AJC NEWSLETTER

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Introduction

We here at Agarwal Jetley & Co. (AJC) are happy to bring another edition of our newsletter capturing the important updates that have taken place in the legal world. 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 associates have looked into the focus provided viz. the judgment of the NCLAT refusing to interfere an initiate insolvency proceeding in case of a RERA award and rejection of Aircel asset sale plan by RBI. Then our partner Neeraj Kumar looks into the Supreme Court judgment regarding the criminal prosecution on same set of facts. Then we delve into two important policies viz the Defence Production and Export Promotion Policy, 2020 and the National Education Policy. We also look into the important judgment of daughters being given coparcenary rights under the Hindu Succession Act. Finally, we look into the recent amendments vide the Companies Amendment Act, 2020 and the changes brought about to foreign funds to be received under the Foreign Contribution (Regulation) Act, 2010.

Home-buyers cannot initiate insolvency proceedings to execute RERA decree - NCLAT[i]

Introduction

The Hon'ble National Company Law Appellate Tribunal **("NCLAT")** on August 14, 2020 had set aside the order passed by the Hon'ble National Company Law Tribunal, Delhi ("**NCLT**") wherein the NCLT directed the initiation of Corporate Insolvency Resolution Process ("**CIRP**") against M/s. Ansal Properties & Infrastructure Ltd. ("**APIL**") on the appeal *[Company Appeal (AT) (Insolvency) No. 452 of 2020]* filed by the Former Director and Shareholder of APIL, for being 'not maintainable'.

Facts

Two home-buyers *namely,* Mr. Ashok Tripathi and Mr. Saurabh Tripathi ("**Respondents**"**)** had booked units with APIL at 'Sushant Golf City 'developed at 'High-Tech Township, Lucknow and were assured delivery of possession by APIL within two (2) years from the date of construction. However, the APIL miserably failed to honour its commitment in delivery of the possession of the flats to the Respondents. The Respondents consequently filed a complaint before the Uttar Pradesh Real Estate Regulatory Authority ("**RERA**") and after adjudication, RERA was pleased to grant a decree of Rs.73,35,686.43/- in favour of the Respondents and subsequently, issued a recovery certificate on August 10, 2019.

Thereafter, the Respondents considering themselves as 'Financial Creditors', approached the NCLT under Section 7, Insolvency and Bankruptcy Code, 2016 ("**Code**") and sought CIRP against APIL on basis of the decree and recovery certificate. The NCLT vide its Order dated March 17, 2020 ("**Impugned Order**") admitted the insolvency application and directed initiation of CIRP against APIL on the account of failure to pay the decree amount to the Respondents and appointed an Interim Resolution Professional ("**IRP**") to conduct the CIRP and overlook the management of APIL.

Consequently, an appeal was preferred by the Former Director and Shareholder of APIL Mr. Sushil Ansal seeking setting aside of the Impugned Order on the ground that the Respondents were not financial creditors under the Code, hence the Section 7 Application filed by the Respondents was not maintainable. In the meanwhile, the IRP had received more than 250 claims against APIL.

NCLAT's findings

In appeal, the NCLAT dealt and analysed in details with the assigned definition and inscribed definition of 'Financial Creditor', defined under Section 5(7) of the Code, and 'Financial Debt', defined under Section 5(8) of the Code. The NCLAT *qua* definition of Financial Creditor held that on the plain reading of the definition, it is amply clear that any person whose financial debt is due is a financial creditor under the Code.
Further, the NCLAT, on analysing the definition of 'Financial debt' in the context of the present case, held that though the initial transaction between APIL and the Respondents was an allotment under a real estate project having commercial effect of a borrowing as defined under Section 5(8)(f) of the Code but the Respondent approached the NCLT, not on the strength of having commercial effects of borrowing, but on the strength of a decree passed by RERA, being the 'decree-holders'.

The NCLAT opined that the Respondents had not triggered the CIRP in a purported capacity as an 'allottees' but in the capacity of 'decree holders', which owed its genesis to the recovery certificate issued by the RERA. Thus, a 'decree-holder 'although covered under the purview of "Creditor" under Section 3(10) of the IBC but does not fall within the definition of class of creditors classified as 'Financial Creditor' as the amount claimed under the decree is an adjudicated amount and not the amount disbursed against the consideration time value of money and hence does not fall within the ambit of 'Financial debt' under Section 5(8) of the IBC.

Conclusion

The NCLAT's Judgment is an important judgment considering the fact that it has far reaching ramification and also has further somehow jeopardize the hopes of the allottees of the real estate project who hoped that by initiating the CIRP against the builders, they would receive back their monies in shorter time than expected.

RBI rejects Aircel assets sale plan[ii]

Introduction

Telecom operator Aircel Limited and its two (2) subsidiaries, Aircel Cellular Limited and Dishnet Wireless Limited ("**Aircel**") is a telecommunications company in which the majority stake is owned by Malaysia's Maxis Communications. Aircel filed a voluntary insolvency petition in the Mumbai bench of National Company Law Tribunal (**NCLT**) citing high unsustainable debt, price wars, legal and regulatory challenges on February 29, 2018 after a merger with Reliance Communications Limited fell through which led to failure in repayment of debt amounting to nineteen thousand seven hundred ninety crore rupees (Rs. 19,790 crore) to its creditors. Pursuant to that, Aircel's two (2) subsidiaries Aircel Cellular Limited and Dishnet Wireless Limited ("**Subsidiaries**") were admitted to the NCLT and cumulatively, the total claims Aircel stood at over fifty-eight thousand seven hundred sixty crore rupees (Rs. 58,760 crore).

The association of asset reconstruction companies ("**ARCs**") in India, a body representing asset reconstruction companies, has written to the Reserve Bank of India (**RBI**) seeking clarity on the rejection of the resolution plan for Aircel.

Involvement of UV Asset Reconstruction Company Limited ("UVARC")

Set up in 2007, UVARC is promoted by individuals and backed by six (6) public-sector banks including, Central Bank of India, Bank of Maharashtra, Union Bank of India, Bank of India, United Bank of India and Allahabad Bank and two (2) insurance companies namely, United India Insurance Company and National Insurance Company. UVARC proposed to resume certain operations of Aircel and sell several assets in order to pay back six thousand six hundred and thirty crore rupees (Rs. 6,630 crore) i.e. eight hundred and seventy million dollars (USD 870 million) (approximately) to the lenders of Aircel.

The plans came to light when the NCLT released its order in the case of 'GTL Infrastructure Limited v. Vijaykumar V. Iyer' on June 10, 2020 ("**NCLT Order**") approving UVARC's proposal to take over Aircel. UVARC would make an upfront equity infusion of eleven crore rupees (Rs. 11 crore) to start some low-capital businesses to generate revenue from Aircel including bulk text messages, data centre and telecom tower leasing. According to the NCLT Order, Aircel aims to generate revenue of sixty-nine crore rupees (Rs. 69 crore) in the first year, ninety-six crore rupees (Rs. 96 crore) in the second year and one hundred twenty-five crore rupees (Rs. 125 crore) in the third year. In addition, UVARC planned to sell Aircel's real estate, optical fibre, towers, equipment and the right to use spectrum to mobilise approximately one thousand five hundred crore rupees (Rs. 1,500 crore).

This resolution plan referred to in the NCLT Order, was challenged by the Department of Telecommunications, Government of India (**DoT**) as they feared that it will not be able to recover its dues, the DoT dues amongst others included, adjusted gross revenue (**AGR**). Aircel has a liability of twelve thousand two hundred eighty-nine crore rupees (Rs. 12,289 crore) in AGR dues to the government, including spectrum usage charges and licence fees.

RBI's rejection

The RBI rejected the resolution plan submitted by UVARC for acquiring the assets of Aircel, stating that the plan did not conform to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (**SARFAESI Act**). The reason for rejecting the plan of UVARC remains unclear because Insolvency and Bankruptcy Code, 2016 (**IBC**) allows asset reconstruction companies to participate in resolution processes. The SARFAESI Act does not permit ARCs to submit resolution plans, but the IBC allows it.

RBI's primary objection is that instead of buying debt, an ARC is buying equity in a company. Under RBI guidelines in force since 2017, ARCs can hold more than twenty-six per cent (26%) equity in a borrower after debt to equity conversion if they meet certain norms including - ARC shall be in compliance with 'Net Owned Fund' requirement of one hundred crore rupees (Rs. 100 crore) on an ongoing basis; at least half of the board of directors of the ARC would comprise independent directors; the ARC shall frame policy on debt to equity conversion with the approval of its board of directors and may delegate powers to a committee comprising the majority of independent directors for taking decisions on proposals of debt to equity conversion; the equity shares acquired under the scheme shall be periodically valued and marked to market. The frequency of valuation shall be at least once in a month. The UVARC resolution plan involved the ARC getting seventy-six per cent (76%) stake in the company in the first five (5) years, with the financial creditors getting the rest.

Under the IBC, which replaced the Sick Industrial Companies Act on December 01, 2016, the debtor ceases to have control of the business, which then shifts to the 'Committee of Creditors' (**CoC**). A 'Resolution Professional' is appointed to manage the business of the debtor on behalf of the CoC with a view to preserving its assets to the extent possible.

However, the SARFAESI Act allows lenders to directly auction assets pledged with them to recover their loans. According to the ARCs' association, IBC has specifically permitted RBI-registered ARCs to act as resolution applicants, which the SARFAESI Act is silent about.

While under the IBC, ARCs can convert seventy-six per cent (76%) of their debt into equity, there are no such provisions under the SAFERASI Act. However, ARCs fall under the SARFAESI Act, with the RBI as their regulator, while the IBC is controlled by the Ministry of Corporate Affairs.

Conclusion

The IBC is complementary and not contradictory to the SARFAESI Act and both are enacted to resolve the financial assets by restructuring to ensure restoration of economic value. The IBC being a later legislation overrides other laws unless inconsistent with any other extant law.

The RBI rejection came in August, 2020 after several rounds of discussions trying to convince the RBI that IBC has a non-obstante clause and it has an overriding effect on other laws contrary to it.

The inclusion of ARCs as resolution applicants under IBC needs more clarity as the RBI has not objected to plans submitted by ARCs in prior instances. If RBI came up with specific regulations for ARCs to follow while submitting resolution plans, it may give more clarity to the situation. UVARC may approach the 'Ministry of Corporate Affairs' and the 'Insolvency and Bankruptcy Board of India' for the same.

Criminal prosecution on same set of facts and circumstances cannot continue if exoneration in departmental proceedings is on merits[iii]

Introduction

The Full Bench (three judges bench) of the Supreme Court ("**SC**") in a recent judgment on September 8, 2020 in *Ashoo Surendranath Tewari vs The Deputy Superintendent of Police, EOW, CBI & Anr. (Criminal Appeal No. 575 of 2020)* ("**Ashoo case**") followed the principles stated in *Radheshyam Kejriwal* vs. *State of West Bengal and Another*, (2011) 3 SCC 581 ("**Radheshyam case**") another Full Bench judgment of the SC which has culled out the ratio from various decisions discussed in the said judgment and finally concluded, *"....the yardstick would be to judge as to whether the allegation in the adjudication proceedings (sic departmental proceedings) as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act (sic relevant provisions for departmental proceedings) in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."*

Facts of the case

Ashoo case arises out of an FIR which was lodged against various accused on account of diversion of funds in criminal conspiracy with kingpin of the crime.

There was an Order of the Central Vigilance Commission (**CVC**) in the departmental proceedings of the Appellant in Ashoo case which went into the facts of the case in great detail and concurred that on merits no sanction ought to be accorded and no offence under the Indian Penal Code, 1860 ("**IPC**") was in fact made out.

However, the Special Court of the Central Bureau of Investigation ("**Special Court**") found that since no sanction was taken under the Prevention of Corruption Act, 1988 ("**PCA**") offences under the PCA can be proceeded with against this accused and he was discharged to that extent. However, so far as sanction under Section 197 of Code of Criminal Procedure Act, 1973 is concerned, the Special Court came to the conclusion that there was no need for sanction in the facts of this case. Special Court refused to discharge the appellant from the offences under the IPC.

The High Court of Judicature at Bombay ("**High Court**") concurred with the findings of the Special Court.

CVC Report

The SC observed that a reading of this report shows that, at the highest, the appellant may be negligent without any criminal culpability. In fact, the positive finding of the CVC that the appellant appears to be a victim of kingpin's plot is of some importance.

Standard of proof in departmental proceeding *vis* criminal proceeding

The SC relied upon a number of judgments of *P.S. Rajya* vs. *State of Bihar*, (1996) 9 SCC 1 and *Radheshyam Kejriwal* vs. *State of West Bengal and Another*, (2011) 3 SCC 581 which have held that the standard of proof in a departmental proceeding, being based on preponderance of probability is somewhat lower than the standard of proof in a criminal proceeding where the case has to be proved beyond reasonable doubt.

Principles laid down in Radheshyam case

After referring to various judgments, the SC in Radheshyam case culled out the ratio of those decisions in paragraph 38 as follows:

> *"**38.** The ratio which can be culled out from these decisions can broadly be stated as follows:*
> *(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;*
> *(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;*
> *(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;*
> *(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;*
> *(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;*
> *(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and*
> *(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases."*

It finally concluded:

> *"**39.** In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."*

Conclusion

The SC in Ashoo case found that the present case squarely falls within the principle as laid down at para 38 (vii) in Radheshyam case. Accordingly, the SC found that the Appellant has been exonerated on merits in departmental proceeding and the allegation found to be not sustainable at all whereby the Appellant has been held innocent. Thereby, the criminal prosecution on the same set of facts and circumstances cannot be allowed to continue and which shall be an abuse of the process of the court. Thus, the SC set aside the judgment of the High Court and that of the Special Court and discharge the Appellant from the offences under the IPC.

Defence Production and Export Promotion Policy, 2020[iv]

Introduction

In order to provide impetus to self-reliance in defence manufacturing, multiple announcements were made under *Atmanirbhar Bharat Package*. In implementing such a framework and to position India amongst the leading countries of the world in defence and aerospace sectors, Ministry of Defence (**MoD**) has formulated a draft Defence Production and Export Promotion Policy, 2020 (**DPEPP 2020**). It was released on August 3, 2020. The DPEPP 2020 is envisaged as an overarching guiding document of MoD to provide a focused, structured and significant thrust to defence production capabilities of the country for self-reliance and exports.

Objectives of DPEPP 2020

(i) To achieve a turnover of one lakh seventy-five thousand crore rupees (Rs. 1,75,000 crores) i.e. approximately twenty-five billion dollars (USD 25 billion) including export of thirty-five thousand crore rupees (Rs. 35,000 crore) i.e. approximately five billion dollars (USD 5 billion) in aerospace and defence goods and services by 2025;

(ii) To develop a dynamic, robust and competitive defence industry, including aerospace and naval shipbuilding industry to cater to the needs of the Indian Armed Forces with quality products;

(iii) To reduce dependence on imports and take forward the "*Make in India*" initiatives through domestic design and development;

(iv) To promote export of defence products and become a part of the global defence value chains; and

(v) To create an environment that encourages research and development (**R&D**), rewards innovation, creates Indian intellectual property (**IP**) ownership and promotes a robust and self-reliant defence industry.

Outlined strategies of DPEPP 2020

(i) Procurement reforms:

(a) A 'Project Management Unit' (**PMU**) is proposed to be set up under DPEPP 2020 for the development and production of technologies involved, life cycle costs and maintenance requirements of platforms, equipment and weapon systems;

(b) DPEPP 2020 aims to move away from licensed production to design, develop and produce indigenously;

(c) It also aims to own the design rights and IP of the systems projected in the Long-Term Integrated Perspective Plan (**LTIPP**) and a Technology Assessment Cell (**TAC**) is proposed to be created; and

(d) Once established, the TAC will assess the industrial capability for design, development and production, including re-engineering for production of major systems such as armoured vehicles, submarines, fighter aircraft, helicopters and radars with the major industries in the country.

(ii) Indigenisation and support to MSMEs and start-ups:

(a) The indigenisation policy under DPEPP 2020 aims to create an industry ecosystem to indigenise the imported components (including alloys and special materials) and sub-assemblies for defence equipment and platforms manufactured in India. Five thousand (5,000) such items are proposed to be indigenised by 2025; and

(b) More than fifty (50) start-ups are currently developing new 'fit-for-military-use' technologies/products under DPEPP 2020.

(iii) Optimise resource allocation:

The share of domestic procurement in overall defence procurement is about sixty per cent (60%). To enhance procurement from domestic industry, the DPEPP 2020 proposes that the procurement needs be doubled from the current seventy thousand crore rupees (Rs. 70,000 crore) to one lakh forty thousand crore rupees (Rs. 1,40,000 crore) by 2025.

(iv) Investment promotion and ease of doing business:

India is already a large aerospace market with rising passenger traffic and increasing military expenditure, as a result of which the demand for aircraft (fixed and rotary wings) is rising.

(a) Therefore, there are opportunities in the aerospace industry that have been identified in DPEPP 2020 in the following segments - aircraft build work, aircraft maintenance, repair and overhaul (**MRO**), helicopters, engine manufacturing and MRO work, line replaceable units, Unmanned Aerial Vehicles and upgrades and retrofits; and

(b) The DPEPP 2020 suggests that the investments in the defence sector need to regularly sustain the steady supply of orders.

(v) Innovation and R&D:

(a) Innovations for Defence Excellence (**iDEX**) is proposed to be operationalised under DPEPP 2020 to provide necessary incubation and infrastructure support to the start-ups in the defence area. iDEX is proposed to further scale engagement with three hundred (300) more start-ups and develop sixty (60) new technologies/products during the next five (5) years; and

(b) Under DPEPP 2020, an 'Intellectual Property Facilitation Cell (**IPFC**)' is proposed to be established under the aegis of Directorate General Quality Assurance (**DGQA**). The primary objective will be to promote a greater culture of innovation and technology development and file a higher number of patents in defence public sector units (**DPSUs**) and ordnance factories ("**Ordnance Factories**"). IPFC is further proposed to scale for promoting the creation of IP in the sector and its commercial utilisation.

(vi) Quality assurance and testing infrastructure:

(a) The quality control and assurance process of the indigenously produced items is proposed to be rationalized and monitored by developing an information technology platform with an industry interface. The competitiveness of the defence industry depends on robust quality assurance practices and mechanisms and this needs to be ensured in all phases of the product life cycle;

(b) Organizational reforms in DGQA are proposed to be taken up to rationalize the workforce and enhance their productivity. Accredited third-party inspection bodies are proposed to be promoted to augment the resources of DGQA by outsourcing certain Quality

Assurance (**QA**) functions throughout the value chain. Presently, DGQA is the main QA organisation entrusted with the responsibility of assuring quality and reliability of defence products, both manufactured indigenously and those procured ex-import. Commensurate to the likely increase in workload in the near future, the resources available with DGQA may need augmentation by means of outsourcing certain QA functions to eligible Government/private bodies. Accordingly, a scheme has been formulated covering modalities for outsourcing 'Third Party Inspection' agencies to perform QA functions pertaining to defence stores manufactured by the private industry within India;

(c) For the MSMEs to be more quality conscious, '*Zero Defect Zero Effect*' is being encouraged under DPEPP 2020. This would help industry to adopt self-certification and green channel route through a process facilitated by DGQA. The green channel route provides for automatic approval of certain combinations under the Competition Act, 2002. In order to promote the ease of doing business to achieve the national vision of 'Make in India', the Government has decided to institute a mechanism for awarding green channel status to the firms having predefined financial and quality credentials;

(d) The pool of test beds/firing ranges/quality assurance-quality control labs/testing infrastructure is proposed to be mapped in the country and enhanced to meet the growing requirements of the industry;

(e) The existing testing infrastructure with defence organizations is proposed to be made available for private industry use on equal priority;

(f) In order to address the grievances and mitigate the concerns of the stakeholders including industry, an appellate mechanism for QA Testing in the form of Independent External Monitor is proposed to be created; and

(g) Efforts will be made to create testing infrastructure through 'Defence Testing Infrastructure Scheme' by providing assistance to industry to set up common testing facilities.

(vii) Export promotion:

(a) 'Defence Attachés' have been mandated and will be supported to promote the export of indigenous defence equipment abroad. This is a new provision made for export promotion of defence goods. This effort would be supplemented by selected DPSUs which are proposed to be positioned to work as export promotion agencies for certain countries with earnings linked to success fee, to promote export of defence products abroad. As per Defence Production Policy (**DPP**) 2018, DPSUs were to set up export offices in countries having such potential with the objective of promoting exports actively;

(b) Subject to strategic considerations, domestically manufactured defence products are proposed to be promoted through Government to Government agreements and lines of credit;

(c) Export Promotion Cell are proposed to be set up to promote defence exports through coordinated action to support the industry would be further strengthened and professionalized. For the purposes of Export Promotion cell under DPEPP 2020, MoD has co-ordinated and followed-up on export related actions including enquiries received from various countries and facilitated private sector and public sector companies for export promotion;

National Education Policy, 2020[v]

Introduction

The union cabinet approved the new National Education Policy, 2020 (**NEP**) with an aim to introduce several changes in the Indian education system. The NEP aims at making "*India a global knowledge superpower*". The cabinet also approved the renaming of the "Ministry of Human Resource Development" to the "Ministry of Education".

The NEP cleared by the cabinet is the third major revamp of the framework of education in India since independence. The two (2) earlier education policies were brought in 1968 and 1986, respectively.

School education

The NEP aims at universalization of education from preschool to secondary level with one hundred per cent (100%) gross enrolment ratio (**GER**) in school education by 2030. It aims to bring two crores (2 crore) out of school children back into the mainstream through an open schooling system.

The current ten plus two (10+2) system is to be replaced by a new five plus three plus three plus four (5+3+3+4) curricular structure corresponding to ages three to eight (3-8), eight to eleven (8-11), eleven to fourteen (11-14), and fourteen to eighteen (14-18) years respectively. It will bring the uncovered age group of three to six (3-6) years under school curriculum, which has been recognized globally as the crucial stage for development of mental faculties of a child. It will also include twelve (12) years of schooling with three years of anganwadi/pre-schooling. Class tenth (10^{th}) and twelfth (12^{th}) board examinations would be made easier, to test core competencies rather than memorised facts, with all students allowed to take the exam twice.

School governance is set to change with a new accreditation framework and an independent authority to regulate both public and private schools. Emphasis on foundational literacy and numeracy with no rigid separation between academic streams, extracurricular and vocational streams in schools. Vocational education is to start from class sixth (6) with internships.

Teaching up to at least class fifth (5) is to be in mother tongue/regional language. No language will be imposed on any student. Assessment reforms with three hundred sixty (360) degree 'Holistic Progress Card' will be introduced for the purpose of tracking student progress for achieving learning outcomes. A new and comprehensive 'National curriculum framework for teacher education 2021', will be formulated by the 'National council for teacher education' in consultation with 'National council of educational research and training'.

By 2030, the minimum degree qualification for teaching will be a four (4) year integrated 'Bachelor of Education (B. Ed) degree'.

Higher education

The GER in higher education is to be raised to fifty per cent (50%) by 2035. Also, three-point five crore (3.5 crore) seats to be added in higher education. The current GER in higher education is twenty-six point three per cent (26.3%).

Holistic undergraduate education with a flexible curriculum can be of three (3) or four (4) years with multiple exit options and appropriate certification within this period. The Master of Philosophy (M.Phil.) courses will be discontinued and all the courses at undergraduate, postgraduate and Doctor of Philosophy (PhD) level will now be interdisciplinary. The academic bank of credits is to be established to facilitate transfer of credits. Multidisciplinary education and research universities at par with 'Indian Institutes of Technology' and 'Indian Institutes of Management' are to be set up as models of best multidisciplinary education of global standards in the country. A 'National Research Foundation' will be created as an apex body for fostering a strong research culture and building research capacity across higher education.

'Higher Education Commission of India' (**HECI**) will be set up as a single umbrella body for the entire higher education system, excluding medical and legal education. Public and private higher education institutions will be governed by the same set of norms for regulation, accreditation and academic standards. Also, HECI will be having four (4) independent verticals namely:

(i) National higher education regulatory council for regulation;
(ii) General education council for standard setting;
(iii) Higher education grants council for funding;
(iv) National accreditation council for accreditation.

Affiliation of colleges is to be phased out in fifteen (15) years and a stage-wise mechanism is to be established for granting graded autonomy to colleges. Over a period of time, every college is expected to develop into either an autonomous degree granting college or a constituent college of a university.

Other changes

An autonomous body, the 'National Educational Technology Forum', will be created to provide a platform for the free exchange of ideas on the use of technology to enhance learning, assessment, planning and administration. A national assessment centre - '*PARAKH*' has been created to assess the students. It also paves the way for foreign universities to set up campuses in India. It emphasizes setting up of gender inclusion fund, special education zones for disadvantaged regions and groups. National institute for Pali, Persian and Prakrit, Indian institute of translation and interpretation are to be set up. It also aims to increase the public investment in the education sector to reach six per cent (6%) of gross domestic product (**GDP**). Currently, India spends around four point six per cent (4.6%) of its total GDP on education.

Education in India

(i) Constitutional provisions:

(a) Part four (IV) of Indian Constitution, Article 45 and Article 39(f) of 'Directive Principles of State Policy', has a provision for state-funded as well as equitable and accessible education.

(b) The forty second (42nd) amendment to the Constitution in 1976 moved education from the 'State' to the 'Concurrent List'. The education policies by the central government provides a broad direction and state governments are expected to follow it. But it is not mandatory, for instance, Tamil Nadu does not follow the three (3) language formula prescribed by the first education policy in 1968.

(c) The eighty sixth (86^{th}) amendment in 2002 made education an enforceable right under Article 21A.

(ii) Other laws

Right to Education Act, 2009 aims to provide primary education to all children aged six (6) to fourteen (14) years and enforces education as a fundamental right. It also mandates twenty-five per cent (25%) reservation for disadvantaged sections of the society.

(iii) Government initiatives

'Sarva Shiksha Abhiyan', mid-day meal scheme, '*Navodaya Vidyalayas'* (NVS schools), '*Kendriya Vidyalayas'* (KV schools) and use of information technology in education are a result of the NEP, 1986.

Conclusion

NEP aims to facilitate an inclusive, participatory and holistic approach, which takes into consideration field experiences, empirical research, stakeholder feedback as well as lessons learned from best practices. It is a progressive shift towards a more scientific approach to education. The prescribed structure will help to cater the ability of the child and stages of cognitive development as well as social and physical awareness. If implemented in its true vision, the new structure can bring India at par with the leading countries of the world.

Daughters have equal coparcenary rights under the Hindu Succession (Amendment) Act, 2005[vi]

Introduction

On August 11, 2020, a three-judge bench consisting of Justices Arun Mishra, S. Abdul Nazeer and MR Shah ("**Bench**") of the Hon'ble Supreme Court (**SC**) delivered a landmark ruling in 'Vineeta Sharma v. Rakesh Sharma and Ors., civil appeal number 32601 of 2018' ("**Case**"), affirming the equal rights of daughters to coparcenary property. The SC clarified that irrespective of a coparcener father being alive or not on or before the Hindu Succession (Amendment) Act, 2005 ("**2005 Amendment**"), a daughter would be entitled to a share in coparcenary property in the same manner as a son simply by virtue of:

(i) her birth; and

(ii) her being alive as on the date of coming into force of the 2005 Amendment.

Background

The Case came up before SC due to the conflicting decisions in 'Prakash v. Phulavati, (2016) 2 SCC 36' ("**Case 1**") and 'Danamma v. Amar, (2018) 3 SCC 343' ("**Case 2**"), concerning the retrospective applicability of Section 6 of the Hindu Succession Act, 1956 ("**Act**") as amended by the 2005 Amendment.

In Case 1, SC held that Section 6 of the Act was prospective in nature and would apply only if the coparcener and his daughter were both alive as on September 09, 2005. The underlying rationale in Case 1 was based on the effect of the '*Notional Partition*' contained in the proviso to Section 6 of the Act, i.e., in the event of the predecessor coparcener's demise prior to the 2005 Amendment, there would be a severance of coparcenary property and consequently there would be no coparcenary property available for partition for a daughter claiming under the 2005 Amendment.

On the other hand, in Case 2, SC held that Section 6 would apply retrospectively. In this case, the father had died in 2001, leaving behind two (2) daughters, two (2) sons and a widow. SC held that "*it is the very factum of birth in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners by birth*", and consequently observed that the two (2) daughters being coparceners were entitled to an equal share in the coparcenary property even though the father was not alive when the substituted Section 6 of the Act came into force in 2005.

Judgement:

I. *Different schools of Hindu law*

The SC first delved into the applicability of different schools of Hindu law:

(i) the Mitakshara system which is followed in most parts of India (under the Mithila, Benares, Bombay and Dravida sub-schools) except Bengal;
(ii) the Dayabhaga system which is followed primarily in Bengal; and
(iii) the Marumakkatayam, Aliyasantana and Nambudiri systems which govern certain areas of south India.

The SC quoted the major differences between the Mitakshara and Dayabhaga systems which were previously highlighted in 'State of Maharashtra v. Narayan Rao Sham Rao Deshmukh, (1985) 2 SCC 321'. Under the Mitakshara system, there is:

(i) community of ownership; and
(ii) unity of possession of joint family property between all the members of the coparcenary.

However, in a coparcenary governed by the Dayabhaga school:

(i) there is no unity of ownership of coparcenary property between members;
(ii) every coparcener takes a defined share in the property and he is the owner of such share;
(iii) there is unity of possession; and
(iv) the share does not fluctuate due to births and deaths.

Thus, under Dayabhaga law, the recognition of the right to a definite share does not militate against the owners of the property being treated as belonging to a family.

II. *Joint Hindu family and Hindu coparcenary*

The SC elaborated upon the differences between the meaning of "Joint Hindu Family (**JHF**)" and "Hindu Coparcenary ("**Hindu Coparcenary**")" under the Act. The SC held that a JHF is a larger body than a Hindu Coparcenary and it:

(i) consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters; and
(ii) is one in worship and holds joint assets, and that after separation of assets, the family ceases to be joint.

On the other hand, the SC reiterated from Case 1 that a Hindu Coparcenary:

(i) only consists of a propositus and three (3) lineal descendants;
(ii) previously included only those persons such as sons, grandsons and great-grandsons who are holders of joint

property (women could not be coparceners prior to the 2005 Amendment);

(iii) coparcener heirs acquire rights in property by birth or adoption; and

(iv) the test to determine if one is a coparcener or not is to ascertain if he has a right to claim partition.

It was held in the Case that a coparcenary property is one which is inherited by a Hindu from his father, grandfather or great-grandfather, and that such coparcenary property is held in the capacity of joint owners. It was further reiterated from Case 1 that property inherited from others could not be treated as part of the coparcenary.

III. *Unobstructed and obstructed heritage*

Section 6 of the 2005 Amendment confers a right by virtue of one's birth which is known as unobstructed heritage. The conferring of a right upon an owner's death is known as obstructed heritage. SC ruled that the father need not be alive as on September 09, 2005, i.e, the date of commencement of the 2005 Amendment, in order for a daughter to be considered a coparcener in the Case.

SC stated that prior to the 2005 Amendment, Section 6 of the Act provided that on the death of a male Hindu, a coparcener's interest in Mitakshara coparcenary shall devolve by '*Survivorship*' upon the surviving members of the coparcenary under the uncodified Hindu law, and not in accordance with the mode of succession prescribed under the Act. However, in the case of a male Hindu leaving behind a surviving female class I heir or a male relative claiming through such a female heir, an exception had been carved out for succession by inheritance in terms of the Act. It was in the context of such an exception that the legal fiction of partition had been created, to ascertain the share of the deceased immediately prior to his death. Such notional partition was only aimed at determining the extent of the share and did not affect the right to claim a share per se.

On the other hand, the Section 6 post the 2005 Amendment makes a daughter a coparcener "*in her own right*" by virtue of her birth and "*in the same manner as the son*", and she would consequently have the same rights and liabilities as that of a male coparcener, in keeping with the right to equality under the Constitutional scheme. This would however be subject to the non-obstante clause set out in the proviso to Section 6(1) of the Act which saves any disposition or alienation including any partition or testamentary disposition of properties which had taken place prior to December 20, 2004.

IV. *Retroactive application of 2005 Amendment*

The SC held that coparcenary rights could be claimed by a daughter from September 09, 2005, the provisions of the 2005 Amendment would be retroactive, as opposed to retrospective, in their application. A retroactive statute is one which operates in the future i.e. its applicability is based upon the character or status that arose earlier, and confers benefits based on an antecedent event, which in the present scenario is the 'birth' of the daughter. Since a daughter is considered to be a coparcener by virtue of this event, the provisions of the 2005 Amendment shall operate on rights claimed on and after the date of the 2005 Amendment. The SC further observed that since the operative requirement under Section 6 post the 2005 Amendment is birth, there is no requirement of both the father and the daughter being alive as on September 09, 2005, as the daughter is not bound by principles of obstructed heritage. An imperative condition is that the coparcenary must have existed as on September 09, 2005.

V. *Manner of acquisition of rights in coparcenary property post the 2005 Amendment*

The SC also held that post the 2005 Amendment, interest in coparcenary property can be acquired only by birth or through adoption within permissible degrees, and not otherwise. Further, SC held that survivorship as a mode of succession of a Mitakshara coparcener, has been abrogated since September 09, 2005, by virtue of Section 6(3) of the 2005 Amendment.

VI. *Rejection of effect of statutory fiction*

SC observed that the statutory fiction created by the proviso to Section 6 of the Act was only for the purpose of determining the share of the deceased coparcener, who was survived by a female heir of class I or a male relative of such female heir. The concept of deemed or notional partition was employed for the limited purpose of giving effect to the explanation to Section 6 of the Act. The SC further held that the mere severance of status by filing of a partition suit or passing of a preliminary decree would not be the same as actual partition and that till the date of final decree, changes in law and changes due to subsequent events ought to be taken into consideration. Therefore, notwithstanding that a preliminary decree has been passed, daughters are to be given a share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

VII**.** *Explanation to Section 6(5) of the Act*

In order to protect the interests of coparcener daughters against unscrupulous tactics and false defences, SC held that a plea of oral partition ought not to be readily accepted and that ordinarily, only a partition effected by a registered instrument or by a decree of a court ought to be recognized. A heavy burden of proof has been cast upon proponents of oral partition including demonstrating separate occupation of portions, appropriation of income, etc. which ought to be supported by cogent and unimpeachable contemporaneous public documents, which may be accepted after exercising all safeguards.

VIII. *Decisions overruled*

SC overruled the decisions in Case 1 and 'Mangammal v T B Raju, (2018) 15 SCC 662' as they reflected inconsistent views vis-a vis the scheme of Section 6 of the Act. The decision in Case 2 has also been partially overruled to the extent that it is contrary to the present ruling.

Companies Amendment Act, 2020 – What it brings to the table[vii]

Introduction

The Government to facilitate ease of doing business, recently bought in the new Companies (Amendment) Act, 2020 ("**Amendment**") on September 28, 2020. The Amendment seeks to decriminalise certain offences under the Companies Act, 2013 ("**Act**") in case of defaults which can be determined objectively and which otherwise cannot be categorized primarily as major defaults.

Apart of decriminalization, the Amendment also provides a new chapter on 'Producer Companies'. Along with aforesaid changes and addition, the Amendment also provides changes in certain definitions and meaning of terms.

Amendments for ease of corporates

Under Section 2(52) of the Act, the Central Government has been empowered to exclude certain companies, based on listing of certain securities on recognized stock exchanges. Thus, after the Amendment only which list only debt securities may be excluded from the definition of listed company for the purposes of the Companies Act.

Further, vide amendment in Section 23 of the Act, as per the Act now certain class of companies will be allowed to be listed in foreign jurisdiction. Such companies would be exempted from various provisions of the Act viz. the 'Prospectus and Allotment of Securities, Share Capital and Debentures, Declaration in respect of beneficial interest in any share, Register of significant beneficial owners in a company or Punishment for failure to distribute dividends'.

Amendments easing compliances

The Amendment has made several changes to the Act vide reduction in timelines to the various compliances. While the Amendment reduces various timelines for the rectification of name of company and time limit for a rights issue, and certain exemptions have also been granted to class of companies for filings in particular with regard to the Central Government exempting certain companies from declaration in respect of beneficial interest in any share, Non-Banking Financial Company and Housing Finance Companies from various resolutions and agreements to be filed.

Strengthening 'Corporate Governance'

The Amendment in order to strengthen 'Corporate Governance' inserts a new section 129A to the Act which empowers the Central Government to direct class or classes of unlisted companies to prepare periodical financial results and their file the same with Registrar of Companies within thirty (30) days from the end of that period as specified in the Central Government.

Amendments relating to 'Winding Up'

As far as 'Winding Up' is concerned, the Amendment provides certain new and improved additions. As far as Section 284 of the Act relating to the promoters, directors, etc., to cooperate with 'Company Liquidator' is concerned, it now provides that when a person required to assist a Company Liquidator does not do so, then the Company Liquidator may make an application to National Company Law Tribunal (**NCLT**) for necessary directions. The NCLT may direct such person to comply with the directions of the Company Liquidator and to cooperate with him in discharging his functions and duties.

Other changes as in the Amendment are for providing copies of order and other documents to the NCLT and other.

Reduction in amount of monetary penalty and exemption from imprisonment

The Amendment provides that offences which prima facie on evaluation be categorized as civil offences, rather than criminal offences, under the Act, their default is rectified by payment of a prescribed penalty.

Further, the Amendment omits punishment of imprisonment in relation to 23 (twenty-three) compoundable offences. The nature of fine, monetary penalty to be levied in each of these offences has been changed from a criminal 'fine' to a civil 'penalty'.

Keeping in view the gravity of offences, an increase in the amount of penalty has been proposed for 3 (three) offences where the punishment of imprisonment is proposed to be omitted.

Producer Companies

The Amendment introduces a new Chapter XXIA relating to 'Producer Companies'. This chapter has been is for the benefit of the farmers, agriculture, handloom, handicraft and cottage industries. "Producer Company" as per the Amendment is a body corporate having objects or activities specified in Section 378B of the Act. The Bill sets out the activities of a company in order for the company to be classified as a "Producer Company". The main objective of the Producer Company is to facilitate the formation of co-operative business as companies and to make it possible to convert existing co-operative business into companies. Production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary production etc. are some of the main objectives that are to be pursued by Producer Companies under the Act.

The FCRA amendment [viii]

Introduction

On September 29, 2020, the Foreign Contribution (Regulation) Amendment Act, 2020 (**"Amendment"**) came into force, which among others provides a change in foreign funding and expenses under the Foreign Contribution (Regulation) Act, 2010 ("**FCRA**").

The "Amendments"

The Amendment firstly revises Section 7 of the FCRA and prohibits a person registered or having prior permission under the FCRA to transfer foreign contribution received by it to "any other person". Therefore, organizations already having FCRA registration prior to the Amendment or even after it, in no case can grant their foreign contribution to other charitable organizations and thus such-grants will also have to be evaluated.

Further, as per the Amendment to Section 8 of the FCRA, the percentage of foreign contribution to be utilized for administrative expenses has been reduced from fifty percent (50%) to twenty percent (20%). These expenses generally contribute for salary, wages, travel expenses and other expenses of an organization.

The Amendment further introduces a Section 12A in the Amendment which provides that a person applying for registration or renewal under FCRA needs to furnish Aadhar Card or Passport or Overseas Citizen of India card for all its directors and key personnel. Additionally, Section 17 has been amended to now mandate receipt of foreign contributions into a designated FCRA Account to be maintained with a notified State Bank of India branch at New Delhi.

Conclusion

The Government has been driven by the increasing misutilization of funds by various non-profit organizations to bring in the Amendment. While the portion relating to expenses may see certain revisions, sub-grants and increased compliances in an increasingly insecure environment is the need of the hour. It is widely believed by various experts that organizations under FCRA with honest intentions and dealings will not feel the pinch of the increased compliances, particularly in a country like India, which has more NGOs that police stations.

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