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Introduction

We here at Agarwal Jetley & Co. (AJC) are happy to bring a new edition of the newsletter. We in this edition cover the various important aspects that are valuable and important legal information. This effort is another step to simplify the understanding for our various readers. 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 the recent judgment of NCLT regarding installments. Then our partner Neeraj Kumar looks into the aspect of whether a family settlement needs registration or not. We then look briefly into the recent order of the Supreme Court on suo motto appointment of an arbitrator.

We then look as to how the state of Karnataka is looking to liberalize its labour laws. Finally, we also view the aspect of trademark protection by commercial courts.

NCLT holds that unpaid installments under settlement agreement not an operational debt[i]

Introduction

The National Company Law Tribunal, Delhi (**"NCLT"**) has recently on July 22, 2020 in *M/s Brand Realty Services Ltd vs M/s Sir John Bakeries India Private Limited* ((IB)1677(ND)/2019) held that unpaid instalment(s) under settlement agreement do not fall within the ambit of 'Operational debt' under section 5(21) of the Insolvency and Bankruptcy Code, 2016 (**"Code").**

Brief Facts

M/s Brand Realty Services Ltd **("Operational Creditor")** entered into an agreement on November 28, 2014 with M/s Sir John Bakeries India Private Limited **("Corporate Debtor")** for providing investment and consultancy services**,** which was later ratified as an Account Settlement Agreement **("Agreement")** on June 15, 2018. As per the Agreement, the Corporate Debtor agreed to pay the commission of Rs.33,94,000/- on a fixed equal amount of Rs.56,500/- for a period of 66 months with effect from April 2018 and issued post-dated cheques, but later the Corporate Debtor approached the Operational Creditor to pay the installments through RTGS. The amount was not transferred as assured consequently, the Operational Creditor served a demand notice on April 30, 2019, to which Corporate Debtor replied that it has no liability to make any payment. Being aggrieved, the Operational Creditor filed an application under Section 9 of the Code before the NCLT for initiating Corporate Insolvency Resolution Process **("CIRP")** of the Corporate Debtor.

NCLT's findings

The NCLT referred definitions of "Debt" under Section 3(11) of the Code and held that the "Debt" just not only includes an operational debt but it also encompasses financial debt and any obligation or liability in respect of a claim which is due from any person ,"Default" under Section 3(12) connotes non-payment of debt and "Operational Debt" under Section 5(21) means claim in respect of provisions of goods and services including employment or default in payment of the dues arising under any law for the time being in force and hence CIRP under section 9 of the code can only be initiated, if Operational Creditor establishes non-payment of "Operational Debt".

The NCLT relied on the decision of *M/s Delhi Control Devices Pvt Ltd vs M/s Fedders Electric and Engineering Ltd (CP(IB) No.343/ALD/2018)* and held that the default in payment of installments under a settlement agreement does not come under the purview of 'operational debt'.

After considering the factual matrix and contention of the parties, the NCLT noted that the proceedings were filed based on the breach of contractual obligations of the Agreement between the parties and not against the default in payment of the Invoices raised as per original agreement.

Conclusion

The NCLT dismissed the application and remarked that the failure or breach of terms and conditions of the Agreement cannot be taken as a ground to trigger Section 9 of the Code. Also, the NCLT is not a recovery court and for initiation of CIRP, it is a pre-condition that there is a default in payment of operational or financial debt.

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Supreme Court says 'Memorandum of Family Settlement' is not a compulsorily registrable document[ii]

Introduction

The issue in respect of requirement of compulsory registration of a document, settlement between members of the family popularly known as 'family settlement', as interest in immovable property worth more than Rs. 100 transferred in party to the settlement, has been way back answered by the Full Bench (three judges bench) of the Hon'ble Supreme Court (SC) in Kale & Ors. vs. Deputy Director of Consolidation & Ors. (1976) 3 SCC 119 **("Kale case").**

However, such issue being an issue of fact comes for consideration in different cases on the basis of their own peculiar facts.

Recently, such issue has arisen in Ravinder Kaur Grewal & Ors. Versus Manjit Kaur & Ors. CIVIL APPEAL NO. 7764 OF 2014 *("***Ravinder Kaur case***")*, the issue was answered by the Division Bench (two judges bench) of the SC through its reported judgment on July 31, 2020.

Settled legal position

The SC in Ravinder Kaur case reiterated the settled legal position in respect of family settlement. It has been observed that the settled legal position is that when by virtue of a family settlement or arrangement, members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once and for all in order to buy peace of mind and bring about complete harmony and goodwill in the family, such arrangement ought to be governed by a special equity peculiar to them and would be enforced if honestly made. The object of such arrangement is to protect the family from long drawn litigation or perpetual strives which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family, as observed in Kale case.

The emphasis has further been given by the SC in Ravinder Kaur case that the courts have leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits.

Essentials of a family settlement

The SC in Ravinder Kaur case observed that in paragraph 10 of the Kale case, the Court has delineated the contours of essentials of a family settlement as follows:

> *"10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:*
> *"(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;*
>
> *(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;*
>
> *(3)* ***The family arrangement may be even oral in which case no registration is necessary****;*
>
> *(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing.* ***Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation****. In such a case the memorandum itself does not create or*

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extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. ***Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same****;*

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement."

(emphasis supplied)

Caveat in respect of sub-para 4 of para 10 of Kale case

Though in sub-para 4 of para 10 of Kale case it says about the mischief of Section 17(2) of the Registration Act, it seems that there is typo error in the same and it ought to be read as Section 17(1)(b) of the Registration Act instead of Section 17(2) of the Registration Act. The same is also evident from a separate concurring judgment written by ***Justice R.S. Sarkaria*** in ***Kale case***.

Principle of Estoppel to family arrangement

The SC in ***Ravinder Kaur case*** observed that in ***Kale case*** the SC has restated that a family arrangement being binding on the parties, clearly operates as an estoppel, so as to preclude any of the parties who have taken advantage under the agreement from revoking or challenging the same. In paragraph 38 of ***Kale case***, the SC noted as follows over which emphasis has been supplied by the SC in ***Ravinder Kaur case***:

"38. … **Assuming, however, that the said document was compulsorily registrable the courts have generally held that a family arrangement being binding on the parties to it would operate as an estoppel by preventing the parties after having taken advantage under the arrangement to resile from the same or try to revoke it**. ….."

(emphasis supplied)

Conclusion

The issue of fact will time and again come to be interpreted in the court of law on its own peculiar facts. However, if the distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court then that distinction will lead to an answer whether the document is such of which registration is compulsory or not. If the document is only a memorandum of family settlement then its registration is not compulsory.

Court is known as temple of justice and justice cannot be overshadowed by mere technicalities over family arrangement ought to be governed by a special equity peculiar to them and would be enforced if honestly made. Thus, where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits.

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Suo Motu appointment of Arbitrator by Court 'not right': Supreme Court[iii]

The Supreme Court **("SC**") has recently vide its Order dated July 14, 2020 in the matter of State Trading Corporation of India Ltd vs. Jindal Steel and Power Limited & Ors, (Civil Appeal No. 2747 of 2020) set aside the order of the Delhi High Court **("DHC")** for *suo motu* appointing arbitrator while ignoring the agreement between parties which provides for mechanism to settle the dispute arising between them by arbitration.

Certain dispute arose between the State Trading Corporation of India Ltd. ("**STCPL**") and Jindal Steel and Power Ltd. ("**JSPL**") and as per the agreement between them the dispute was to be resolved through arbitration under the aegis of Indian Council of Arbitration and rules framed thereon. As such, an Application under Section 9 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") was filed by the JSPL before the DHC for restraining STCPL from invoking and encashing the performance bank guarantees amounting to Rs.88.40 Crores, which were executed in favour of STCPL, among other directions.
The Single Judge of DHC vide its Order rejected the JSPL's prayer for restraining the STCPL from encashing the bank guarantees. Challenging the said Order, JSPL approached the division bench of the DHC wherein it *suo moto* appointed an arbitrator ignoring the mechanism under the agreement between parties.

Aggrieved by the said Order of DHC's division bench, STCPL approached SC through present civil appeal. The SC after perusing the relevant dispute and pertinent clauses of the agreement between the parties found that disputes between parties had to be settled in accordance with the rules of arbitration of the Indian Council of Arbitration. The SC held that when the parties have agreed to a procedure for appointment of arbitrator, ignoring the same, the DHC was 'not right' in *suo motu* appointing an arbitrator in an appeal arising out of proceedings under Section 9 of the Arbitration Act. Accordingly, the SC set aside the division bench's Order of DHC and gave liberty to the parties to initiate arbitration before the Indian Council of Arbitration.

Karnataka starts major labour reforms[iv]

Introduction

In its bid to attract investments and restart the economy on a big scale, the State Government of Karnataka ("**Government**") has promulgated the Industrial Disputes and Certain Other Laws (Karnataka Amendment) Ordinance, 2020 ("**Ordinance**").

The Ordinance provides various relaxations in Industrial Disputes Act, 1947 ("**ID Act**"), the Factories Act, 1948 ("**Factories Act**") and the Contract Labour (Regulation and Abolition) Act, 1907 ("**CLRA**").

The changes

In the ID Act, the Ordinance proposes the change with regard to special provisions of section 25K which deals with the lay, retrenchment and closure of certain establishments, the minimum criterion of workmen (blue collar employees) has been raised from 100 to 300 employees. Hence, now entities which require prior permission of the Government as per the ID Act, for carrying out the aforesaid activities would now be 300. In terms of the Factories Act, in the definition of the term factory which carries on activities with or without the aid of power. In terms of with power, the minimum number of workers required has been raised from 10 to 20 and in case of without power from 20 to 40. Further the overtime limit of 75 hours in a quarter has been increased to 125 hours.

Finally, the applicability of the CLRA to an establishment, the number of labour has been increased from 20 and is now revised to 50.

Effect

The Ordinance has come into effect from the date it was published. The amendments vide the Ordinance are a step in the right direction enabling ease of doing business, increasing production and boosting employment. This will also help in attracting more industries to Karnataka.

Polo wars – Court grants relief[v]

Introduction

In a recent case the Commercial Court, Patiala House Courts, New Delhi ("**Court**") provided relief to clothing and accessory brand manufacturer Ralph Lauren with regard to the "Polo" mark. In an interesting set of events the Court vide an order dated July 20, 2020 the Court granted an ad interim injunction restraining the alleged use of the "Polo" mark thereby in a certain manner probably raising hopes for foreign manufacturers and investors who fight long battles trying to protect their brand value in India. This update looks at the same case.

Facts of the case

A suit was filed by the Polo/Lauren Company L.P., U.S.A. ("**Plaintiff**") in the Court under section 134 and 135 of Trademarks Act, 1999 ("**TM Act**") and Section 55 of Copyright Act, 1957 for permanent injunction restraining Mr. Chirag Ashwinbhai Parekh ("**Defendant**") from using the trademarks/labels LOS POLISTAS with or without DEVICE OF POLO PLAYER and EL POLISTA with or without DEVICE OF POLO PLAYER in relation to clothing goods and accessories.

It was alleged that the Defendant is also engaged in the identical business of manufacture, distribution and sale of apparel and clothing etc. He has adopted the trademark/label Los Politas and EL Polista with device of Polo Player.

The Plaintiff also alleged that the trademark adopted by the Defendant in relation to its goods and business are almost deceptively similar to the Plaintiff's said trademark/label in each and every respect i.e. phonetically, visually and structurally.

Plaintiff's submission

The Plaintiff submitted that it is engaged in the business of manufacture, distribution and sale of a wide range of apparels and clothing since 1967. Also, that it has been using the formative POLO marks in style, manner and phonetically since its inception. The word/label POLO is the most essential feature of the Plaintiff's style/trade name.

In this regard the Plaintiff stated that it has the exclusive rights to deal with the said trademark/label/tradename in relation to its goods and business. It has also launched websites and online stores under the domain name www.polo.com and www.ralphlauren.com. It has also obtained various trademarks registration pertaining to its trademark/label in the world including India.

Further, recently, Aditya Birla Fashions and Retail Limited had become licensee of the Plaintiff in India. Its trademark/tradename is "well known" as described with regard to "well known mark" under the TM Act.

In light of what had been stated by the Plaintiff, it was alleged that Defendant with intent to gain unfair profits engaged in the identical business of manufacture, distribution and sale of apparel and clothing etc. with the trademark/label Los Politas and EL Polista with device of "Polo Player". Also, the trademark/label adopted by the Defendant in relation to its goods and business are identical with and deceptively similar to the Plaintiff's said trademark/label in each and every manner that is phonetically, visually & structurally.

Court's observation

The Court observed that Defendant had earlier adopted the identical/deceptively similar mark with the device of Polo player and on the suit filed by the Plaintiff, the defendant was restrained from using or dealing in the then impugned trademark/label 'CPL' with device of polo player and/or any other word/mark/label which may be identical with and/or deceptively similar to Plaintiff's trademark in relation to clothing and accessories.

The Defendant had filed the applications for impugned Trade mark/label LOS POLISTAS with the device of Polo player on January 10, 2020 on proposed user basis, against which the Plaintiff had filed oppositions on March19, 2020 which is pending disposal. The Court was of the firm view that *mere acceptance of an application for registration of a trademark or its advertisement confers no right for its usage*. The Court stated that in the present case, the Defendant was aware of the Plaintiff rights, goodwill, reputation, benefits and users etc. in said trademark at the time of its impugned adoption and use of trademark.

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Hence, the Court granted ex-parte ad-interim injunction in favour of the Plaintiff against the Defendant.

Conclusion

With the advent of foreign direct investment and increased presence of foreign companies, the idea of increased protection to registered brands has also taken flight. In fact, this order coming from the Commercial Courts bodes well in light of the aspect that the said courts are performing their desired objective.

Further, taking cue, the Court in this matter took it upon itself to see that the appropriate relief is given to the Plaintiff rather than relying on the Trademark Registry to settle the dispute. This will give increased impetus and a sense of security to foreign investors regarding their "brand protection".

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