AJC NEWSLETTER

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Introduction

We here at Agarwal Jetley & Co. (AJC) are happy to bring a slightly delayed edition of our weekly newsletter capturing the important updates that have taken place in the legal world. Will world deals with COVID-19, our operations were also hampered and hence we could not bring you our newsletter at the end of ending June 28, 2020. However, there is good news s this edition not only covers the legal aspects and knowledge bits for week ending June 28, 2020 but also for the last week ending on July 5, 2020. A little long maybe, but we are sure you would not be complaining. We would be happy to hear from you about the 'AJC Newsletter', the hits and misses, inputs and any clarifications that you all require and deem necessary. We thank you in advance and are happy to continue this trend of keeping everyone "Legally Up to Date".

Aspects covered in this issue

In this issue we cover various relevant topics. Our partners and associates have looked into the focus provided viz. the COVID-19 package to the power sector and discussed the disbursement process for loans. We also cover an important update of co-operative banks coming under the RBI scanner. Then we look at a recent order under RERA which intrigues and may cheer up investors who feel that their deposits are generally a lost cause. The RERA authority refreshingly provides relief to the investors. We then look into the Delhi High Court's request vide its order to bring some level playing field and not let multiple arbitration proceedings in one single matter hamper arbitration disputes. Finally, our partner Neeraj Kumar closely looks at a recent judgment of the Bombay High Court bringing Vodafone much required relief and cash flow.

Reduction of rate of loans for DISCOMs[i]

Introduction

The Union ministry of home affairs has written to the states and union territories extending ninety thousand crore rupees (Rs. 90,000 crore) package under Aatmanirbhar Bharat Abhiyanto the Distribution Companies ("**DISCOMs**"). The funding is slated to be done in two (2) tranches of forty five thousand crore rupees (Rs. 45,000 crore) each. The loans will be offered to the DISCOMs in order to help these entities clear their dues towards power generating companies and reinvigorate the power sector hit hard by COVID-19 outbreak and the subsequent lockdown.

Objective

The first month of the lockdown had not only decreased the daily average power demand by close to thirty five per cent (35%) as compared to 2019, but it also turned out to be a period with the lowest average electricity consumption in the country over the last eleven (11) years. This step would act as revival agent.

Further incentives

The Union Ministry of Power also decided to defer the fixed charge on power not scheduled of Central Generating companies (**Gencos**) for the lockdown period and it will be repaid in interest free three (3) equal instalments in subsequent months. During the lockdown period, there has been significant drop in demand because the industrial and commercial units were closed. According to the Power Purchase Agreements, DISCOMs pay a fixed charge to Gencos for all the contracted quantity, even if power is not drawn. This has burdened the DISCOMs because they have to pay for the power that was not used during the lockdown period.

The financially stressed DISCOMs would be offered loans at cheaper rates of eight point five to nine (8.5% to 9%) per cent for a ten (10) year period by state owned power sector financing companies Power Finance Corporation Limited (**PFC**) and Rural Electrification Corporation Limited (**REC**) for clearing their dues towards power generation companies.

Disbursement procedure

The REC announced an opportunity for the DISCOMs to avail loans to clear their dues. The loans under this program will be co-funded by REC and PFC in equal amounts. As per the announcement, fifty per cent (50%) of the loan will be provided in Tranche-I, and the balance fifty per cent (50%) will be provided in Tranche-II.

Eligibility

All state-owned DISCOMs, Gencos and distribution companies' holding companies having administrative control of DISCOMs, companies buying power on behalf of DISCOMS, as well as private DISCOMs, will be eligible for loans under this announcement.

Documentation required

The DISCOMS will have to give the details of the due amount in the form of electricity bills of the State Government departments, companies, and other bodies. The electricity duty payable to State Governments will be deducted while determining the extent of the loan. The payment will be released to the Central Public Sector Undertaking (**CPSU**) generators, renewable generators, Independent Power Producer (**IPP**) and CPSU transmission companies after being authorized by the respective DISCOMs.The borrower will have to submit the state bank guarantee with due approval from the state finance department before the first instalment of the loan.

Pre-disbursement conditions

Tranche-I

(i) The borrower should not have any overdue in the books of REC or PFC. In order to execute an agreement between the REC, PFC, DISCOM and the State:
(ii) There should be a liquidation plan for clearing of dues by the State Government towards unpaid electricity dues;
(iii) There should be a liquidation plan for clearing the unpaid subsidy amount to the DISCOMs;
(iv) The dues paid by the State Government should be used to repay the outstanding loan amount to REC and PFC;
(v) The State Government should ensure timely payment of electricity bill dues to DISCOMs.

Tranche-II

(i) The borrower should not have any overdue in the books of REC/PFC;
(ii) DISCOMs should show that the agreements given at the time of Tranche-I have been implemented or are under implementation;
(iii) The State Government has a plan in place to bring down its aggregate technical and commercial losses and Average Cost of Supply (**ACS**) and

Average Revenue Realized (**ARR**) gap over the next three (3) to four (4) years.

In case the State Government does not adhere to the liquidation plan, an additional interest of point two five per cent (0.25%) will be charged on the outstanding loan amount. In the future, if the State Government fails to make the payment within sixty (60) days of their due dates, they will have to pay an additional interest of point two five per cent (0.25%).

The above conditions will also be applicable for private sector DISCOMs.

Benefit to DISCOMs

The liquidity injection plan would help DISCOMs in a big way as it would provide them credit at cheaper rates for a ten (10) year period with a two (2) year moratorium on payments. DISCOMs would save between three to nine (3% to 9%) per cent on interest payments under this liquidity window as late payment surcharge on delayed payment to Gencos is at twelve percent to eighteen percent (12% to 18%).

The loan announced by the Government would be a bonanza for the State Governments to bail out the DISCOMs and help them clear the dues. The loan will help to increase the value chain of the power sector – the whole link- DISCOMs, generators, and the end consumers.

The Finance Minister (**FM**) stated that this liquidity scheme was essential as the DISCOMs revenue plummeted due to the lockdown and they are in the midst of unprecedented cash flow problem accentuated by demand reduction. The power sector financiers PFC and REC would infuse liquidity of ninety thousand crore rupees (Rs. 90,000 crore) to DISCOMs against receivables. Loans will be extended against state guarantees for exclusive purpose of discharging liabilities of DISCOMs to Gencos.

The loans would be given to DISCOMs against specific activities and reforms which include digital payments facility by DISCOMs for consumers, liquidation of outstanding dues of State Governments and plans to reduce financial and operational losses. This exercise was made beneficial to consumers, as it was decided that central public sector generation companies shall give rebate to DISCOMs on clearance of their dues, which shall be passed on to the final consumers, which include industries by way of rebate of power tariff.

Conclusion

The Covid-19 outbreak and subsequent lockdown has squeezed power demand sharply in months of March and April and the fall has been such sharp that demand for full year 2020-21 is set to report a one per cent (1%) decline, the first time in thirty six (36) years. With expectation that lockdown may continue in large parts of the country for some more time, the DISCOMs are set to add losses after losses every year making their operations unviable. DISCOMs have already been reeling under low demand conditions for some time and this has impacted their revenue and ability to service payment dues to generators. The problems of DISCOMs has aggravated due to the decline in consumption from the high tariff paying industrial and commercial consumers and the likely delays in cash collections from other consumer segments.

Co-operative banks come under the purview of Reserve Bank of India[ii]

Introduction

The Union Cabinet on June 24, 2020 decided to bring all co-operative banks under the purview of the Reserve Bank of India (**RBI**) through an ordinance ("**Ordinance**"). This was announced by union information and broadcasting minister Prakash Javadekar during a virtual press conference. Government banks, including one thousand four hundred eighty two (1,482) urban cooperative banks and fifty eight (58) multi-state cooperative banks, will now be brought under the supervisory powers of the RBI. The supervisory norms that apply to commercial banks will also be applicable to them. The RBI now has the power to supersede the board of cooperative banks.

Co-operative banks

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They are the banks whose main objective is to provide financial assistance to economically weaker sections of the society. Cooperative Banks are registered under the Cooperative Societies Act, 1912 and are regulated by the RBI under Banking Regulation Act, 1949 ("**Act**") and Banking Laws (Application to Cooperative Societies) Act, 1965. Examples of cooperative banks include The New India Cooperative Bank.

Objective

The basic aim of this move is to keep an eye on the functions of the cooperative banks. They will be audited under the RBI rules. In case of a financial crisis, RBI will keep a watch on the board of the cooperative bank. However, the administrative issues will continue to be looked after by the Registrar of Cooperatives ("**Registrars**").

At present, the Registrars have a control over incorporation, registration, management, recovery, audit, supersession of the board of directors and liquidation while the RBI is invested with the *regulatory functions*.

Amendments in Banking Regulation Act, 1949

The Banking Regulation (Amendment) Ordinance, 2020 ("**Bill**") seeks to amend the Act, with regard to cooperative banks. The Act regulates the functioning of banks and provides details on various aspects such as licensing, management, and operations of banks.

Exceptions: Section 3 of the Act states that it does not apply to certain cooperative societies. These include:

(i) primary agricultural credit societies;
(ii) cooperative land mortgage banks; and
(iii) any other cooperative societies (except those specified in the Act).

The Ordinance amends Section 3 to state that the Act will not apply to:

(i) primary agricultural credit societies; and
(ii) cooperative societies whose principal business is long term financing for agricultural development.

Further, Section 7 of the Act is amended to state that these societies must not:

(i) use the words 'bank', 'banker' or 'banking' in their name or in connection with their business; and
(ii) act as an entity that clears cheques.

Issuance of shares and securities by cooperative banks

The Ordinance seeks to amend Section 12 of the Act to provide that a cooperative bank may issue equity shares, preference shares, or special shares on face value or at a premium to its members or to any other person residing within its area of operation. Further, it may issue unsecured debentures or bonds or similar securities with maturity of ten (10) or more years to such persons. Such issuance will be subject to the prior approval of the RBI, and any other conditions as may be specified by RBI.

The Ordinance states that no person will be entitled to demand payment towards surrender of shares issued to him by a co-operative bank. Further, a co-operative bank cannot withdraw or reduce its share capital, except as specified by the RBI.

Supersession of board of directors

Section 36 AAA of the Act states that RBI may supersede the board of directors ("**Board**") of a multi-state cooperative bank for up to five (5) years under certain conditions. These conditions include cases where it is in the public interest for RBI to supersede the Board, and to protect depositors.

The Ordinance adds that in case of a co-operative bank registered with the Registrar of a state, the RBI will supersede the Board of Directors after consultation with the concerned state government, and within such period as specified by it.

Power to exempt cooperative banks

The Ordinance under Section 5A states that RBI may exempt a cooperative bank or a class of cooperative banks from certain provisions of the Act through notification. These provisions relate to restrictions of certain types of employment, qualifications of the Board and appointment of a chairman. The time period and conditions for the exemption will also be specified by the RBI.

Certain provisions omitted

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The Ordinance seeks to omit certain provisions from the Act. Some of these provisions are listed below:

(i) Section 20 of the Act restricts cooperative banks from making loans or advances on the security of its own shares. Further, it prohibits the grant of unsecured loans or advances to its directors, and to private companies where the bank's directors or chairman is an interested party. The Act also specifies conditions when unsecured loans or advances may be granted and specifies the manner in which the loans may be reported to RBI. The Ordinance omits this provision from the Act.

(ii) Section 23 of the Act states that cooperative banks cannot open a new place of business or change the location of the bank outside of the city, town or village in which it is currently located without permission from RBI. The Ordinance omits this provision.

(iii) Section 24 of the Act requires a scheduled cooperative bank to maintain assets with a value not exceeding forty per cent (40%) of the total demand and time liabilities, within India. The Ordinance omits this provision.

Reasons behind the move

The Punjab and Maharashtra Cooperative Bank (**PMC**) had a major fiasco in 2019 wherein Housing Development and Infrastructure (**SIDL**) had procured a major loan from PMC against the existing guidelines of the cooperative banks which included various incidents of corruption and mismanagement from the officials at the top management. SIDL was on the verge of insolvency and despite that they procured a loan from the public deposits at PMC which resulted in an economic downfall of the bank. As a result, RBI had to take over the operations of PMC and withdrawal of the public deposits was refused. Therefore, during the Budget 2020, the Finance Minister (**FM**) had announced that cooperative banks would be brought under the ambit of RBI.

This rule has been brought under the Banking Ordinance 2020 as a result of the aforementioned circumstances.

Advantages

(i) The supervision of the RBI would infuse the confidence of more than eight point six crore (8.6 crore) depositors into the cooperative banks.

(ii) The public deposits worth almost four point eight four crore (4.84 crore) would be assured to be safe in the cooperative banks.

(iii) The benefit of the decisions of the RBI available to the public and the private banks at present would also reach the cooperative banks.

(iv) The FM as a part of this move has also increased the Deposit Insurance and Credit Guarantee Corporation (**DICGC**) from one lakh rupees (Rs. 1,00,000) to five lakh rupees (Rs. 5,00,000).

Conclusion

Cooperative banks had for a long been a weak link in the financial system because of lack of adequate oversight. While RBI has been regulating and supervising banking functions, primary oversight has been with the Registrar. This development aimed at providing comfort to depositors and prevention at a repetition of the PMC scam. This move is expected to increase professionalism and governance amongst the cooperative banks.

RERA authority - booking amount in construction project needs to be refunded[iii]

Introduction

The Maharashtra Real Estate Appellate Tribunal **("MHREAT")** has recently in *Mrs Rekha Navani vs M/s Omkar Ventures Private Limited AT006000000021466 of 2019* enlightened the inequitable terms/clauses in the Allotment Letter and directed the developer to refund the entire booking amount to the home-buyer/allottee.

Background of the Case

Mrs Rekha Navani **("Appellant")** booked a flat on November 30, 2017 for a total consideration of Rs. 1.36

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crores with Omkar Ventures Private Limited **("Respondent")** for the project "Lawns and Beyond", Phase-2, Omkar International District located at Andheri, Mumbai. A channel partner of the Respondent, at the time of the booking, promised that in case if Appellant is found ineligible for housing loan, the amount paid by her would be refunded. The Appellant had paid an amount of Rs.1 Lakhs towards expression of interest (**EOI**) and Rs. 6.95 Lakhs as application fee. Subsequently, the Respondent had issued a letter of allotment dated December 5, 2017 to the Appellant following which demand notices were also issued by the Respondent to pay the further amount towards the flat. As the Appellant could not procure the loan from banks, consequently, she requested the Respondent to cancel the booking and refund the entire amount. However, despite many follow-ups, Respondent only refunded Rs.1 Lakh and remaining amount of Rs.6.95 Lakhs was forfeited. Aggrieved by the same, the Appellant approached the Maharashtra Real Estate Regulatory Authority ("**MHRERA**") with a complaint ("**Complaint**") against the Respondent seeking refund of the entire amount along with an interest as per Section 19(4) of the Real Estate (Regulation and Development) Act, 2016 ("**RERA Act"**). In the complaint, the Appellant particularly, contended that Respondent could not forfeit any amount paid to it as no such clause was provided in the allotment letter and hence, she was entitled to refunded under Section 18 and 19 of the RERA Act.

MHRERA'S Judgment

MHRERA disagreeing with the contentions of the Appellant dismissed the complaint holding that since there was no agreement of sale executed between the parties thus, the Appellant was not entitled to any refund under Section 18 of the RERA Act. Being aggrieved, Appellant filed an appeal before MHREAT against the MHRERA's Order.

MHREAT'S Judgment

The MHREAT while dealing with the issue that "*Whether the Appellant is entitled for refund of the paid amount paid along with interest"*, held that the terms prescribed by Respondent in its allotment letter and application form are not only in derogation of the provision of RERA Act and rules framed thereunder but are also one-sided, ambiguous and inequitable.

The MHREAT opined that the terms "EOI" and "Application Fee", in common parlance, are used to construe as the fees paid while booking the flat(s) and does not refer to the consideration amount of the flat. However, Respondent has intentionally interpreted Application Fee as total consideration towards the flat, and later on, interpreted the "EOI" and "Application Fee" together as earnest money in the allotment letter, which created difficulty for the Appellant to comprehend implications of such terminologies mentioned in the allotment letter/application form, and such arbitrary and one-sided implications has made the contractual obligations unfair and inequitable.

The MHREAT further held that RERA Act is a welfare legislation enacted to safeguard the interest of the allottees, and as such Respondent cannot be allowed to act against the RERA Act by formulating formats which are one-sided, ambiguous and inequitable.

The MHREAT, considering the judgments of the Supreme Court pronounced in Central Inland Water vs. Brojo Nath Ganguly & Anr 1986 *(AIR SCR (2)(278))* and Pioneer Urban Land and Infrastructures vs. Govindhan Raghavan *(Civil Appeal No.12238/2018),* held that court/tribunals should not enforce an unreasonable, unfair contract or unfair clause where parties are not equal in bargaining power. Hence, the Respondent cannot take an advantage where Appellant was not aware of one-sided or inequitable terms enshrined in the allotment letter.

The MHREAT further held that the Respondent cannot brush aside its liability stating that the promise to refund was made by the channel partner as the channel partner was appointed by the Respondent itself, hence Respondent was liable to refund the forfeited amount to the Appellant.

The MHREAT vide its Judgment dated June 29, 2020 allowed an appeal setting aside an Order passed by the MHRERA, and directed Respondent to refund the forfeited amount to the Appellant.

Conclusion

MHREAT'S Judgment is a waking call for developers/builders who have entered into contract with the allottees/buyers with unilateral or one-sided clause as the same can be rendered unenforceable and being derogatory to the provisions of the RERA Act. Further, this will give a more of boost to the allotees/buyers

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who are suffering with mentally and financially losses due to the unreasonable, unfair clauses in the letter of allotments/sale agreements issued by the builders/developers.

Delhi HC - There needs to be an end of multiplicity in arbitral proceedings[iv]

Introduction

The courts in India are brimming with pending cases. The filing of new cases is continuing so does the piling of pending cases. In order to save the time and faith of parties, the alternate dispute resolution has been introduced as an alternative resolution process where cases are decided outside the courts by impartial third party. However, in certain scenarios, the Apex Court and various other courts have acknowledged that Arbitration in some cases have turned out to be time-consuming defeating the main purpose of alternate dispute resolution.

The Delhi High Court **("DHC")** on June 23, 2020 in Gammon India Ltd & Anr vs National Highway Authority of India (OMP (*COMM) 390/2020*) ("**Case**") has held that multiple arbitration before different arbitral tribunals in respect of the same contract leads to enormous confusion consequently whole purpose of arbitration i.e., speedy resolution would be lost.

Facts of the Case

In this Case, Gammon Atlanta JV, a joint venture of Gammon India Ltd **("Petitioner")** and Atlanta Limited **("Contractor")** and National Highway Authority of India **("Respondent")** entered into a contract on December 23, 2003 **("Contract")** for the work of widening to 4/6 lanes and strengthening of existing 2 lane carriageway of NH-5 in the State of Orissa **("Project").** The value of the work was estimated to be Rs. 118.9 crores. The project was fixed to be commenced on January 15, 2001 and was to be completed within 36 months i.e., by January 14, 2004. However, the Project was not completed within the agreed time and the extension for completion was granted till December 31, 2006.

In March, 2007, vehicular traffic was allowed on the main carriageway which amounted to deemed "taking over" of the carriageway by Respondent according to the Contractor.

In the course of execution of Project, certain disputes had arisen between the parties regarding various claims which were raised by the Contractor and Respondent.

On August 1, 2004 Dispute Resolution Board **("DRB")** was formed as per clause 67.1 of the "Conditions of Particular Application" in order to resolve the dispute between the parties. However, the same has been remain unresolved by the DRB and hence, the Contractor invoked arbitration clause mentioned in the contract vide notice dated January 27, 2005 to be decided by an arbitral tribunal (**"Arbitral Tribunal/Tribunal")**.

Award I

The Claims that were refereed before the 1st Arbitral Tribunal were:

"Claim I. Compensation for losses incurred on account of overhead and expected profit.
Claim II. Compensation for reduced productivity of machinery and equipment deployed.
Claim III. Revision of rates to cover for increase of cost of materials and labour during extended period over and above the relief available under escalation (price adjustment) provision in the agreement."

The Award was rendered on October 5, 2007 with respect to the above-mentioned claims and *Claim I* was rejected by the Tribunal on the ground that the Contractor has been executing the work and hence will earn profit/loss commensurate with the work done. With respect to Claim II, the Tribunal held that work worth of Rs 37 crores has been affected during the initial contract period of the Project and the Contractor was held accountable for underutilisation of machinery and equipment and hence compensation of 5% i.e. Rs. 1.85 crores was awarded to the Contractor. With respect to claim III, the Tribunal held that the same had not been mentioned in the list of claims in the notice dated January 27, 2005 invoking the arbitration clause as per the Agreement was neither in any followed letter and hence, the claim was considered outside the preview of the Tribunal.

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Award I was challenged by the Contractor and the Respondent, however the Contractor withdrew the challenge in respect of Claim III, sought liberty to approach a 2nd arbitral tribunal ("**2nd AT**") which was allowed by DHC vide order dated March 13, 2009 in a case which was filed by Respondent. Special Leave Petitions ("**SLPs**") were filed against *Award I* on June 8, 2017 before the Hon'ble Supreme Court. However, the same were rejected vide Orders dated 08.08.2017 and *Award I* attained its finality.

Award II

In 2007, the Contractor had invoked the jurisdiction of the DRB in respect of payment of 'Tack Coat' under bill of quantities which was rejected by the DRB. Being aggrieved, the Contractor invoked the arbitration clause in the Agreement and resultantly, the said claim along with the Claim III of 1st arbitral proceeding were referred to the 2nd AT owing to the permission granted by the Delhi High Court. The 2nd AT relied on the findings of the 1st Arbitral Tribunal and rejected Claim III thereof. The 2nd AT rejected other claim of payment of Tack Coat and awarded Nil to the Contractor.

Award III

On March 24, 2008 the Respondent imposed the liquidated damages upon the Contractor for the delay caused. However, being dissatisfied with the recommendations of the DRB, the Contractor invoked a 3rd arbitration vide notice dated December 23, 2008. The 3rd arbitration tribunals ("3rd AT") vide its award dated February 20, 2012 allowed refund of the entire liquidated damages to the Contractor on the ground that the Contractor was entitled to a further extension of time and consequently the liquidated damages that has been imposed are illegal.

The petition has been filed before the Delhi High Court **("DHC")** in August 2011 challenging *Award II*.

DHC'S analysis

The DHC analysed the legal position on multiple arbitration/awards and held that by perusal of the provisions of the Arbitration and Conciliation Act, 1996 **("ACA")** it signifies that the dispute can be elevate at different stages and there can be multiple arbitrations in a single contract.

The DHC further held that different claims at different stages of a contract/project is permissible in law insofar the contract can be of long term and parties may wishes to seek adjudication of the disputes when they arise, however multiplicity shall be avoided by the parties in view of the principles of public policy.

The DHC illustrated an example of construction contracts and noted that the claims may be multiple in number but the basic disputes would be about termination, delays, breach etc. which form core of the disputes for almost all claims.

The DHC held that in the present Case, the parties have invoked arbitration thrice and three different tribunals have rendered three different awards, and when the previously constituted tribunal already seized the disputes between the parties, the constitution of subsequent tribunals were unwarranted and inexplicable.

The DHC analysed the case of Dolphin Drilling Ltd vs ONGC *AIR 2010 SC 1296* and noted that all the disputes that are in existence when the arbitration clause is invoked are ought to be raised and referred in one go. The DHC noted that it is necessary to have certainty in arbitral proceedings and remedy of arbitration shall not be misused by the parties. Constitution of different tribunals is mischief and must be avoided as the intent of the parties may also not be bonafide.

In view of the submissions made on behalf of the Contractor that the findings in Award III have to be read with the present petition, the DHC opined that Award II on its own is quite well reasoned and also in terms of the contract and none of the findings of Award III can be incorporated into the present petition to rule in favour of the Contractor qua Award II for awarding compensation/rate revision/escalation and hence the stand of the Contractor is not liable to be tenable.

The DHC further stated that while hearing a petition under section 34 of the ACA, it would be discordant to hold that findings in subsequent award would render previous award illegally and the arbitral award have to be tested in its own merits not on the basis of a subsequent findings.

In an attempt to further avoid any multiplicity of arbitral tribunals and contradictory awards, the DHC in

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the Case issued slew of directions mentioned herein below:

(i) In every petition under section 34 of ACA, the parties approaching the courts ought to disclose that whether any other proceedings are pending or adjudicated on the same contract and if so, along with the stage and forum of proceedings;

(ii) At a time when petition under Section 34 of ACA is heard, parties ought to disclose that whether any other petitions under section 34 is pending and if so, seek disposal of the petitions to avoid conflicting findings;

(iii) In petitions for appointment of an arbitrator/ constitution of arbitral tribunal, parties ought to disclose if any tribunal stands constituted for adjudication of claims in the same contract or series of contracts , an endeavor can be made by the relevant High Court/arbitral tribunal under Section 11 of ACA to refer the matter to the same tribunal in view to avoid any conflicting findings;

(iv) Appointing authorities under contracts consisting of arbitration clause ought to avoid appointment of separate arbitrators/tribunals for different claims arising from the same contract or series of contract.

Conclusion

The DHC in the Case dismissed the Petition and held that that multiple arbitrations with respect to same contract before different arbitral tribunals leads to huge confusions. The constitution of different tribunals in respect of the same contract consequently lead to the purpose of arbitral proceedings insignificant as the basic purpose of arbitration is speedy disposal.

The DHC further held that the present order in the Case be sent to the Registrar General to be placed before the Chief Justice of India in order to consider if any modifications are required to be made in the Rules of the DHC framed under the ACA

Bombay HC directs IT department to refund INR 833 crores to Vodafone in 2 weeks[v]

Facts of the case

Vodafone Idea Limited, formerly known as Vodafone Mobile Services Limited which merged with Idea Cellular Limited and now known as Vodafone Idea Limited ("**Petitioner**") had filed the Writ Petition bearing WP-LD-VC No. 81 of 2020 ("**Petition**") before the Bombay High Court ("**Bombay HC**") *inter alia* praying for a Writ of Mandamus and seeks refund of Rs.1009,43,88,637/- as quantified by order dated May 28, 2020. In prayer clause (b) of the Petition, the Petitioner seeks admitted refund of Rs.833,04,88,000/- in accordance with the rectification/section 245 of Income Tax Act, 1961 ("**IT Act**") order dated 28th May, 2020. Section 245 of the IT Act empowers the Income Tax (**IT**) Department power to adjust any previous year's demand of tax payable with the current year's refund.

The Petitioner had filed its return of income on September 30, 2014. The said income tax return was revised on March 31, 2016 and further revised on February 22, 2017. On October 31, 2019, the respondent no. 1, i.e. the Assistant Commissioner of Income Tax, Circle 5(2) (2) ("**Respondent No.1**") passed an assessment order under Section 143(3) r/w. Section 144C of the IT Act determining the refund of Rs.733,80,83,366/- payable to the Petitioner on November 7, 2019.

The Petitioner filed an application for rectification under Section 154 of the IT Act seeking rectification of certain mistakes apparent from the record according to the Petitioner. The Petitioner filed another rectification application with the Respondent No.1 on December 3, 2019 in view of the case of Petitioner having been transferred from Delhi to Mumbai by order under Section 162 of the IT Act. Since the respondents, i.e. Respondent No.1, respondent no.2- The Principal Commissioner of Income Tax, City – 5 & Respondent No. 3 Union of India ("**Respondents**") in the Petition did not grant any refund in favour of the Petitioner, the Petitioner filed a Writ Petition (Civil) No. 2733 of 2018 ("**Writ Petition**") before the Delhi High Court. By the judgment and order dated December 14, 2018, the Delhi High Court dismissed the said Writ Petition. Being aggrieved by the said judgment and order, the Petitioner preferred Special Leave Petition which was

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converted as Civil Appeal No. 2377 of 2020 ("**Appeal**").

By the judgment and order dated April 29, 2020, the Supreme Court ("**SC**") in the Appeal held that insofar as assessment year 2014- 2015 is concerned, the final assessment order passed under Section 143 of the IT Act indicated that the Petitioner was entitled for refund of Rs.733 Crores while in assessment year 2015-16 there was a demand of Rs.582 Crores. The Respondents urged before the SC that the demand in respect of earlier assessment years including the liability as a result of order dated 28th December, 2019 being outstanding, the Respondents would be entitled to invoke the requisite power under Section 245 of the IT Act to set off the amount of refund payable in respect of assessment year 2014-15 against tax remaining payable.

The Respondents were accordingly directed by the SC that the amount of Rs.733 Crores shall be refunded to the Petitioner within four weeks from the date of the said order subject to any proceedings that the Revenue may deem appropriate in accordance with law. The Respondents were directed to conclude the proceedings initiated pursuant to the notice under sub-section (2) of Section 143 of the IT Act in respect of assessment year 2016-2017 and 2017-2018 as early as possible. Except those directions issued in paragraph No.23 of the said judgment, the SC did not interfere with the impugned judgment and order passed by the Delhi High Court and dismissed the said Appeal without any order as to costs.

Pursuant to the said judgment and order dated April 29, 2020 ("**Order**") delivered by the SC the Respondent No.1 issued an intimation under Section 245 of the IT Act. In the said intimation, it was the case of the Respondent No.1 that as per their records, a sum of Rs.8640827138/- was outstanding against the Petitioner in respect of various assessment years i.e. 2000-01, 2004-05, 2005-06, 2006-07, 2007-08, 2012-13 and 2018-19. By the said intimation, the Respondents proposed to set off the outstanding demand against the refund for the assessment year 2014-2015 arrived in case of the Petitioner. The Petitioner was directed to inform the Respondents in case of any of those demands mentioned in the said notice was stayed by any court.

The said intimation under Section 245 of the IT Act was strongly objected by the Petitioner on various grounds.

On 28th May, 2020, the Respondent No.1 passed an order under Section 154 of the IT Act read with Section 143(3) of the IT Act. Insofar as assessment year 2014-2015 is concerned, the Respondent No.1 held that the Petitioner was entitled to refund of Rs.1009,43,88,637/-. The Respondent No.1 in the said order however, also held that the demand for several years was pending against the Petitioners for the sum of Rs.176,3900637/-. The Respondent No.1 deducted the said amount of Rs. 176,3900637/- out of the refund amount of Rs. 1009,43,88,637/- and determined the net refundable amount at Rs.833,04,88,000/-.

The Petitioner asked for refund by seeking compliance of the Order. The Respondents however, did not refund any amount to the Petitioner including Rs.833,04,88,000/- which according to the Respondents was due and payable to the Petitioner. The Petitioner thus, filed this Petition inter alia praying for various reliefs.

Findings of the Bombay HC

A perusal of the record clearly indicates that insofar as assessment year 2014-15 is concerned, the SC by judgment and Order had already directed the Respondents to refund a sum of Rs.733 Crores to the Petitioner however subject to any proceedings that the Revenue may deem appropriate to initiate in accordance with law. The Respondent No.1 had already issued two notices dated May 8, 2020 and May 13, 2020 respectively inter alia seeking adjustment of the refund in sum of Rs.953,75,27,138/- against the refund payable to the Petitioner for the assessment year 2014-15.

A perusal of the order dated May 28, 2020 passed by the Respondent No.1 clearly indicates that said order was the common order passed in the application filed by the Petitioner under Section 154 of the IT Act and also under Section 245 of the IT Act. Adjustment of the alleged tax dues which was required to be made according to the Respondents against the refund amount due to the Petitioner in the assessment year 2014-15 was already made by the Respondent No.1 in the said order. The aforesaid order, insofar as Respondents are concerned, has attained finality. The question as to whether the Respondent No.1 could have adjusted the sum of Rs.176,3900637/- or not is an issue raised in this Writ Petition. The said issue would be decided by

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Bombay High Court at the stage of final hearing of the Writ Petition.

However, insofar as the net refundable amount of Rs. 833,04,88,000/- is concerned, in our view, the Respondents already having invoked their powers under Section 245 of the IT Act which action has ended with passing of the order dated May 28, 2020, the Respondents cannot withheld the admitted refundable amount of Rs. 833,04,88,000/- on the ground that the Respondents may have a future demand against the Petitioner arising out of the pending assessment orders. In our view, there is no such power vested in the Respondents to adjust the admitted refund amount against the tax dues which are not even adjudicated upon by the Respondents and may arise in future as contemplated/visualized by the Respondents.

Respondents cannot be allowed to invoke section 241-A of the IT Act for the first time in the affidavit in reply to the writ petition filed by the Petitioner. Be that as it may, a plain reading of the said provision makes it clear that the power to withhold the refund granted to the Assessing Officer is subject to the previous approval of the Principal Commissioner or Commissioner, as the case may be and that also would be for every assessment year after 1st April, 2017 where refund of any amount becomes due to the assessee under the provisions of sub-section(1) of section 143 of the IT Act and not for the earlier assessment year. The assessment year in question in this case is 2014-15. In our view , the Section 241A of the IT Act pressed in service even in the affidavit-in-reply or otherwise is not attracted to the refund of assessment year 2014-15 or any assessment year prior to 2017-18.

It is not in dispute that as on today, there is no determination of any further tax liability for any other assessment year which liability can be adjusted against the admitted refundable amount determined by the Respondent No.1 assuming Section 241A of the IT Act is applicable or otherwise. Even otherwise no approval is granted by the Principal Commissioner or Commissioner as the case may be to withhold the refund up to the date on which the assessment is made. self monitoring.

In this case, the assessment order under Section 143(1) of the IT Act for the assessment year 2014-2015 has already attained finality resulting in refund of amount in view of the Order and the order dated 28th May, 2020 passed by the Respondent No.1.

Insofar as the reliance placed by the learned counsel for the Respondents on the judgment of the Delhi High Court in the case of ***Maruti Suzuki India Ltd. V/s. Deputy Commissioner of Income Tax [2012] 347 ITR 43 (Delhi)*** is concerned, in our view, the said judgment is not even remotely applicable to the facts of this case. Reliance placed by the learned counsel for the Respondents on the said judgment is totally misplaced.

Order of the Bombay High Court

The Respondents are directed to refund a sum of Rs.833,04,88,000/- to the Petitioner within two (2) weeks from the date of uploading of this order without fail.

Conclusion

This judgment of the Bombay HC is relevant in view of the position stated by it as follows:

(i) there is no such power vested in the Respondents to adjust the admitted refund amount against the tax dues which are not even adjudicated upon by the Respondents and may arise in future as contemplated/visualized by the Respondents;

(ii) Section 241A of the IT Act pressed in service even in the affidavit-in-reply or otherwise is not attracted to the refund of assessment year 2014-15 or any assessment year prior to 2017-18.; and

(iii) a plain reading of section 241A of the IT Act makes it clear that the power to withhold the refund granted to the Assessing Officer is subject to the previous approval of the Principal Commissioner or Commissioner, as the case may be and that also would be for every assessment year after 1st April, 2017 where refund of any amount becomes due to the assessee under the provisions of sub-section (1) of section 143 of the IT Act and not for the earlier assessment year.

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