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THE NEWSLETTER

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UPDATE YOURSELF

The Jurisdiction of NGT is Limited to Adjudication of A Substantial Question Relating to Environment

The Hon'ble Supreme Court of India ("**Court**") in the case of ***TechiTaga Tara vs. Rajendra Sing Bhandari &Ors.*** **[Civil Appeal No. 1359/2017 dated 22nd September, 2017**] has set aside the judgment of the principal bench of National Green Tribunal ("**NGT**") wherein the NGT had found out that the appointment of members in State Pollution Control Boards ("**SPCB**") in about ten (10) states was irregular. The primary question before the Court was whether appointment/ removal of members of SPCB is within the statutory jurisdiction of NGT. The Court examined Section 14 (*Tribunal to settle disputes*) of the National Green Tribunal Act, 2010 ("**Act**") which provides that the NGT has jurisdiction over all civil disputes wherein a substantial question of law relating to environment is raised and such a question has arisen from any of the enactments specified in Schedule-I to the Act and Section 15 (*Relief, compensation, restitution*) of the Act which enunciates the types of relief which may be granted when such substantial question in relation to environment is raised under the Act, and held that the said sections cannot be read in isolation but are required to be read together. The Court observed that based upon a conjoint reading of the afore-mentioned sections of the Act, it is clear that for NGT to exercise its jurisdiction there must be a substantial question of law related to environment and not an academic question and that there must be a claimant raising a dispute which would be capable of settlement by the grant of a relief in the nature of (i) compensation; or (ii) restitution of property damaged; or (iii) restitution of environment; and (iv) any other ancillary or incidental relief connected therewith. In the instant appeal the question of appointment of members and chairman of SPCB at best could have been a substantial question in relation to their appointment but not a substantial question in respect of the environment. Moreover, according to Court such a question of appointment may be a dispute for the purpose of a constitution court but not for the purpose of the Act. Therefore, the NGT does not have the rightful jurisdiction to entertain such a question. On the second issue of laying down guidelines for recruitment of chairperson and members of SPCB, the Court directed state governments to come up with appropriate guidelines within six (6) months.

National Green Tribunal

GST Tax Payers of Rajasthan Get Relief

The Division Bench of the Hon'ble Rajasthan High Court ("**Court**") in the matter of ***Rajasthan Tax Consultants Association vs. Union of India & Ors.*** **[D.B. Civil Writ Petition No. 15239/2017 dated 20th September, 2017]**, heard the writ petition filed by the Association ("**Petitioner**"), which focused on the problems faced by the taxpayers on account of the technical glitches in the GSTN portal. Advocate Mr. Sanjay Jhanwar (Chir Amrit) argued the matter on behalf of the Petitioner. During the course of his arguments, Mr. Jhanwar highlighted the unprepared-

ness and the clinical trials of the taxpayers by the Government and the GSTN. The respondents argued that GSTN portal is at an initial stage and all the issues would be resolved in the due course of time. The Court after hearing the matter has granted the following interim reliefs *vide* order dated 20th September, 2017:

- The Central and the State Departments have to provide a separate district-wise email addresses to Mr. Jhanwar which the registered person can use, to inform the concerned district information officer about any technical errors faced by it while log-in to the system using GSTN portal and the same is not responding. The Court further directed that the department shall ensure that the problems received from the registered person through email are resolved expeditiously.
- That no coercive action (penal interest, late fees and prosecution) shall be taken against the registered person, if such delay was caused due to technical glitches and the same have been informed by e-mail to the concerned district officer.
- Application of all those registered persons who were not able to opt for the composition scheme up to 16th August, 2017 on account of technical glitches, will be accepted w.e.f. 1st July, 2017. In case they cannot do the same through GSTN portal, then they will send application through e-mail to the district information officer.
- Speedy redressal of any other problems informed by e-mail shall be done.

However, the Court has specifically directed that the said relief shall be available only to the taxpayers of State of Rajasthan.

Certain Expenditure After 01.04.2017 Would No Longer Be An Eligible Deduction

Section 35AC of the Income Tax Act, 1961 (**"IT Act"**) grants deduction in case of expenditure by way of payment to approved institutions carrying out eligible project or the scheme or payment made directly on such eligible project or scheme by the assessee. However, sub-section (7) inserted with effect from 1st April, 2017 withdraws such deduction. The Hon'ble Gujarat High Court (**"Court"**) in the case of ***Prashanti Medical Services & Research Foundation vs. Union of India*** **[[2017] 85 taxmann.com 266 (Gujarat) dated 14th September, 2017]**, dealt with the question that whether sub-section (7) of Section 35AC of the IT Act can be made applicable to the projects which were already approved by the authority under Section 35AC (1) of the IT Act prior to 1st April, 2017. The facts of the case are that the petitioner being a public trust was constituted with the object of rendering free medical services to the weaker section which includes by-pass surgeries, valve replacement etc. The petitioner survived entirely on donations. The petitioner set up a unit at Ahmadabad on 27th September, 2014 and received an approval for exemption as regards the same under Section 35AC of the IT Act *vide* notification dated 7th December, 2015. The petitioner contended that the insertion of sub-section (7) of Section 35AC of the IT Act would have adverse effect on the pending projects and therefore, the said provision should be read down as not applicable to the projects which were approved prior to 1st April, .2017. On the other hand, the department opposed the petition contending that the Parliament had the power to grant deduction and also has power to withdraw the same. It also contended that the said provision was not unconstitutional and the courts recognize a greater degree of latitude to the legislature in economic sphere. That there cannot be an estoppel against the statute and reading down the provision would result into great uncertainty, since many similar projects and schemes would have a span of number of years. Considering the contentions of both sides, the Court dismissed the petition and upheld the validity of sub-section (7) of Section35AC

of the IT Act with prospective effect disallowing deductions of all expenses w.e.f. 1st April, 2017. The Court dismissed the petition on the ground that the Union legislature is competent to introduce such amendments and after 1st April, 2017, the legislature desired to withdraw such deduction. As a result, it is possible that some of the institutions, projects or schemes may be adversely affected and the legislation may act somewhat harshly. However, this cannot be a ground for annulling the statutory provision.

MCA Restricts Layers of Subsidiaries Upto Two Under Companies Act, 2013

The Ministry of Corporate Affairs *vide* **Notification F.No, 01/1312013 CL-V (Vol.III) dated 20th September, 2017** has notified the Companies (Restriction on number of layers) Rules, 2017 ("**Rules**"). Rule 2(1) of the Rules clearly lays down that, otherwise as expressly provided in the Rules, no company shall have more than two layers of subsidiaries on and from the date of commencement of these Rules i.e. the date of publication of these rules in the Official Gazette ("**Commencement Date**"). However, the proviso to the said rule has carved out two exceptions which are: (i) that the provisions of Rule 2(1) shall not affect a company from acquiring a company incorporated outside India with subsidiaries beyond two layers as per the laws of such country; and (ii) that for computing the number of layers under this Rule, one layer which consists of one or more wholly owned subsidiary shall not be taken into account. Further, the Rules have specified four types of companies which shall be exempted from the application of these Rules, *viz*, (i) a banking company; (ii) a non-banking financial company; (iii) an insurance company; and (iv) a government company ("**Exempted Companies**").

Rule 2(4) of the Rules provides that where the number of layers of subsidiaries in a company is more than two (2) in number on or before the Commencement Date, then such company: (i) shall file a return in Form CRL-1 with the Registrar within a period of 150 days from Commencement Date; (ii) shall not have, after the Commencement Date, any additional layer of subsidiaries over and above the layers existing on the Commencement Date; and (iii) shall not, in case one or more layers are reduced by such company subsequent to the Commencement Date, have the number of layers beyond the number of layers it has after such reduction or maximum layers allowed in Rule 2(1), whichever is more. Rule 2(3) of the Rules, further states that the provisions of the Rules shall not be in derogation to Section 186(1) of the Companies Act, 2013 wherein a similar restriction on number of layers of investment companies is already in force. Non-compliance of the said Rules shall attract penal repercussions which are specifically mentioned in Rule 2(5) of the Rules.

The Power of Attorney Holder is Not Competent To File An Insolvency Application Under IBC, 2016

The Hon'ble National Company Law Appellate Tribunal, New Delhi ("**Tribunal**") in the case of ***Palogix Infrastructure Private Limited Appellant vs. ICICI Bank Limited*** **[Company Appeal (AT) (InsoL) No. 30 of 2017 decided on 20th September, 2017]** examined the issue as to whether the holder of power of attorney ("**POA**"), where such POA is given prior to enactment of the Insolvency and Bankruptcy Code ("**Code**"), is entitled to file an application under Section 7 or Section 9 or Section 10 of the Code. The respondent (Financial Creditor) initiated corporate insolvency resolution process ("**CIRP**") against the appellant (Corporate Debtor) by filing an application under Section 7 of the Code through its POA holder ("**Holder**") before division bench of the adjudicating authority ("**Authority**"). After hearing the application, the Authority

observed that specific authorization to the Holder with respect to initiation of **CIRP** should be given and thus, directed the respondent to rectify the defect. By subsequent order dated 16th May, 2017, the Adjudicating Authority admitted the application on removal of defects; ordered moratorium and appointed interim resolution professional who has been directed to convene a meeting of the committee of creditors in accordance with the Code. The said order has been challenged before the Tribunal by the appellant and the appellant contented that a power of attorney is an authorization by a 'principal' to its 'agent' to do an act. A fortiori, such authorization can only be of acts which are in the contemplation and knowledge of the principal as on the date when such authorisation is given. If the principal itself is unaware of an eventuality, it cannot authorize its agent for such eventuality. The key issue before the Tribunal was whether the constituted attorney authorized to file suits or proceedings against the company for recovery of the amount and also to affirm plaints and affidavits and other pleadings in any court of India, including the Tribunal, can file an application for CIRP under Section 7 of the Code. The Tribunal in the present case observed that as the Code sets in motion a very serious and irreversible process; therefore, the procedural pre-requisites under the Code must be strictly construed. Further, the Tribunal referred the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ("**Rules**") and Form-1 given in the Rules which is required to be filed under Section 7 of the Code, and observed that the said form mandates the financial creditor to submit name and address of the person authorized to submit application on its behalf. Thus, only an authorized person as distinct from power of attorney holder can make an application under Section 7 and required to state his position in relation to financial creditor. Further, the Code is a complete code by itself and the provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder. Therefore, the Tribunal held that a power of attorney holder is not authorized and competent to file an insolvency application under Sections 7, 9 and 10 of the Code on behalf of the financial creditor. One more reason that the Tribunal gave behind its holding was to prevent the initiation of CIRP by a person acting fraudulently or with malicious intention.

Liability of Guarantors of A Company Where Such Company is Facing Moratorium under the IBC

In the case of ***Sanjeev Shriya vs. State Bank Of India & Ors.*** **[(Writ C. No. 30285 of 2017) decided on 6th September, 2017],** the Hon'ble Allahabad High Court ("**Court**") held that during the moratorium period of a company as declared by National Company Law Tribunal ("**NCLT**"), the Debt Recovery Tribunal ("**DRT**") cannot proceed against the guarantors or the company. The petitioners, who were the directors ("**Guarantors**") of L.M.L. Limited, Kanpur ("**Company**"), executed a deed of guarantee in favour of State Bank of India ("**SBI**") for a loan granted by SBI to the Company. In 2007, the Company was declared as a "Sick Industrial Company" by the Board of Industrial and Financial Reconstruction. In 2017, SBI filed an application under Section 9(3) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 before DRT in Allahabad for the recovery of Rs.72,75,29,053.71/- against the Company (the principal borrower) and the Guarantors. On 30th March, 2017, the DRT passed an interim order requiring the Guarantors to disclose particulars of assets as specified by SBI. Subsequently, the Company approached NCLT under Section 10 of the Insolvency and Bankruptcy Code, 2016 ("**Code**") to initiate a corporate insolvency resolution process. The NCLT, *vide* its order dated 30th May, 2017, admitted the application and, *inter alia*, declared a moratorium on the institution or continuation of suits and/or proceedings against the Company ("**NCLT Order**"). Based

on the NCLT Order, the Guarantors sought stay of the proceedings before DRT. It was contended that: (i) since the matter was pending before NCLT and NCLT had exclusive jurisdiction; and (ii) in light of the moratorium in terms of the NCLT Order; proceedings before DRT vis-à-vis the Guarantors should be stayed by DRT. On 6th June, 2017, DRT passed an order whereby it kept the proceedings against the Company in abeyance but proceeded against Guarantors. This order was challenged in a writ petition before the Court. Guarantors contended that DRT had exceeded its jurisdiction. The Court opined that the proceedings were in a "fluid stage" and for the same course of action, two split proceedings i.e. before the DRT as well as the NCLT, should be avoided, if possible. The Court held that as sufficient safeguards are provided in the Code and the regulations framed thereunder to the bank, and even the liability has not been crystallized either against the principal debtor or guarantors/ mortgagors in the present case, thus, the proceeding, which are pending before the DRT cannot go on and the same should be stayed till the finalisation of corporate insolvency resolution process or till the NCLT approves the resolution plan under sub-section (1) of Section 31 of the Code or passes an order for liquidation of corporate debtor under Section 33 of the Code, as the case may be.

Simultaneous Proceedings under SARFAESI and Arbitration Act for Recovery of Loan Arrears Are Valid

The Hon'ble Supreme Court ("**Court**") in the case of ***M.D. Frozen Foods Exports Pvt. Ltd. & Ors. vs. Hero Fincorp Ltd.*** (**Civil Appeal No. 15147 of 2017 decided on 21st September, 2017**) examined the issue as to whether the arbitration proceedings initiated by the respondent under the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") can be carried on along with the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**Act**") proceedings simultaneously. In the present case, the appellants borrowed monies for their business against security of immovable properties by the creation of an equitable mortgage by deposit of title documents. As they have failed to repay the amount, the account of the appellants became a Non-Performing Asset (NPA). Therefore, the respondent initiated the arbitration proceedings against the appellants. However, prior to such invocation of the arbitration proceedings, a notification was issued which specified that the provisions of the Act will be applicable to some specific non-banking finance company ("**NBFC**"). As the provisions of Act were now applicable to the respondent, the respondent issued a notice to the appellants under Section 13(2) of the Act. Meanwhile, the interim order for restraining the appellants from creating any third party interest over the properties was confirmed by the arbitral tribunal. Thus, the appellants approached the Hon'ble Delhi High Court challenging the said order and upon the dismissal of the appeal, the appellants have filed an appeal before the Court. The Court in order to address the issue raised by the appellants examined the Section 35 and 37 of the Act. Section 35 of the Act states that the provisions of the Act will have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force. Therefore, reading Sections 35 and 37 together, the Court held that the initiation of arbitration proceedings in any manner does not prejudice the rights of the appellants to seek relief under the Act. The Court further clarified that all disputes relating to the "right in personam" are arbitrable and, therefore, the choice is given to the parties to choose this alternative forum. A claim of money by a bank or a financial institution cannot be treated as a "right in rem", which has an inherent public interest and would thus not be arbitrable. As far as the present case is concerned, the parties have elected the mode of settlement of disputes to an arbitral tribunal. Thus, the provisions of the Act are a remedy in addition to the provisions of the Arbitration Act. The Court further observed that the proceedings under the Act are in the nature of enforcement proceedings, while arbitration is an adjudicatory process. Thus, the Court held that appellants are entitled to initiate both arbitration proceedings under the Arbitration Act and proceedings under the Act with respect to a loan account.

QUICK TAKEAWAYS

- A public interest litigation (PIL) is filed before the Hon'ble Supreme Court of India seeking painless end for death convicts and has suggested shooting, injection or electrocution instead of hanging.
- The Cabinet has approved introduction of the Payment of Gratuity (Amendment) Bill, 2017 in the Parliament which shall increase the upper ceiling of gratuity amount from Rs.10 lakhs to Rs.20 lakhs.
- The Ministry of Finance *vide* **Notification No. 88/2017-Customs (N.T.) dated 21th September, 2017** has notified Customs and Central Excise Duties Drawback Rules, 2017 which shall come into force from 1st October, 2017.
- The Central Government *vide* Notification 33/2017 dated 15th September, 2017 has made effective the provisions of Section 51(1) of the CGST Act, which mandates the specified persons to deduct TDS at the rate of 1% from the payment made or credited to the supplier, where the total value of supplies under a contract exceeds Rs.2,50,000/-.
- The Hon'ble High Court of Calcutta has held that without producing the cheque before the drawer bank, complaint under Section 138 of the Negotiable Instruments Act, 1881 will not be maintainable.
- The Reserve Bank of India *vide* **press release no. 2017-2018/624 dated 4th September, 2017** has designated HDFC Bank as a Domestic Systematic Important Bank. Prior to the press release, only State Bank of India and ICICI bank were in the list of Domestic Systematically Important Bank.
- The Hon'ble High Court of Delhi, in a rather progressive order, held that the CBI cannot be completely exempted from the Right to Information Act, 2005.
- Hon'ble Supreme Court of India in the case of ***Employees State Insurance Corporation & Anr. vs. Mangalam Publications (I) Private Limited,*** **decided on 21st September, 2017** held that interim wages comes within the definition of wages as per Section 2(22) of Employees State Insurance (ESI) Act, and that the employer is liable to pay ESI contribution on the interim wages as well.
- The Hon'ble Supreme Court of India in ***N.K. Jewellers vs. Commissioner of Income Tax, New-Delhi*** **[85 taxmann.com 361 [2017]]** has held that in view of the amendment brought in by the Finance Act, 2017 in Section 132A of the Income Tax Act, 1961, "reason to believe" or "reason to suspect", as the case may be, recorded by any Income-tax Authority under section 132 or section 132A of the Act is not required to be disclosed to any person or any authority or the Appellate Tribunal.
- The Hon'ble High Court of Gujarat in ***Nayanben Firoz Khan Pathan*** v. ***Patel Shantaben Bikhabhai [Special Civil Application no. 15825 of 2017]*** delivered on 26th September, 2017 held that Hindu daughters have a legal right to inherit property under Hindu Succession Act, 1956 even upon marriage with a Muslim and embracing Islam.
- The Hon'ble Supreme Court in ***SEBI vs. Shri Kanaiyalal Baldevbhai Patel*** decided on 29th September, 2017, brings non-intermediary front running in the security market under the prohibition prescribed under Regulation 3 and Regulation 4(1) of the SEBI (Prohibition Of Fraudulent And Unfair Trade Practices Relating to Security Market) Regulations 2003.
- In exercise of the powers conferred by Rule 117 of the Central Goods and Services Tax Rules, 2017 read with Section 168 of the CGST, 2017, the Commissioner, on the recommendations of the Council extended the period for submitting the declaration in FORM GST TRAN-1 till 31st October, 2017.
- The Hon'ble High Court of Calcutta in the case of ***Sefali Bannerjee*** **v.** ***Union of India and Ors.*** **[F.M.A 4403/ 2016]**, held that a Divorced daughter falls under the definition of 'unmarried daughter' and in entitled to receive benefits of employment on compassionate grounds.
- The Income Tax Appellate Tribunal (ITAT), Bangalore, in case of **Shri** ***Ashok Kumar Rai vs. The Joint Commissioner of Income Tax***, held that the amount paid towards chit loss cannot be treated as interest payments, and therefore, in such cases, there is no need to deduct tax at source.

KNOWLEDGE CENTRE

FAQs on Stamp and Registration of Documents

Q. 1. What is the purpose behind stamping and registration of a document?

The basic purpose for stamping and registration of a document is to create an evidentiary value of the document in relation to the transaction for which such document has been created.

Q. 2. What are relevant laws that govern the stamping and registration of documents?

Stamping – Under Entry 91 of List I and Entry 63 of List II of Schedule 7 of the Indian Constitution both and State Government are empowered to levy the stamp on documents. Hence, there exist two laws, i.e., Indian Stamp Act, 1899 as per which Central Government has power to levy stamp duty and respective State laws like Rajasthan Stamp Act, 1998 where respective State Governments have power to levy stamp duty.

Registration – The registration of documents is governed by only a single consolidated law, i.e., the Registration Act, 1908 ("**Registration Act**").

Q. 3. What are the categories of documents that require stamping and registration?

Stamping – Every instrument which creates, transfers, limits, extends, extinguishes or records any right or liability has to be stamped as per respective stamp laws.

Registration – Section 17 of the Registration Act purports several categories of instruments which are required to be compulsorily registered, such as, leases of immovable property from for term exceeding one year.

Q. 4. What is the time limit for stamping and registration of the documents?

Stamping - In Rajasthan as per the Rajasthan Stamp Act, 1998, an instrument must be stamped within before or at the time of execution or immediately thereafter on the next working day following the day of execution. However, different stamp laws may prescribe there respective timeline.

Registration - As per the Registration Act, a document must be registered within four months from the date of its executions.

Q. 5. What are the consequences of not stamping and registering any document?

As stated above, any document which is not registered and stamped shall be not admitted as evidence by any authority to give effect to the transaction for which such instrument has been created.

Q. 6. What are the rates of stamp duty and registration charges applicable on documents?

The applicable rates of stamp duty and registration charges are given in the Schedule attached to every stamp and registration act. As per the rate of stamp duty and registration charges prescribed in the Schedule, one has to calculate the stamp duty and registration charges.

Q. 7. What is the appropriate place for stamping and registration of any document?

A document must be stamped and registered at the place where such document has been executed as per the relevant stamp and registration laws. However, in case of any document related to immovable property, the same must be executed at the place where such immovable property is situated.

Q. 8. What are the modes of stamping and registering a document?

Stamping – A document can be stamped by purchasing the stamp papers (i.e., non-judicial papers) and executing such document on the said stamp paper. In Rajasthan, a document can also be stamped by way of e-stamping and by way of franking of the document.

Registration – The registration of a document must be done before the sub-registrar by payment of registration charges. However, in some States payment of registration charges electronically is also available.

Q.9. What do you mean by franking of a document for the payment of stamp duty?

Franking is similar to the payment of stamp duty. It is one of the several methods of indicating the payment of stamp duty. Franking machines are available at notified branches of banks and office of sub-registrar of the State.

Q.10. What do you mean by e-stamping of a document for the payment of stamp duty?

E-stamping is a payment of stamp duty on documents electronically without involvement of purchase of non-judicial stamp papers. Further, it is a web based secured system of payment of stamp duty to the Government, which is highly secure and tamper proof.

EDITORIAL

DISPUTE AND EXISTENCE OF DISPUTE UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 ("CODE")

- By *Adv. Saransh Kothari, Associate*

The Indian Parliament introduced the Code to provide an efficient mechanism to the creditors to recover their debts. The Code defines different kinds of creditors, such as, financial creditors, operational creditors, etc. Pursuant to Section 5(21) of the Code, 'operational debt' means claim in respect of provision of goods or services including employment or debt in respect of repayment of dues arising under any law for the time being in force and payable to the Government or local authority. Further, the Code defines 'operational creditor' as a person to whom an operational debt is owed.

Under the Code, Section 9 prescribes for filing of a corporate insolvency resolution application ("**Application**") by an operational creditor before the National Company Law Tribunal ("**NCLT**") and the Hon'ble Supreme Court in **Mobilox Innovations Private Limited *v.* Kirusa Software Private Limited** decided on 21st September, 2017, in para 25 of the judgment, observed that for admitting the Application, the NCLT primarily has to examine three questions, i.e., (i) the subsisting operational debt exceeds Rs. 1,00,000/-, (ii) the documentary evidence produced showing that the debt is due and payable and has not been paid, and (iii) whether there is ***existence of dispute*** between the parties or any record of pendency of suit or arbitration proceeding prior to receipt of demand notice of the unpaid operational debt in respect of such dispute.

Further, the term 'dispute' is defined in Section 5(6) of the Code, which includes a suit or arbitration proceeding relating to: (i) existence of amount of debt; (ii) the quality of goods or service; or (iii) the breach of representation or warranty. Additionally, the procedural requirements to be completed by the operational creditor before filing the Application are broadly given in Section 8 of the Code, wherein, it is provided that the operational creditor is required to deliver demand notice or invoice demanding payment to the corporate debtor, thereafter, the corporate debtor within 10 days of receipt of demand notice or invoice demanding payment, shall notify the operational creditor about ***existence of dispute***, if any, and record of pending suit or arbitration proceedings filed before receipt of notice or invoice in relation to such dispute.

A bare perusal of Section 8 of the Code shows that a dispute could be proved by showing that a suit or arbitration proceedings are pending. However, the expression 'existence of dispute' as mentioned Section 8(2)(a) of the Code, is of prime importance as it is the only defense available to any corporate debtor under the Code through which the corporate debtor can avoid initiation of proceedings under the Code by an operational creditor.

The definition of 'dispute' as defined in Section 5 (6) of the Code is inclusive in nature and has to be broadly interpreted provided that the dispute relates to Clause (i) to (iii) of Section 5 (6) of the Code. If 'dispute' is given its ordinary meaning, then it should cover all disputes of debt, default, etc. and not just limited to two ways of disputing demand by the corporate debtor i.e. by record of pending suit or arbitration. The legislature used the term 'includes' which shows the intention of the legislature that it required an illustrative definition of dispute. Further, the use of word 'includes' enlarges the meaning of expression so as to comprehend not only such things that the expression signifies in their natural import but those things that clause declares, they shall include. Also, if the legislature wanted to specifically restrict the scope of the definition, the legislature would have used the term 'means' which was initially included in the definition of dispute under Section 5 (4) of the Insolvency and Bankruptcy Bill,

2015 ("**Bill**"), wherein it would be interpreted that definition is hard and fast and no other meaning can be assigned to the expression, other than the meaning given in the definition.

In addition, Section 5(4) of the Bill, provided that the dispute must be in *bonafide* suit or arbitration proceedings and as the term '*bonfide'* has been removed from the Code, therefore, use of term '*bonfide'* in Section 8(2)(a) of the Code is not required for determining whether a dispute exists or not. The NCLT is only required to determine the genuineness of dispute. The parties must show that debt is owed to other party and the NCLT must be satisfied that there is a dispute that is not frivolous or vexatious.

Moreover, the word 'and' as used in Section 8(2)(a) of the Code must be read as 'or'. If the aforesaid word is read as 'and', the disputes would arise only if, they are pending in suit or arbitration proceedings and not otherwise. Hence, it would cause great hardship to the operational creditors as dispute may arise few days before triggering of insolvency process and in such a case, although dispute exists between the parties but there is no time to approach either a court or arbitral tribunal. Also, the limitation period for filing a suit continues for a period of 3 years and therefore, such persons would be outside the purview of Section 8(2) of the Code and such inconsistency was not intended by the legislature. Further, the Hon'ble Supreme Court in **Mobilox** (*Supra*) observed that it is settled law that the term 'and' may be read as 'or' to further the object of the statute and to avoid any anomalous situation.

Considering the above, the ascertainment of 'dispute' and 'existence of dispute' are integral part of every Application filed by an operational creditor and as the language of Code is ambiguous and not clear therefore, various adjudicating authorities have interpreted the aforesaid terms in different manner. The Hon'ble Supreme Court in the case of **Mobilox** (*Supra*) put a rest to all such different interpretations. Now, the NCLT is supposed to reject the Application filed by an operational creditor, if notice of dispute has been received by an operational creditor. The notice must only show that a dispute exists between the parties and the NCLT is only required to ascertain the reasonableness of the contention raised by the corporate debtor. As long as a dispute exists between the party which is not hypothetical or illusionary, the NCLT is required to reject the Application. Therefore, it is enough that a dispute exists between the parties and NCLT is not required to ascertain whether a dispute exists or not.

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