VOLUME 42, FEBRUARY 2018

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THE NEWSLETTER

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UPDATE YOURSELF

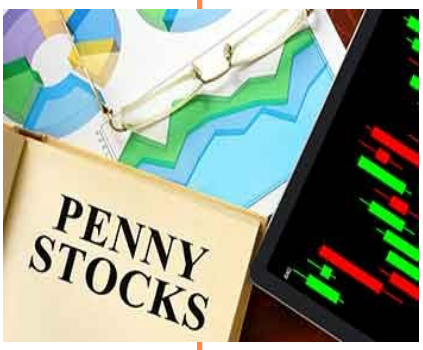
Relief to Educational Institutions Under GST

Central Government *vide* Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 ("**Exemption Notification**") specifically exempted the services provided by the educational institutions to its students, staff and faculty. The Exemption Notification also exempts the services provided to the educational institutions by way of transportation of students, staff and faculty, catering including mid-day meals schemes approved by government, security or cleaning services performed in such educational institutions and services relating to admission, or conduct of examination. However, the benefit of the said exemption was available only if the services had been supplied to the educational institutions providing services by way of pre- school education and education up to higher secondary school or equivalent. The Central Government *vide* Notification No. 2/2018- Central Tax (Rate) dated 25.01.2018 ("**Amendment Notification**") has amended the Exemption Notification to extend the scope of exemption to the services provided by/to the educational institutions. The Amendment Notification extends the scope of exemption provided in the Exemption Notification, to the services provided to the educational institutions relating to admission or conduct of examination by such institution. Thus, as the result of the Amended Notification, the services relating to admission or conduct of examination, provided to all the educational institutions are exempt from levy of GST irrespective of the fact that whether or not such institution provides services by way of pre -school education or education up to higher secondary school or equivalent. Further, the services provided by the education institutions by way of conduct of entrance exams against the consideration in the form of exam fee have also been exempted by the Central Government. The Amendment Notification also exempts the services provided by way of supply of online educational journals or periodicals, to the educational institutions excluding those educational institutions which are engaged in providing pre-school education or education up to higher secondary school or equivalent.

LTCG Claimed As Exempt u/s 10(38) of Income Tax Act Held to be Genuine

The Hon'ble High Court of Punjab and Haryana ("**Court**") in case of ***Pr.*** Commissioner ***of Income Tax (Central), Ludhiana vs. Prem Pal Gandhi [ITA no. 95 of 2017 dated 18.01.2018]*** has held that addition to the total income of an assessee cannot be made solely on the basis that the assessee has earned huge long-term capital gains from purchase and sale of shares. In the instant case, the assessee earned Rs.4,11,77,474/- profits from sale of shares and claimed the same as exempt under Section 10(38) of the Income Tax Act, 1961 ("**Act**"). As per Section 10(38) of the Act, an assessee is eligible for exemption of income arising from transfer of long-term capital asset being shares in the company if certain conditions mentioned in the

said section are fulfilled. However, the said claim of the assessee was disallowed by the assessing officer on the ground that, that the profits of the assessee, actually represent undisclosed income of the assessee. On appeal by the assessee, the CIT(A) observed that the assessing officer failed to produce any evidence whatsoever in support of his suspicion and thus, rejected the addition made by the assessing officer. On further appeal to the ITAT, the order of CIT(A) was upheld. Thus, the department appealed before the Court against the order of ITAT. The Court held that although the appreciation was high, but it should be appreciated that the shares were traded at National Stock Exchange and there was no evidence to indicate that the same was manipulated. Moreover, the purchase and sale of shares was also done through proper banking channels. Therefore, the Court relying upon its own judgment in the case of ***Pr. Commissioner of Income Tax (Central), Ludhiana vs. Sh. Hitesh Gandhi [ITA No. 18 of 2017 dated 16.02.2017]***, dismissed the appeal of the revenue and held that no substantial question of law arises in the instant case.



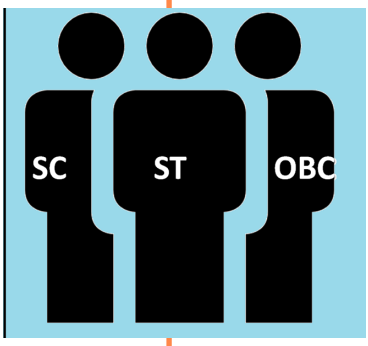
The Arbitral Award on the Issue of Limitation is An Interim Award And Thus Can Be Challenged

The Hon'ble Supreme Court ("**Court**") in the case of ***M/s. Indian Farmers Fertilizer Co-operative Limited vs. M/s. Bhadra Products [Civil Appeal No. 824 of 2018 decided on 23.01.2018]*** examined the issue as to whether an arbitral award deciding the issue of limitation can be considered as an interim award, and whether such interim award can then be set aside under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Act**"). In the instant case, M/s. Indian Farmers Fertilizers Co-operative Limited ("**IFFCL**") awarded a tender work to M/s. Bhadra Products ("**BP**") for supply of defoamers and entered into a letter of intent with BP thereby, laying down the terms and conditions of supply, targets to achieve, etc. Thereafter, as BP failed to meet the agreed targets, dispute arose between IFFCL and BP ("**Parties**") and arbitration was invoked. One of the issues in the said dispute was related to limitation and the same was decided by the arbitrator in favor of BP ("**Award**"). IFFCL filed a petition before the District Court ("**DC**") under Section 34 of the Act to set aside the Award which is an interim award. DC dismissed the petition on the ground that the Award cannot be said to be an interim award. The decision of DC was challenged by IFFCL before the Hon'ble High Court of Orissa. The Hon'ble High Court of Orissa dismissed the appeal by reiterating the reasoning of DC. Thereafter, IFFCL filed an appeal before the Court challenging the decision of Hon'ble High Court of Orissa. The Court observed that apart from stating that the term 'arbitral award' includes an interim award under Section 2(c) of the Act, the Act is silent and does not define what is an interim award. Therefore, in order to determine the scope of 'interim award' the Court referred to Section 31(6) of the Act and observed that bare perusal of Section 31(6) makes it clear that the jurisdiction to make an interim arbitral award is left to the good sense of the arbitral tribunal, and that it extends to 'any matter' with respect to which it may make a final arbitral award. The expression 'matter' is wide in nature, and subsumes issues at which the parties are in dispute. Therefore, it is explicitly clear that any issue/matter in a dispute between the parties which is required to be answered by the arbitral tribunal can be the subject matter of an interim arbitral award. . Further, the Court referred to Section 32(1) of the Act which states that the arbitral proceedings would be terminated only by the final arbitral award, as opposed to an interim award, thus making it clear that there can be one or more interim awards, prior to a final award, which conclusively determine some of the issues between the parties, culminating in a final arbitral award which ultimately decides all remaining issues between the

parties. Thus based upon the above observations, the Court held that the learned arbitrator has disposed of one matter between the Parties i.e. the issue of limitation therefore, the Award can be considered as an "interim award" within the meaning of Section 2(1)(c) of the Act and hence, being subsumed within the expression "arbitral award", the Award can be challenged under Section 34 of the Act.

Caste of A Person Does Not Change After Marriage

The Hon'ble Supreme Court ("**Court**") in the case of ***Sunita Singh vs. State of Uttar Pradesh and others [Civil Appeal No. 487 of 2018 decided on 19.01.2018]*** examined the issue as to whether a woman can take benefit of reservation just because she is married to a man who belongs to scheduled caste. The appellant, born in "Agarwal" family ("**General Caste**"), was married to Dr. Veer Singh, who belonged to "Jatav" Community ("**Scheduled Caste**"). A caste certificate dated 29.11.1991 was issued by District Magistrate/Collector certifying appellant as a scheduled caste ("**Certificate**"). Based on the academic qualifications and the Certificate, she was appointed as a teacher at Kendriya Vidyalaya ("**Institution**"), and served the Institution for twenty one (21) years. A complaint was lodged against the appellant regarding the Certificate issued to her claiming that she belonged to General Caste and not Scheduled Caste. After making preliminary verification, the Tehsildar *vide* his order cancelled the Certificate and asked the appellant to return the Certificate issued earlier to her ("**Order**"). As a result of cancellation of the Certificate, the Institution terminated the employment of the appellant ("**Termination Order**"). Aggrieved by the Order and the Termination Order, the appellant made representations and appeals to authorities and to the Hon'ble High Court of Allahabad but the same was dismissed by them. Thus, the appellant filed an appeal before the Court challenging the order of the Hon'ble High Court of Allahabad which confirmed the Termination Order. The Court, after hearing the parties, held that the caste of a person is determined by birth and the same cannot be changed by marriage with a person of another caste. Thus, in the instant case, the caste of the appellant will not change by merely marrying a person who belongs to Scheduled Caste and issuance of Certificate to the appellant was not right. However, after taking into account the fact that the appellant has served the Institution for twenty one (21) years and that she has neither played fraud nor misrepresented before any of the authorities for getting the Certificate, the Court took a lenient view by exercising jurisdiction under Article 142 of the Constitution of India, 1949 and ordered to convert the Termination Order to an order of compulsory retirement.



Standard Procedure to be followed by AO before invoking Section 68 of Income Tax Act

In order to streamline the process of invocation of Section 68 of the Income Tax Act, 1961 ("**Act**"), the Central Board of Direct Taxes ("**CBDT**") *vide* its letter dated 10.01.2018 addressed to department officers ("**Letter**") prescribed the standard procedure to be followed by the Assessing Officer ("**AO**") for applying the provisions of Section 68 of the Act. Section 68 of the Act provides for addition of unexplained cash credit in total income of an assessee. As per the Letter, for invoking Section 68 of the Act, following steps are required to be followed in sequence:

Step-1:- Whether there is credit of a sum during the year in the books of accounts maintained by the taxpayer.

Step-2:-If yes, assessee should be asked to explain the nature and source of such credit appearing in the books of accounts.

Step-3:- In case, the assessee offers no explanation, sum so credited may be charged to income-tax as the income of the assessee of that previous year. Step-4:- If assessee furnishes an explanation, the AO should examine whether the explanation so offered establishes following three ingredients: (i) identity of the creditor; (ii) creditworthiness of the creditor; and (iii) genuineness of the transactions.
Step-5:- If assessee's explanation is reliable or acceptable, sum so credited may not be charged to income tax.
Step-6:-If the explanation, offered by the assessee is not acceptable or reliable, the AO should give a detailed reasoning in the assessment order for not accepting the same.
Step-7:-The reasons for not accepting the explanation of the assessee should be communicated to the assessee.
Step-8:-The order passed by the AO should be speaking one bringing on record all the facts, explanation furnished by the assessee in respect of nature and source of credit in its books of accounts and reasons for not accepting the explanation of the assessee.
However it is clarified in the Letter that above steps are not exhaustive but only illustrative in nature. Further it is also clarified that sequence of the steps may depend upon the facts of each case.

Bill to amend Negotiable Instruments Act, 1881 introduced in Lok Sabha

The bill to amend Negotiable Instrument Act, 1881 ("**Act**") namely the Negotiable Instrument (Amendment) Bill, 2017 ("**Bill, 2017**") was introduced in the Lok Sabha on 02.01.2018. As per the Statement of Objects and Reasons of the Bill, 2017, the Act is proposed to be amended to address the issue of undue delay in final resolution of cheque dishonour cases so as to provide relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation which would save time and money. The Bill, 2017 proposes to insert two new sections namely "***Section 143A – Power to direct interim compensation***" and "***Section 148 – Power of Appellate Court to order payment pending appeal against conviction***". The new Section 143A makes the provision for payment of interim compensation not exceeding 20% of the value of the cheque to the complainant by the drawer of the dishonoured cheque, during the pendency of the proceedings for the offence of dishonour under Section 138 of the Act ("**Interim Compensation**"). The new Section 143A states that the concerned Court trying an offence under Section 138 of the Act, may order for payment of Interim Compensation ("**Order**"):

(i) in a summary trial or a summons case, where the drawer pleads not guilty to the accusation made in the complaint; and
(ii) in any other case, upon framing of charge.
Further, the Interim Compensation shall be paid within sixty (60) days from the date of Order. The new Section 143A also states that: (i) if the drawer is found guilty, then the amount of Interim Compensation shall be adjusted against the fine imposed on the drawer under Section 138 of the Act or against the amount of compensation awarded to the complainant under Section 357 of Code of Civil Procedure, 1973; and (ii) if the drawer is acquitted, the complainant is required to return the Interim Compensation along with interest to the drawer within 60 days from the date of acquitted order.

The Bill, 2017, also, provides for the insertion of new Section 148 in the Act which states that in an appeal by the drawer against conviction under Section 138 of the Act, the appellate court is empowered to order the appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial court ("**Appeal Pending Amount**") within 60 days from the date of said order. The Appeal Pending Amount shall be in addition to the Interim Compensation (if any) paid by the appellant under new Section 143A. In addition, the new Section 48 states that the appell-

ate court may direct the release of the Appeal Pending Amount at any time during the pendency of the appeal. However, if the appellant is acquitted, the complainant shall repay to the appellant the Appeal Pending Amount so released along with interest within 60 days from the date of acquitted order.

Registered Trademarks Can't Be Removed Without Giving Prior Notice to Registered Proprietor

The Hon'ble Bombay High Court ("**Court**") recently in the matter of ***Kleenage Products (India) Private Limited vs. The Registrar of Trade Marks*** **(Writ Petition No. 850 of 2015, decided on 17.01.2018)** allowed a petition seeking prohibition of removal of the trademark 'KLITOLIN' from the records of the register of trademarks. The bench of Justice RM Borde and Justice RG Ketkar heard the petition filed by Kleenage Products Private Ltd, a company engaged in manufacture and sale of washing and cleaning preparations. In the instant case, the petitioner had applied for registration of trademark 'KLITOLIN' which was accepted and from 1988 to 2009 the said trademark was renewed multiple times. The trademark was due for renewal on 21.08.2009, but the petitioner failed to tender application for renewal. It was, thereafter, revealed that the trademark is likely to be removed from the register. The Court after due consideration of facts of the matter and the applicable law held that any such removal, as stated above, can only be possible if prior notice, mandatory under Section 25(3) of the Trade Marks Act 1999 ("**Act**"), has been given. The Court relied on the judgment in the matter of ***Cipla Limited vs. Registrar of Trade Marks and another*** **(Writ Petition No.1669 of 2012 Decided on 23.09.2013)** wherein the Court had referred to Hon'ble High Court of Delhi's judgment in the matter of ***Malhotra Book Depot vs. Union of India and Ors [2012 (49) PTC 354 (Del.)]*** wherein it was held that mere expiration of the registration by lapse of time, and failure of the registered proprietor of the trade mark to get the same renewed, by itself, does not lead to the conclusion that the same can be removed from the register by the Registrar of Trademarks without complying with the mandatory procedure prescribed in Section 25(3) of the Act read with Rule 67 of the Trademark Rules, 2017.

State Bar Council has No Power to Interfere with the Election of Bar Association

The Madhya Pradesh High Court ("**Court**") in the case of ***Bar Association Lahar, Dist. Bhind vs. State Bar Council of M.P and another [W.P. No.750/2017 and W.P. No.14586/2016 decided on 17.01.2018]***, has ruled that State Bar Councils cannot interfere with the election process or election of a Bar Association. The observed that the only purpose of the Advocates Welfare Fund Act, 1982 ("**Act, 1982**") is to provide succour to advocates who cease to practice or advocates who suffer from any disability or who die. The Act, 1982 no where confers the power to the State Bar Council to have control or to supervise the election affairs of a Bar Association. Further the Court observed that from a bare reading of the various provisions of the Advocates Act, 1961 ("**Act, 1961**") and , it is graphically clear that there is no provision either under the Act, 1961 nor under the Advocates Welfare Fund Act, 1982 to interfere with the elections conducted by the Bar Associations.

QUICK TAKEAWAYS

- In the matter of ***Federation of Hotel & Restaurant Association of India vs. Union of India [[2018] 89 taxmann.com 384 (SC)]***, the Hon'ble Apex Court held that hotels can sale packaged water above MRP as neither Standards of Weights and Measures Act, 1976, Standards of Weights and Measures (Enforcement) Act, 1985 or Legal Metrology Act, 2009 would apply on such composite contract.
- CBEC *vide* Notification No. 3/2018 – Central Tax dated 23.01.2018 has made certain amendments in respect of rate of amount to be paid under composition scheme, value of supply, E-way bill rules, Refund rules etc. as prescribed under CGST Rules.
- The Ministry of Law and Justice *vide* its notification dated 19.01.2018 published that the Insolvency and Bankruptcy Code (Amendment) Act, 2017 of Parliament has received the assent of the President on the 18.01.2018 altering and inserting certain provisions of The Insolvency Bankruptcy Code, 2016.
- Hon'ble High Court of Delhi in the matter of ***Ansal Housing & Construction Limited vs. ACIT [2018] 89 taxmann.com 238 (Delhi)*** held that if properties held as stock in trade were not at all let out for any previous years there would be no question of availing vacancy allowance given in Section 23(1)(c) of Income Tax Act, 1961.
- The Hon'ble High Court of Rajasthan in the case of ***MahadevBalai vs. ITO D.B. [Income Tax Appeal No. 20 / 2016]*** held that the fact that the investment and document is registered is made in the name of the spouse (wife) is not a ground for disallowing exemption from capital gains under Section 54B of the Income Tax Act, 1961, if the funds utilized for the investment belong to the assessee.
- The Government has enacted the Consumer Protection Act, 2018 repealing the previous Consumer Protect Act, 1986.
- CBDT has decided to issue an intimation of the proposed adjustment to draw the attention of the taxpayer to difference identified while processing ITRs under Section 143(1)(a)(vi) of the Income Tax Act, 1961. If taxpayer failed to submit respond within one month of receiving such communication, then a formal intimation under Section 143(1)(a)(vi) of the Income Tax Act, 1961 would be issued.
- In the case of ***Vikash Akash and Anr. vs. State of M.P. (Cr.R.No. 3589/2017),*** the Hon'ble High Court of Madhya Pradesh reiterated that the incompetence of a lawyer cannot be a ground for recalling witnesses under Section 311 of the Code of Criminal Procedure, 1973.
- CBEC on 23.01.2018 *vide* various notifications has reduced the late fees to be paid in case of delayed filing of FORM GSTR-1, GSTR-5, GSTR-5A and GSTR-6.
- The Hon'ble Supreme Court of India in the case of ***Suresh Ganpati Halvankar vs. The State of Maharashtra & Ors. [Criminal Appeal No. 156/2018]*** relating to Section 138 of the Electricity Act 2003 which deals with maliciously injuring the electricity meters has held that the offence mentioned in the said section also relates to theft of electricity and therefore, is compoundable under the said Act.
- The Hon'ble High Court of Kerala in ***Shaji Mathew and Anr. vs. Union of India and Ors [WP (C) No.39115 of 2017]*** has held that the Central Board of Film Certification (CBFC) has the power to re-examine a certified film, and to prohibit public exhibition of the film till such re-examination, in order to ascertain whether the film was complying with the conditions of certification as per Rule 33 of the Cinematograph (Certification) Rules.
- The Securities and Exchange Board of India (SEBI) has barred Price Waterhouse from auditing any listed company in India for a period of two years for its alleged role in the multi-crore Satyam scam.

KNOWLEDGE CENTRE

FAQs on Limited Liability Partnership Act, 2008

Q.1. Can a partnership firm, private company and unlisted public company convert into a Limited Liability Partnership ("LLP")?

Pursuant to Section 55, 56 and 57 of the Limited Liability Partnership Act, 2008 ("**Act**"), a partnership firm, private company and unlisted public company can be converted into an LLP by complying the requisites given in respective Schedule II, Schedule III and Schedule IV of the Act.

Q.2. Whether a trust becomes a partner in an LLP?

A trust is not a legal entity having separate legal existence like a body corporate. Thus, a trust cannot become a partner in an LLP.

Q.3. Whether a trust becomes a partner in an LLP through its trustee?

It is not allowed for a trust to become a partner in an LLP through its trustee. However, the trustee in his/its individual capacity can become a partner of an LLP. Further, the Ministry of Corporate Affairs, *vide* its circular no. 3712014 dated October 14, 2014, has clarified that a Real Estate Investment Trust, Infrastructure Investment Trust and other trusts under Securities and Exchange Board of India Act, 1992, can become a partner in an LLP through its trustee, if the trustee of such trusts are body corporate.

Q.4. Whether a Hindu undivided family ("HUF") becomes a partner in an LLP?

Ans. A HUF is a body of individuals and not a body corporate. Hence, a HUF cannot become partner in an LLP either through its own or Karta.

Q.5. Can an LLP invests its funds outside India?

Ans. For the purpose of making investment outside India, it is necessary to look into Foreign Exchange Management Act, 1999 ("**FEMA**"). As per FEMA, an LLP can make investment outside India under the Joint Venture/Wholly Owned Subsidiary guidelines, subject to the limitation prescribed therein.

Q.6. Can an LLP receives foreign direct investment ("FDI") from outside India?

Ans. An LLP is eligible to receive FDI only in those sectors where 100% FDI is allowed under automatic route and there are no FDI-linked performance conditions.

Q.7. Is it required for an LLP to maintain its books of account?

Ans. All books of account as prescribed under Rule 24 of the LLP Rules, 2009 pursuant to Section 34(1) of the Act shall require to be kept at the registered office of an LLP.

Q.8. Is it required for an LLP to prepare its annual financial statement?

Ans. As per Section 34(2) of the Act, within a period of 6 months from the end of each financial year the annual financial statements shall be prepared for such financial year, and the same shall be signed by the designated partners of the LLP.

Q.9. Can 2 LLPs are allowed to merge together?

Ans. As per Section 60 to 62 of the Act, two LLPs are allowed to merge together.

Q.10. Under which law winding up of an LLP is prescribed, when an LLP fails to pay its debts?

Ans. In case an LLP fails to pay its debts, the winding up proceedings of such LLP shall be done in accordance to the provisions of the Insolvency and Bankruptcy Code, 2016.

EDITORIAL

Viability of Pre-Arbitral Steps in India

-By *Rajat Sharma, Advocate*

Multi-tiered dispute resolution clauses prescribing pre-arbitral steps are common in commercial contracts, which allow parties to resolve their disputes in a non-adversarial set up while maintaining commercial relationships and cost effectiveness. On the other hand, such prolonged negotiation involved in pre-arbitral steps may not only cause delays, but also allows a dishonest party to evade its contractual obligations. At present, the most common pre-arbitral procedural mechanisms include:

- amicable and good-faith negotiation between the parties;
- meetings between the parties' key executives and representatives, to arrive at a settlement;
- mediation; or
- submitting the dispute to an expert or a non-binding decision-making person or body.

Almost all contracts require performance of such pre-arbitral steps as a condition precedent to arbitration, but are they specifically enforceable? In other words, are pre-arbitral steps mandatory or directory in nature? For the purpose to get some clarity on this issue, Courts have analysed the same as discussed in the following paragraphs.

Supreme Court's view

In view of Section 11(6A) inserted by the Arbitration and Conciliation (Amendment) Act 2015 ("**Amendment Act**") in the Arbitration and Conciliation Act 1996 ("**Act**"), Hon'ble Supreme Court ("**SC**") in **Duro Felguera, SA *vs.* Gangavaram Port Limited** [(2017) 9 SCC 729] has held that it would confine its examination only to the existence of an arbitration agreement in an application seeking the appointment of an arbitrator under Section 11. It is therefore likely that the Courts may leave the arbitral tribunal to answer the question of compliance with pre-arbitral steps. Indian Courts, including SC, have dealt with the question of enforceability of pre-arbitral steps even before the Amendment Act. In particular, SC has emphasized the importance of the parties' conduct before initiating arbitration. For example, if based on the parties' conduct, the Court believes that relegating the parties to pre-arbitral mechanism would be an empty formality, then the Courts would be reluctant to interpret pre-arbitration requirements to be mandatory in nature.

In support of the afore-mentioned proposition, in **Visa International Limited *vs.* Continental Resources (USA) Limited** [Arbitration Petition No. 16 OF 2007], where the clause provided amicable settlement before reference to arbitration is worthwhile to be mentioned. SC in the instant case referred to the letters exchanged between parties and inferred that attempts were made for amicable settlement with no result, leaving no option but to invoke arbitration.

Further, in **Demerara Distilleries Private Limited *vs.* Demerara Distillers Limited** [Arbitration Case (Civil) No. 11 of 2013], SC had while dealing with an application seeking appointment of an arbitrator, rejected the plea that invocation of arbitration was premature. Under the agreed mechanism, the parties had decided that the differences would be resolved first by mutual discussions, followed by mediation, and only if mediation failed would they arbitrate. The court inferred from the correspondence between the parties that any attempt at that stage to resolve disputes by mutual discussions and mediation would be an empty formality and proceeded to appoint an arbitrator.

Furthermore, the Courts in India at multiple instances discussed another very important issue which relates to the nature of pre-arbitral clauses in the commercial contracts. In this regard Hon'ble Delhi High Court ("**HC**") in **Ravindra Kumar Verma *vs.* BPTP Limited** [(2015) 147 DRJ 175], held that the clause providing for conciliation or mutual discussion before invocation of arbitration to be directory and not mandatory in view of Section 77 of the Act. HC held that there should be no bar on filing proceedings to refer a matter to arbitration if this is necessary to preserve the parties' rights (eg., limitation). However, in certain cases, there may be an effective need for conciliation. In such cases, the parties should be directed to take up the agreed procedure for conciliation and mutual discussion in a time-bound and reasonable period before proceeding with arbitration. In another case of ***Union of India* vs. *M/s Baga Brothers*** [2017 SCC OnLine Del 8989], a party had challenged an award on the grounds that the precondition of conciliation provided under the contract was not resorted to before invoking arbitration. HC dismissed the contention while relying on **Ravindra Kumar Verma** (*Supra*), holding the said pre-arbitral step to be directory. HC has followed this decision by holding similar clauses to be directory and has proceeded with the appointment of an arbitrator. Both Hon'ble Allahabad and Rajasthan High Courts have also taken a view similar to that of HC.

However, a contrary opinion was formed by Hon'ble Bombay High Court ("**BHC**") in **Tulip Hotels Private Limited *vs.* Trade Wings Limited** [2010(1) Mh LJ 73], wherein BHC dismissed a petition for the appointment of an arbitrator when the parties had failed to follow the prescribed pre-arbitral step of conciliation. BHC held that where the parties agree to a specific procedure and mode for settling their dispute by way of arbitration and prescribe certain preconditions for referring the matter to arbitration, they must comply with those pre-conditions and only then they can refer the matter to arbitration. It is noteworthy that the specified pre-arbitration step in this case was conciliation under the Act. Further in another judgment of **Rajiv Vyas *vs.* Johnwin** [2010 (6) Mh LJ 483], BHC refused to dismiss the application seeking the appointment of arbitrator and chose to refer the disputes to a conciliator while simultaneously constituting an arbitral tribunal to which the disputes would be referred in the event that the conciliation failed.

Therefore, in order to avoid disputes over dispute resolution clauses, it is essential that they shall be drafted with the utmost care and caution. Pre-arbitral steps entailing a time-bound process, mediation before a specific authority or conciliation under the Act are more likely to stand the test of judicial scrutiny instead of open-ended and vague pre-arbitral steps. As the law stands, it is unlikely for an arbitral tribunal to dismiss the arbitration when faced with the issue of enforcing a prearbitral step. Just like the Courts, the tribunal will consider the parties' conduct leading up to the invocation of arbitration and if it concludes that a direction to follow pre-arbitral steps will be an empty formality, it will proceed with arbitration. The other option for the tribunal would be to direct the parties to follow the specified pre-arbitral process within a fixed timeframe and suspend arbitration in the meantime. This would allow the parties to meet the desired objective of exploring an amicable resolution without compromising the arbitration.

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