") to allow removal of the materials lying in the Customs Bonded Warehouses, without payment of customs duty, under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

The case of the Respondent before the NCLT was that the ABG Shipyard ("**Corporate Debtor**") imported materials for construction and building ships, which were to be exported post manufacturing. The Corporate Debtor had thus availed of a benefit available under the Export Promotion Capital Goods Scheme ("**EPCG Scheme**") published by way of certain notifications published by the Central Board of Indirect Taxes and Customs, Department of Revenue, Ministry of Finance, Government of India. Consequently, the Corporate Debtor was provided with a license under the EPCG Scheme concerning the materials being imported. However, since the Corporate Debtor failed to submit an Export Obligation Discharge Certificate ("**EODC**") and thereby comply with its obligations in respect of the EPCG license, the Office of the Commissioner of Customs (Export), EPCG (Monitoring Cell), Mumbai (Customs Authority) issued various notices to the corporate debtor *inter alia* directing the Corporate Debtor to pay the applicable customs duty concerning the materials. However, subsequently, the Appellant proceeded to recover its alleged dues against the Corporate Debtor by putting the property of the Corporate Debtor for sale by way of auction, exercising its powers under the Customs Act, 1962.

Thus, the issues for consideration before the NCLAT were *inter alia* whether the Appellant could have exercised powers under the Customs Act, 1962 during the pendency of proceedings under the IBC and whether the IBC would take precedence over the provisions of the Customs Act, 1962 by virtue of it being a special enactment.

***Findings*:**

The NCLAT, upon analysing the facts of the case observed that the goods lying in the customs bonded warehouses cannot be called the Corporate Debtor's assets, since it never claimed them after importing them. Since the containers were not cleared by the Corporate Debtor after import, it had relinquished its rights to the imported goods by not making any efforts towards removing the imported goods. The NCLAT thus held that the respondent liquidator had consequently no right to take into possession the goods for which the Corporate Debtor's title is deemed relinquished by implication of law.

The NCLAT further observed that the Customs Act, 1962 is a complete code in itself. Basing its reliance upon decisions rendered by the Hon'ble Apex Court and decisions of certain High Courts, the NCLAT observed that the NCLT and NCLAT cannot usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute does not arise solely from or relate to the insolvency of the Corporate Debtor. The NCLAT further observed that by filing a claim under Section 38 of the IBC, it cannot be held that the Appellant had relinquished its right over the warehoused goods and submitted it to the jurisdiction of the liquidator. Thus, it was held that the liquidator could not bypass the provisions of the Customs Act, 1962 by relying upon the provisions of the IBC and that the liquidator cannot possess uncleared goods from the customs warehouses without upfront payment of customs duty.

The appeal thus, came to be allowed by the NCLAT and the order of the NCLT whereby the NCLT had directed removal of the materials lying in the customs bonded warehouses without payment of customs duty under Section 60(5) of the IBC was modified to the extent that goods can be released or disposed of as per applicable provisions of the Customs Act, 1962.

v. V Nagarajan v. SKS Ispat and Power Ltd. and others

[Judgement of the Hon'ble Supreme Court of India dated October 22, 2021, in Civil Appeal No.3327 of 2020]

Background:

The instant appeal before the Hon'ble Supreme Court of India under Section 62 of the Insolvency and Bankruptcy Code ("**IBC**") was filed by Mr. V. Nagarajan ("**Appellant**") against an order of the National Company Law Appellate Tribunal ("**NCLAT**") dated July 13, 2021, dismissing the appeal before the NCLAT as barred by limitation. The Appellant had filed an appeal before the NCLAT against the order dated December 31, 2019, of the National Company Law Tribunal, Chennai ("**NCLT**") which had dismissed the Appellant's miscellaneous application in a liquidation proceeding, seeking interim relief against the invocation of a bank guarantee by the Respondent No.10 (SKS Power Generation Chhattisgarh Limited) against the corporate debtor.

The Appellant had filed the appeal before the NCLAT on June 8, 2020, challenging the order of the NCLT passed on December 31, 2019. The NCLAT however dismissed the appeal on the ground that the appeal had been filed beyond the period of limitation for appeals prescribed in Section 61(2) of the IBC i.e., 30 (thirty) days, extendable by a further 15 (fifteen) days.

Before the Hon'ble Supreme Court, it was contended by the Appellant that while the order was passed on December 31, 2019, it was uploaded on the NCLT website only on March 12, 2020 for the first time and the corrected order was uploaded only on March 20, 2020. The Appellant further contended that Section 420 of the Companies Act, 2013 read with Rule 50 of the National Company Law Tribunal Rules, 2016 ("**NCLT Rules**") mandates a free copy of the order to be issued to every party and since the free copy was not provided to the Appellant even as on the date of filing the appeal before the NCLAT, the appeal was filed within the prescribed limitation period.

The two issues before the Hon'ble Supreme Court were:

- When will the clock for calculating the limitation period run for proceedings under the IBC?
- Is the annexation of a certified copy mandatory for an appeal to the NCLAT against an order passed under the IBC?

Findings:

On the first issue it was held by the Hon'ble Supreme Court that owing to the special nature of the IBC and it being a code in itself, it has an overriding effect over other statutes. In contradiction to Section 421(3) of the Companies Act, Sections 61(1) and (2) of the IBC consciously omit the requirement of limitation being computed from when the "order is made available to the aggrieved party". Therefore, the aggrieved party is required to exercise due diligence and apply for a certified copy upon pronouncement of the order it seeks to assail. This would also be in consonance with the requirement under Rule 22(2) of the NCLAT Rules which requires every appeal to be accompanied by a certified copy of the impugned order.

It was further held that accepting a construction of the provisions of Section 61 of the IBC to mean that the period of limitation will be calculated only from the date of receipt of a free certified copy will upset the

strict timelines prescribed under the IBC and a sleight of interpretation of procedural rules cannot be used to defeat the substantive objective of a legislation that has an impact on the economic health of a nation.

On the second issue, it was held that Rule 22(2) of the National Company Law Appellate Tribunal Rules, 2016 ("**NCLAT Rules**") mandates that a certified copy of the impugned order to be annexed to an appeal, which is also in consonance with IBC. Rule 14 of the NCLAT Rules allows for dispensation from annexing a certified copy of the impugned order, but the same cannot be claimed as an automatic exception without having put any effort to pursue a timely resolution of grievance.

In the facts of the case, it was held that the appellant having been present before the NCLT when the impugned order was pronounced and having demonstrated no efforts in securing the certified copy of the order dated December 31, 2019, the 30 (thirty) day period of limitation to file an appeal expired on January 30, 2020 as per Section 61(2) of the IBC and the extended period of 45 (forty five) days would have expired on February 14, 2020. Thus, the present appeal under section 62 of the IBC was dismissed.

vi. Ngaitlang Dhar v. Panna Pragati Infrastructure Pvt. Ltd. and Others

[Judgment of the Hon'ble Supreme Court of India dated December 17, 2021, in Civil Appeal Nos. 3665 – 66 of 2020 with Civil Appeal Nos. 3742 – 43 of 2020]

Background:

The Civil Appeals were filed before the Hon'ble Supreme Court of India under Section 62 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). Civil Appeal Nos. 3665 – 66 of 2020 were filed by Ngaitlang Dhar, the successful Resolution Applicant, and Civil Appeal Nos. 3742 – 43 of 2020 were filed by Amit Pareek, the Resolution Professional. The appeals assailed the judgment passed by the National Company Law Appellate Tribunal, New Delhi ("**NCLAT**") dated October 19, 2020, in Company Appeal (AT) (Insolvency) Nos. 515 of 2020 ("**C.A. 1**") and 516 of 2020 ("**C.A. 2**").

C.A. 1 was filed assailing the National Company Law Tribunal's ("**NCLT**") order dated March 18, 2020 rejecting Panna Pragati Infrastructure Private Limited's ("**PPIPL**") request for direction to the Resolution Professional ("**RP**") to take on record and consider PPIPL's revised offer submitted by email dated February 14, 2020.

C.A. 2 was filed assailing the order dated May 18, 2020 passed by the NCLT, in an unnumbered I.A. filed by the RP, by way of which Ngaitlang Dhar's Resolution Plan came to be approved by the NCLT.

By way of the impugned judgment and order dated October 19, 2020, the NCLAT had set aside both the orders, dated March 18, 2020 and May 18, 2020, and directed that the corporate insolvency resolution process be resumed from the stage of consideration of the resolution plans.

Findings:

The Hon'ble Supreme Court after considering the facts of the case has reiterated that in order to ensure that the process as envisaged under the IBC is completed within the stipulated timelines, the "commercial wisdom" of the Committee of Creditors takes utmost precedence and the avenue for judicial intervention is limited only to the considerations laid down under Section 30(2) and Section 61(3) of the IBC.

While interpreting the phrase 'material irregularity' found in Section 61(3) of the IBC, the Hon'ble Supreme Court has held that any intervention on appeal would be maintainable only if there was any material irregularity in the process adopted by either the RP or the committee of creditors. The Hon'ble Supreme Court placed reliance on the case of *Keshardeo Chamria Vs. Radha Kissen Chamria* [(1953) 4 SCR 136] which held that any errors of fact or law do not fall within the ambit of the terms "illegally" and "material irregularity" and the consideration is not with respect to the decision itself but the manner in which the decision was arrived at. The term is limited to material defects of procedure and the IBC does not contemplate errors of law or fact which may be seen after the formalities prescribed by law are complied with.

As such, the Hon'ble Supreme Court held that the process adopted in the instant case by the RP and the committee of creditors did not highlight any irregularity, let alone a material irregularity. Moreover, it noted that the dominant purpose of the IBC, being to ensure revival of the Corporate Debtor and to make it an ongoing concern, had been fulfilled inasmuch as all the dues owed to the creditors had already been paid off and the Corporate Debtor is now a going concern. In view of the above considerations, the Hon'ble Supreme Court opined that intervention was not warranted in the instant case and therefore, allowed the appeals and quashed the judgment of the NCLAT dated October 19, 2020.

V. LITIGATION & ARBITRATION

i. Gyan Prakash Arya v. M/s Titan Industries Limited

[Civil Appeal No. 6876 of 2021 decided on November 22, 2021, by the Hon'ble Supreme Court of India]

Background:

In the present case, the Appellant, i.e., Gyan Prakash Arya had entered into an agreement with M/s. Titan Industries Limited ("**TIL**").

A dispute arose between the parties relating to recovery of pure gold weighing 3648.80 grams said to have been in the possession of the Appellant. TIL invoked the arbitration clause contained in their agreement and subsequently, the arbitral tribunal passed an award where the Appellant was directed to return 3648.80 grams of gold along with interest @ 18% (eighteen percent) per annum calculating the value of gold at Rs. 740/- (Rupees seven hundred and forty) per gram, within three months.

Subsequently, TIL filed an application under Section 33 of the Arbitration & Conciliation Act, 1996 ("**the Act**") before the arbitral tribunal with a request to modify the award seeking correction in computational/arithmetical/clerical error by deleting "at Rs. 740 (Rupees seven hundred and forty) per gram as claimed in the claim statement" and substituting the same with "Rs. 20,747/- per 10 grams".

Thereafter, the Appellant filed an application under Section 34 of the Act before the City Civil Court seeking setting aside of the arbitral award, which was dismissed. Subsequently, an appeal under Section 37 of the Act filed by the Appellant against the dismissal of its application under Section 34 of the Act was also dismissed by the High Court of Karnataka.

Findings:

The Hon'ble Supreme Court adjudicated upon the issue as to whether the arbitral tribunal had modified the award as per the mandate under Section 33 of the Act. The Hon'ble Supreme Court set aside the order passed by the Arbitral Tribunal modifying the original award.

The Hon'ble Supreme Court observed that while under Section 33 of the Act, the award can be modified only in a case of an arithmetical and/or clerical error, it cannot be said that there was any arithmetical and/or clerical error in the original award passed by the arbitral tribunal in the present case.

It was further held that what had been claimed by the original claimant in the statement of claim has been awarded and therefore the order passed by the learned arbitrator in the application under Section 33 of the Act was beyond the scope and ambit of Section 33 the Act.

ii. Union of India v. Manraj Enterprises

[Civil Appeal No. 6592 of 2021 decided on November 18, 2021, by the Hon'ble Supreme Court of India]

Background:

In the present case, a contract was entered into between the Union of India ("**Appellant**") and Manraj Enterprises ("**Manraj**") with regard to three works contracts. A dispute arose between the parties and the parties resorted to arbitration for resolution of the dispute. The sole arbitrator awarded an amount of Rs. 78,81,553.08/- along with *pendente lite* and future interest at the rate of 12% (twelve percent) and 18% (eighteen percent) respectively on the entire awarded amount except for the earnest money deposit and security deposit.

Thereafter, Union of India filed an application before the Hon'ble High Court of Delhi under Section 34 of the Arbitration and Conciliation Act, 1996 ("**the Act**") challenging the award made pertaining to pre-suit, *pendente lite* and future interest awarded on the balance due payment, from the due date of payment. The said appeal was dismissed by the Single Judge of the Hon'ble High Court. Subsequently, the Division Bench of the Hon'ble High Court also confirmed the award made by the arbitrator awarding *pendente lite* interest and future interest awarded on the balance due payment. Being aggrieved with the impugned judgment of the of the Hon'ble High Court, the Union of India filed the appeal before the of the Hon'ble Supreme Court of India.

Findings:

The Hon'ble Supreme Court adjudicated upon the issue as to whether contractor / Manraj was entitled to any interest *pendente lite* on the amounts payable to the contractor other than upon the earnest money or the security deposit.

The Hon'ble Supreme Court observed that as per clause 16(2) of the General Conditions of the Contract ("**GCC**"), no interest would be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract.

The Hon'ble Supreme Court placing reliance on the case of *State of Karnataka v. Shree Rameshwara Rice Mills*, (1987) 2 SCC 160, observed that the liability to pay for damages on account of breach of conditions of the agreement does not fall outside the terms of the contract but within the terms of the contract.

In addition, the Hon'ble Supreme Court observed that the expression "*amounts payable to the contractor under the contract*" cannot be read in conjunction with "*earnest money deposit*" or "*security deposit*" by applying the principle of ejusdem generis as the words used in clause 16(2) of the GCC is "or".

Accordingly, the Hon'ble Supreme Court set aside the award passed by the Arbitral Tribunal awarding *pendente lite* and future interest on the amounts held to be due and payable to Manraj under the contract.

iii. M/s. Narinder Singh and Sons v. Union of India through Divisional Superintendent Engineer – II, Northern Railway, Ferozepur Division, Ferozepur

[Civil Appeal No. 6734 of 2021 decided on November 18, 2021, by the Hon'ble Supreme Court of India]

Background:

In the present case, the Appellant was awarded a tender by the Respondent i.e., Divisional Superintendent Engineer-II, Northern Railway, Ferozepur Division, Ferozepur, Punjab, for additional washing line to accommodate 26 coaches at Jammu Tawi Railway Station. Disputes arose when the Respondent terminated the contract due to non-performance and repeated lapses by the Appellant. The Appellant invoked the arbitration clause and subsequently, an arbitrator was appointed. Thereafter, the arbitrator, pronounced an *ex parte* award against the Respondent. The said award was challenged by the Respondent under Section 34 of the Arbitration and Conciliation Act, 1996 ("**the Act**"), before the Additional District Judge, Gurdaspur, which was dismissed. However, the Respondent succeeded in the appeal filed under Section 37 of the Act before the Hon'ble Punjab and Haryana High Court. The Hon'ble High Court set aside the award primarily on the ground that the arbitrator had violated the principles of natural justice and had proceeded with great haste and hurry. As regards to remanding the matter back to the arbitrator, the Hon'ble High Court held that the court remand was impermissible, but the parties were at liberty to approach the arbitrator for fresh adjudication or avail any other remedy permitted by law, while stating that the period spent in the arbitration proceedings and the resultant litigation should be excluded in terms of Section 43(4) of the Act.

Findings:

The Hon'ble Supreme Court observed that the Respondent was "unable to present his case", a valid ground and justification for setting aside an award under clause (iii) to sub-section (2)(a) to Section 34 of the Act. Further, the award was also "in conflict with the public policy of India" under clause (ii) to Section 34(2)(b) read with the applicable Explanation 1 to Section 34(2) of the Act.

The Hon'ble Supreme Court further observed that the Respondent was also deprived of reasonable and fair opportunity to cross-examine the Claimant's witness.

Accordingly, the Hon'ble Supreme Court held that there was violation of principles of natural justice and lack of full opportunity as envisaged by Section 18 of the Act, thereby, impeding a fair and just decision. The Hon'ble Supreme Court held that therefore, the award was liable to be set aside in terms of clause (iii) to Section 34(2)(a) as well as clause (ii) to Section 34(2)(b) of the Act.

iv. Punjab State Civil Supplies Corporation Ltd & Another v. M/s Ramesh Kumar and Company & Others

[Civil Appeal No. Civil Appeal No 6832 of 2021 decided on November 13, 2021, by the Hon'ble Supreme Court of India]

Background:

In the present case, the sole arbitrator, by way of an arbitral award, rejected the claims of the Respondents and upheld the actions of the Appellants, Punjab State Civil Supplies Corporation Ltd & Another of forfeiting the security deposit. The award was challenged under Section 34 of the Arbitration and Conciliation Act, 1996 ("**the Act**") before the District Judge, however, the petition was dismissed. The judgment of the District Judge was challenged before the Hon'ble High Court under Section 37 of the Act. The High Court allowed the appeal, *inter alia*, on the ground that the award lacked reasons and the reasons which were assigned were arbitrary and erroneous. Further, having held that the award was liable to be set aside, the Hon'ble High Court decreed the claim of the Respondents for the supply of 22,389 wooden batons, together with the security deposit of Rs. 1,00,000/- (Rupees One Lakh) and awarded interest at the rate of 12% (twelve percent) from the date from which the amount became due.

Findings:

The Hon'ble Supreme Court reiterated that it is a settled law that jurisdiction in a first appeal arising out of a decree in a civil suit is distinct from the jurisdiction of the High Court under Section 37 of the Act arising from the disposal of a petition challenging an arbitral award under Section 34 of the Act. The Court observed that while considering a petition under Section 34 of the Act, the court does not act as an appellate forum.

The Supreme Court also observed that the High Court had transgressed the limits of its jurisdiction and accordingly set aside the Impugned Judgment of the Hon'ble High Court.

v. Harcharan Singh Hazooria v. Kulwant Singh Hazooria & Others

[CS(OS) 2244/2008 decided on October 29, 2021, by the Hon'ble High Court of Delhi]

Background:

In the present case, the plaintiff filed the suit seeking partition of the suit property and possession after partition of the share of the plaintiff, being one-half. A decree of declaration was also sought that the gift deeds dated May 23, 2007 and June 02, 2008 said to have been executed by Late Smt. Jaswant Kaur were null and void and were not binding on the Plaintiff and consequently, cancellation of the said gift deeds. Other connected reliefs were also sought.

The basic controversy in the suit, centred around the validity and legality of the two gift deeds.

Findings:

The Hon'ble High Court of Delhi while dealing with issue with regard to the nature of evidence which the parties are expected to lead to support the plea of fraud, undue influence, etc. placing reliance on the case

of *Krishna Mohan Kul alias Nani Charan Kul & Another vs. Pratima Maity & Others* (2004) 9 SCC 468, the court held that when fraud, misrepresentation or undue influence was alleged by a party in a suit, normally the burden is on them to prove such fraud, undue influence or misrepresentation.

However, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence, the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position. Such a person has to prove fair play in the transaction and show that the transaction was genuine and bona fide.

Relying on the case of *Marcel Martins vs. M Printer & Others*, (2012) 5 SCC 342 the Hon'ble High Court of Delhi held that a fiduciary relationship arises: (i) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first; (2) when one person assumes control and responsibility over another; (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship; or (4) when there is a specific relationship that has traditionally been recognised as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.

Accordingly, in the present case, the Hon'ble High Court of Delhi set aside and quashed the gift deeds executed in favour of the Defendants, who were holding a position of confidence/trust, as the Defendants failed to prove in evidence that the transaction was fair and reasonable and that no undue advantage had been taken by them of their position.

vi. Gujarat State Disaster Management Authority v. M/s Aska Equipments Limited

[Civil Appeal No. 6252 of 2021 decided on October 8, 2021, by the Hon'ble Supreme Court of India]

Background:

In the present case, dispute arose between the parties regarding payment of goods which was taken by the Appellant. An award was passed by the Facilitation Council (set up under the Micro, Small and Medium Enterprises Development Act, 2006) in favour of M/s. Aska Equipments Limited, i.e., Respondent and the Appellant was directed to pay a sum of Rs. 10,50,53,387/- (Rupees ten crores fifty lakhs fifty three thousand three hundred and eighty seven). The appellant preferred an application before the learned Additional District Judge under Section 34 of the Act read with Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 ("**MSME Act**") being aggrieved by the said award. Pursuant to the same, the Appellant was required to deposit 75% (seventy five percent) of the amount awarded by the arbitrator. Feeling aggrieved, the Appellant herein, filed a writ petition before the Hon'ble High Court. By the Impugned Judgment and order, the Hon'ble High Court dismissed the said writ petition. The present appeal was filed by the Appellant, against the Impugned Judgment and order of the Hon'ble High Court.

Findings:

The Hon'ble Supreme Court of India adjudicated upon the issue as to whether in an appeal/application filed under Section 34 of the Act read with Section 19 of the MSME Act, the Appellate court would have any discretion to deviate from the mandatory pre-deposit of 75% (seventy five percent) of the awarded amount.

The Hon'ble Supreme Court held that the requirement of deposit of 75% (seventy five percent) of the amount in terms of the award as a pre-deposit was mandatory and the Appellate court does not have any

discretion in this regard. However, at the same time, the Hon'ble Supreme Court observed that it may allow pre-deposit to be made in instalments considering the hardship which the Appellant may face in depositing 75% (seventy five percent) of the awarded amount.

VI. LABOUR & EMPLOYMENT

i. Haryana Government notifies date for implementation of the Haryana State Employment of Local Candidates Act, 2020

The Government of Haryana, by way of Notification No. Lab/25467/2021 dated November 6, 2021, has specified January 15, 2022, as the date for implementation of the Haryana State Employment of Local Candidates Act, 2020 (**"Act"**). Further, by way of another Notification No. Lab./25478/2021, also dated November 6, 2021, the State Government has notified Rs. 30,000/- (Rupees thirty thousand) as the gross monthly salary/ wages for the purposes of registration under Section 3 of the Act. Section 3 of the Act requires covered employers to register such employees on the government's designated portal, who earn a gross monthly salary or wages up to the specified threshold.

The full text of the Notification No. Lab/25467/2021 can be accessed here. The full text of the Notification No. Lab./25478/2021 can be accessed here.

ii. Government of Tamil Nadu notifies the Tamil Nadu Labour Welfare Fund (Amendment) Act, 2021

The Government of Tamil Nadu, by way of Notification No. 455 dated October 1, 2021, has notified the Tamil Nadu Labour Welfare Fund (Amendment) Act, 2021 (No. 22 of 2021) (**"Amendment Act**"), amending Section 15 of the Tamil Nadu Labour Welfare Fund Act, 1972. As per the Amendment Act, the contribution of employees to the Labour Welfare Fund has been increased from Rs. 10/- (Rupees ten) to Rs. 50/- (Rupees fifty), while the contribution of the employer has been increased from Rs. 20/- (Rupees twenty) to Rs. 100/- (Rupees one hundred).

The full text of the Notification can be accessed here.

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